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A. I. R. 1976 SC 1760 (Aug.)

At page 1760, Col. 2, Point 'A' Index Note, Line 7. — Read 'no' for "not"

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1830	1976 U J (SO) 541	404	(1976) 2 All LR 125		(1976) 78 Pun	170	(1976) 1 Kant
1836	(1976) 43 Tax 49		1976 A W C 114		L R (D) 142		L 377
	1976 U J (SO) 436	405	---		(1976) 12	172	(1976) 1 Kant
	103 I T R 777	407	1976 Ren C J 374		D L T 209		L J 287
1841	(1976) 2 S C C 977	411	---		1976 Ren C J 422	174	(1976) 1 Kant
	1976 S L W R 392	414	---	261	(1976) 12 D L T 73		L J 349
1845	---	415	---		(1976) 78 Pun	AIR 1976 Madh Pra	
1855	1976 Cri L R	AIR 1976 Andh Pra		263	(1976) 78 Pun	AIR	Other Journals
	(SO) 274	AIR	Other Journals		L R (D) 71	164	1976 M P L J 349
	1976 U J (SO) 527	293	(1976) 2 Andh Pra		1976 Rajdhani		1976 Jab L J 394
1856	1976 S L W R 417		L J (HC) 249		L R 356	169	1976 M P L J 268
1860	(1976) 1 S C		(1976) 1 Andh		(1976) 12 D L T 69		1976 Jab L J 309
	W R 494		W R 84		ILR (1976) 1	175	1976 M P L J 254
1866	---	295	(1976) 1 Andh Pra		Delhi 559		1976 Jab L J 323
1866	---		L J (HC) 114	265	ILR (1976) 1	AIR 1976 Madras	
1899	42 Out L T 566	301	1976 Andh L T 263		Delhi 457	AIR	Other Journals
	(1976) 2 Serv	306	1976 Andh L T 140	AIR 1976 Gauhati		273	89 Mad L W 164
	L R 186	309	(1975) 2 Andh	AIR	Other Journals		(1976) 2 Mad L J 5
1904	1976 S L W R 373		W R 418	65	---	276	89 Mad L W 95
	(1976) 1 S C	312	1976 Andh L T 110	71	---		(1976) 1 Mad
	W R 448		(1976) 1 Andh	76	---		L J 332
	(1976) 2 Serv	317	W R (HC) 397	AIR 1976 Goa		280	89 Mad L W 107
	L R 35		(1976) 2 An h Pra	AIR	Other Journals		(1976) 1 Mad
	1976 U J (SO) 471		L J (HC) 313	70	---	282	(1976) 1 Mad
	1976 Hindu	321	(1976) 1 Andh	72	---		L J 161
	L R 473		W R 36	74	---		89 Mad L W 90
1909	1976 U J (SO) 387	326	ILB (1976)	75	---	283	88 Mad L W 666
	(1976) 1 S C		Andh Pra 1047	77	---		(1975) 2 Mad
	W R 391	329FB	1976 Andh L T 250	78	---		L J 482
	(1976) 2 S C C 951		(1976) 2 Andh Pra	79	---	287	89 Mad L W 249
	1976 SOC Cri) 349		L J (HC) 1	AIR 1976 Gujarat			(1976) 1 Mad
1910	1976 U J (SO) 373	AIR 1976 Bombay		AIR	Other Journals		L J 344
	(1976) 2 S C C 236	AIR	Other Journals	132	17 Guj L R 56	289	89 Mad L W 740
1913	(1976) 2 S C C 850	315	---	134	---	292	89 Mad L W 124
1921	1976 S L W R 403	320	---	140	---	295	89 Mad L W 151
1924	1976 Cri L R	332	---	142	17 Guj L R 15	302	(1976) 1 Mad
	(SO) 251	333	---				L J 286
1929	---	336	---	AIR 1976 Him-Pra		303	(1976) 1 Mad
1935	---	AIR 1976 Calcutta		AIR	Other Journals		L J 341
1947	(1976) 2 Kant	AIR	Other Journals	52FB	(1976) 3 Cri LT 63	304	89 Mad L W 291
	L J 1	309	---		(1976) 12 D L T		(1976) 1 Mad
	1976 All Cri C 224	320	---		1 (HP)		L J 303
	1976 Cri L R						89 Mad L W 220
	(SO) 246						
1953	---						
1956	---						
1961	---						
1964	---						

AIR 1976 Orissa	AIR 1976 Patna	AIR 1976 Punjab	AIR 1976 Punjab
AIR Other Journals	AIR Other Journals	AIR Other Journals	AIR Other Journals
163 (1976) 1 Cut W R 73 ILR (1976) Cut 218 175FB42 Out L T 648	282 1976 B B C J (HC) 141 1976 Pat L J R 180 286 ... 287 ...	279con 1976 Cur L J (Civ) 398 283 1976 Cur L J (Civ) 364 287 78 Pun L R 601 291 78 Pun L R 308 1976 Pun L J 187 1976 Rev L R 403 295 ... 300 77 Pun L R 819	300con 1975 Hindu L R 435 304FB ... AIR 1976 Rajasthan AIR Other Journals 195 1976 W L N 222 197 ... 199 1976 W L N 204 202 ... 208 ...
AIR 1976 Patna	AIR 1976 Punjab		
AIR Other Journals	AIR Other Journals		
267 ... 271 ... 278 ...	279 78 Pun L R 545 1976 Punj L J 356 FB1976 Rev L R 379		

LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC.
IN A. I. R. 1976 SEPTEMBER

Diss. = Dissented from in; **Not F.** = Not followed in; **Over.** = Overruled in;
Revers. = Reversed in.

ALLAHABAD .

AIR 1937 All 280 (Pt. A) = 1937 All LJ 171
— Diss. AIR 1976 Mad 289.
AIR 1958 All 506 (Pt. A) — Diss. AIR 1976
Delhi 261.
1966 All WR (HC) 355 — Diss. AIR 1976
All 389.
1968 All LJ 1102 = ILR (1968) 2 All 814 —
Diss. AIR 1976 Andh Pra 321 B.
AIR 1971 All 297 (Pt. A) = ILR (1971) 1 All
31 — Diss. AIR 1976 Pat 282 C.
1973 All LJ 402 — Over. AIR 1976 SC 1800.
(1974) Criminal Appeal No. 2646 of 1973 and
Reference No. 95 of 1973, D/- 27-11-1974
(All) — Revers. AIR 1976 SC 1924.

ANDHRA PRADESH

AIR 1956 Andh Pra 250 (Pt. B) = 1956 Andh
WR 824 — Diss. AIR 1976 Guj 140.
AIR 1969 Andh Pra 345 (FB) — Revers. AIR
1976 SC 1978 A.
(1974) C. M. P. No. 1948 of 1973, D/- 13-9-
1974 (Andh Pra) — Revers. AIR 1976
Andh Pra 301 B.
(1975) 2 Andh Pra LJ 229 — Revers. AIR
1976 SC 1845 B. C.

BOMBAY

(1974) 76 Bom LR 83 = ILR (1975) Bom 9
— Diss. AIR 1976 Guj 140.

CALCUTTA

ILR (1968) 2 Cal 575 — **Revers.** AIR 1976
SC 1810.
AIR 1973 Cal 515 (Pt. A) — **Diss.** AIR 1976
Pat 282 B.

DELHI

ILR (1969) Delhi 1214 — Revers. AIR 1976
SC 1856.

GOA

(1968) Civ. App. No. 213 of 1966, D/- 20-1-1968 (Goa) — Revers. AIR 1976 SC 1825.

GUJARAT

(1969) 74 ITR 353 (Guj) — Revers. AIR 1976 SC 1935.

Gujarat (contd.)

(1971) F. A. No. 203 of 1965, D/- 30-11-1971
(Guj) — Revers. AIR 1976 Guj 142.

JAMMU AND KASHMIR

(1974) Election Petn. No. 4 of 1972, D/- 10-6-1974 (J and K) — Revers, AIR 1976 SC 1866 B.

KARNATAKA

(1975) Criminal Petns. Nos. 50 and 51 of 1975,
D/- 16-12-1975 (Kant) — Revers. AIR
1976 SC 1947.

MADHYA PRADESH

(1974) Election Petn. No. 8 of 1972, D/- 7-3-1974 (Madh Pra) — Revers. AIR 1976 SC 1886 A.

(1975) C. R. No. 579 of 1974, D/- 24-3-1975
(Madh Pra) — Over. AIR 1976 Madh Pra
175 A.

1975 Cri LJ 1766 (Madh Pra) — Revers. AIR
1976 SC 1967.

MADRAS

AIR 1944 Mad 401 = (1944) 1 Mad LJ 361
→ Over. AIR 1976 SC 1978 A.

AIR 1968 Mad 436 (Pt. F) = (1969) 1 Mad
LJ 49 — Diss. AIR 1976 Orissa 175 (FB).

(1974) Criminal Appeal No. 744 of 1974 and Referred Trial No. 45 of 1974, D/- 25-11-1974 (Mad) — Revers. AIR 1976 SC 1970.

ORISSA

AIR 1969 Orissa 180 — Diss. AIR 1976 Punjab 304 A (FB).

AIR 1969 Orissa 182 — Diss. AIR 1976 Punj
304 A (FB).

ILR (1974) Cut 731 — Revers. AIR 1976
SC 1899 A.

PUNJAB

AIR 1961 Punj 424 = ILR (1960) 2 Punj 386
— Diss. AIR 1976 Andh Pra 301 A.

(1970) C. W. No. 197 of 1968, D/- 21-5-1970
(Punjab) — Revers. AIR 1976 SC 1921.

(1971) Criminal Writ No. 10 of 1971, D/-
8-9-1971 (Punj) — Revers. AIR 1976 SC
1855.

THE SCHEDULE

(See section 79)

(1) Length :

1 inch	=0'205 4 metre
1 foot	=0'304 8 metre
1 yard	=0'914 4 metre
1 mile	=1 609'344 metres
1 nautical mile (UK)	=1 853'18 metres

For Survey of India only

1 foot	=0'304 799 6 metre
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(2) Area :

1 square inch	=0'000 645 16 square metre
1 square foot	=0 092 903 04 square metre
1 square yard	=0 836 127 36 square metre
1 square mile	=2 589 988 110 336 square metres

For Survey of India only

1 square foot	=0'092 903 square metre
1 acre	=4046'856 1 square metres
	=0'404 685 61 hectare

(3) Volume :

1 cubic inch	=0'000 016 387 064 cubic metre
1 cubic foot	=0'028 316 846 592 cubic metre
1 cubic yard	=0'764 554 857 984 cubic metre
1 gallon (UK)	=0'034 546 087 cubic metre
1 gallon (USA)	=0 003 785 411 784 cubic metre
1 bushel (USA)	
(2 150'42 cubic inches)	=0'035 239 070 17 cubic metre
1 barrel (for petroleum)	=0'158 937 234 928 cubic metre
1 acre-foot	=1 233'482 cubic metres

(4) Mass :

1 grain	=0'000 064 798 91 kilogram
1 tola	=0'011 663 803 8 kilogram
1 seer	=0'933 104 304 kilogram
1 maund	=37'324 172 16 kilograms
1 ounce (troy)	=0'031 103 476 8 kilogram
1 pound (avoirdupois)	=0'453 592 37 kilogram
1 hundredweight (UK)	=50'802 345 44 kilograms
1 hundredweight (USA)	=45'359 237 kilograms
1 ton (UK)	=1 016'046 908 8 kilograms
1 ton (USA)	=907'184 74 kilograms

(5) Temperature :

1 degree Fahrenheit (unit)	=5/9 kelvin or degree (celsius)
temperature in degrees Fahrenheit	=5/9 (t° F+459'67) kelvins
(t° F)	=5/9 (t° F-32) degree celsius

(6) Force :

1 pound force	=4'448 221 615 260 5 newtons
1 poundal	=0'138 254 954 376 newton

(7) Pressure :

1 barometric inch of mercury	=3 386'383 640 341 pascals
1 inch of water	=249'088 91 pascals

(8) *Energy* :

1 British thermal unit	=1 055'055 852 62 joules
1 foot.pound.force	=1'355 817 948 331 400 4 joules

(9) *Power* :

1 horse.power (UK)	=745'699 871 582 270 22 watts
1 horse.power (European)	=735 498 75 watts
1 ton of refrigeration	=3516'852 842 67 watts.

THE FINANCE ACT, 1976

[Act No. 66 of 1976]*

[27th May, 1976]

An Act to give effect to the financial proposals of the Central Government for the financial year 1976-77.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

CHAPTER I**PRELIMINARY****1. Short title and commencement.**

(1) This Act may be called THE FINANCE ACT, 1976.

(2) Save as otherwise provided in this Act, sections 2 to 30 and section 43 shall be deemed to have come into force on the 1st day of April, 1976.

CHAPTER II**RATES OF INCOME-TAX****2. Income-tax.**

(1) Subject to the provisions of sub-sections (2), (3) and (4), for the assessment year commencing on the 1st day of April 1976, income-tax shall be charged at the rates specified in Part I of the First Schedule and shall be increased,—

(a) in the cases to which Paragraphs A, B, C and D of that Part apply, by a surcharge for purposes of the Union; and

(b) in the cases to which Paragraphs E and F of that Part apply, by a surcharge, calculated in each case in the manner provided therein.†

(2) In the cases to which sub-paragraph I or sub-paragraph II of Paragraph A of Part I of the First Schedule applies where the assessee has in the previous year, any net agricultural income, in addition to total income, and the total income exceeds eight thousand rupees, then,—

(a) the net agricultural income shall be taken into account, in the manner provided in case (b) (that is to say, as if the net agricultural income were comprised in the total income after the first eight thousand rupees of the total income but without being liable to tax) only for the purpose of charging income-tax in respect of the total income; and

(b) the income-tax chargeable shall be calculated as follows:—

(i) the total income and the net agricultural income shall be aggregated and the amount of income-tax shall be determined in respect of the aggregate income at the rates specified in Sub.Paragraph I or, as the case may be, sub-paragraph II of the said paragraph A, as if such aggregate income were the total income;

(ii) the net agricultural income shall be increased by a sum of eight thousand rupees and the amount of income-tax shall be determined in respect of the net agricultural income as so increased at the rates specified in Sub-Paragraph I or, as the case may be, sub paragraph II of the said Paragraph A, as if the net agricultural income as so increased were the total income;

(iii) the amount by which income-tax determined in accordance with sub-clause (i) exceeds the amount of income-tax determined in accordance with sub-clause (ii) shall be the income-tax chargeable in respect of the total income;

(3) Where in the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956, the total income includes any profits and gains and from life insurance business, the income-tax payable by it shall be the aggregate of the income-tax calculated—

(i) on the amount of profits and gains from life insurance business so included, at the rate applicable in the case of the Life Insurance Corporation of India, in accordance with Paragraph E of Part I of the First Schedule, to that part of its total income which consists of profits and gains from life insurance business; and

[*] Received the assent of the President on 27-5-1976. Act published in Gaz. of India; 27-5-1976, Part II-S. 1, Ext P. 645.

For Statement of Objects and Reasons, see Gaz. of India; 15-3-1976, Part II-S. 2, Ext. P. 689.

(ii) on the remaining part of its total income, at the rate applicable to the company on its total income.

(4) In cases to which the provisions of Chapter XII or section 164 of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act) apply, the tax chargeable shall be determined as provided in that Chapter or that section, and with reference to the rates imposed by sub-section (1) or the rates as specified in that Chapter or section, as the case may be.

(5) In cases in which tax has to be deducted under sections 193, 194, 194A, 194B, 194D and 195 of the Income-tax Act at the rates in force, the deduction shall be made at the rates specified in Part II of the First Schedule.

(6) Subject to the provisions of sub-section (7), in cases in which income-tax has to be calculated under the first proviso to sub-section (5) of section 132 of the Income-tax Act or charged under sub-section (4) of section 172 or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or deducted under section 192 of the said Act from income chargeable under the head "Salaries" or deducted under sub-section (9) of section 80E of the said Act from any payment referred to in the said sub-section (9) or in which the "advance tax" payable under Chapter XVII.C of the said Act has to be computed, at the rate or rates in force, such income-tax or, as the case may be, "advance tax" shall be so calculated, charged, deducted or computed at the rate or rates specified in Part III of the First Schedule:

Provided that in cases to which the provisions of Chapter XII or section 164 of the Income-tax Act apply, "advance tax" shall be computed with reference to the rates imposed by this sub-section or the rates as specified in that Chapter or section, as the case may be:

Provided further that an assessee, being a company, may in lieu of payment of surcharge on income-tax at the rate specified in Paragraph E of Part III of the First Schedule, make a deposit under the scheme framed under sub-section (8) before the last instalment of advance tax is due in its case, and where it does so,—

(i) in a case where the amount of the deposit so made is equal to or exceeds the amount of surcharge on income-tax payable by it, the amount of surcharge on income-tax payable by it shall be *nil*;

(ii) in a case where the amount of the deposit so made falls short of the amount of surcharge on income-tax payable by it, the amount of surcharge on income-tax payable

by it shall stand reduced by the amount of the deposit; and

(iii) any order made by the Income-tax Officer under section 210 of the Income-tax Act and the notice of demand issued in pursuance thereof shall have effect as if the amount of surcharge on income-tax specified therein had been reduced to *nil* or, as the case may be, by the amount of the deposit.

(7) In the cases to which sub-paragraph I or sub-paragraph II of Paragraph A of Part III of the First Schedule applies, where the assessee has, in the previous year or, if by virtue of any provision of the Income-tax Act, income-tax is to be charged in respect of the income of a period other than the previous year, in such other period, any net agricultural income, in addition to total income, and the total income, exceeds eight thousand rupees, then, in calculating income-tax under the first proviso to sub-section (5) of section 132 of the Income-tax Act or in charging income-tax under sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or in computing the "advance tax" payable under Chapter XVII.C of the said Act, at the rate or rates in force,—

(a) the net agricultural income shall be taken into account, in the manner provided in clause (b) (that is to say, as if the net agricultural income were comprised in the total income after the first eight thousand rupees of the total income but without being liable to tax), only for the purpose of calculating, charging or computing such income-tax or, as the case may be, "advance tax" in respect of the total income; and

(b) such income-tax or, as the case may be, "advance tax" shall be so calculated, charged or computed as follows:—

(i) the total income and the net agricultural income shall be aggregated and the amount of income-tax or "advance tax" shall be determined in respect of the aggregate income at the rates specified in sub-paragraph I or, as the case may be, sub-paragraph II of the said Paragraph A, as if such aggregate income were the total income;

(ii) the net agricultural income shall be increased by a sum of eight thousand rupees and the amount of income-tax or "advance tax" shall be determined in respect of the net agricultural income as so increased at the rates specified in sub-paragraph I or, as the case may be, sub-paragraph II of the said Paragraph A, as if the net agricultural income as so increased were the total income;

(iii) the amount by which income-tax or as the case may be, "advance tax" determined in accordance with sub-clause (i) exceeds

the amount of income-tax or "advance tax" determined in accordance with sub-clause (ii) shall be the income-tax or "advance tax" in respect of the total income.

(8) Where an assessee, being a company, makes, during the financial year commencing on the 1st day of April, 1976 any deposit with the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964 under any such scheme as the Central Government may, by notification in the Official Gazette, frame in this behalf then, the surcharge on income-tax payable by the company for the assessment year commencing on the 1st day of April, 1977,—

(i) in a case where the amount of deposit so made is equal to or exceeds the amount of surcharge on income-tax payable by it, shall be nil; and

(ii) in a case where the amount of the deposit so made falls short of the amount of surcharge on income-tax payable by it, shall be reduced by the amount of the deposit.

(9) For the purposes of this section and the First Schedule,—

(a) "company in which the public are substantially interested" means a company which is such a company as is referred to in section 108 of the Income-tax Act;

(b) "domestic company" means an Indian company, or any other company which, in respect of its income liable to income-tax under the Income-tax Act for the assessment year commencing on the 1st day of April, 1976, has made the prescribed arrangements for the declaration and payment within India of the dividends (including dividends on preference shares) payable out of such income in accordance with the provisions of section 194 of that Act;

(c) "industrial company" means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining.

Explanation. — For the purposes of this clause, a company shall be deemed to be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining, if the income attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VIA of the Income-tax Act) is not less than fifty-one per cent. of such total income;

(d) "insurance commission" means any remuneration or reward, whether by way of commission or otherwise, for soliciting or procuring insurance business (including business relating to the continuance, renewal or revival of policies of insurance);

(e) "net agricultural income", in relation to a person, means the total amount of agricultural income, from whatever source derived, of that person computed in accordance with the rules contained in Part IV of the First Schedule;

(f) "tax-free security" means any security of the Central Government issued or declared to be income-tax free, or any security of a State Government issued income-tax free, the income-tax whereon is payable by the State Government;

(g) all other words and expressions used in this section or in the First Schedule but not defined in this sub-section and defined in the Income-tax Act shall have the meanings, respectively, assigned to them in that Act.

CHAPTER III

DIRECT TAXES

Income-tax

3. Amendment of section 2.

In the Income-tax Act, in section 2, with effect from the 1st day of June, 1976,—

(a) after clause (28), the following clause shall be inserted, namely :—

"(28A) 'interest' means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;"

(b) in clause (37A), in sub-clause (i),—

(i) for the words and figures "in a case not falling under section 164", the words, figures and letters "in a case not falling under section 115A or section 115B or section 164" shall be substituted;

(ii) for the words and figures "in a case falling under section 164, the rate specified in that section", the words, figures and letters "in a case falling under section 115A or section 115B or section 164, the rate or rates specified in section 115A or section 115B or, as the case may be, section 164" shall be substituted.

4. Amendment of section 9.

In the Income-tax Act, in section 9, in sub-section (1), with effect from the 1st day of June, 1976,—

(a) in clause (i), the words "or through or from any money lent at interest and brought into India in cash or in kind" shall be omitted;

(b) after clause (iv), the following clauses shall be inserted, namely :—

(v) income by way of interest payable by—

(a) the Government; or

(b) a person who is a resident, except where the interest is payable in respect of any debt incurred or moneys borrowed and used, for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the interest is payable in respect of any debt incurred, or moneys borrowed and used, for the purposes of a business or profession carried on by such person in India;

(vi) income by way of royalty payable by—

(a) the Government; or

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April, 1976 and the agreement is approved by the Central Government.

Explanation 1. — For the purposes of the foregoing proviso, an agreement made on or after the first day of April, 1976 shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date; so, however, that, where the recipient of the income by way of royalty is a foreign company, the agreement shall not be deemed to have been made before that date unless, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 (whether fixed originally or on extension) for furnishing the return of income for the assessment year commencing on the 1st day of April, 1977, or

the assessment year in respect of which such income first becomes chargeable to tax under this Act, whichever assessment year is later, the company exercises an option by furnishing a declaration in writing to the Income-tax Officer (such option being final for that assessment year and for every subsequent assessment year) that the agreement may be regarded as an agreement made before the 1st day of April, 1976.

Explanation 2. — For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (v) :

(vii) income by way of fees for technical services payable by—

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India.

Explanation. — For the purposes of this clause, "fees for technical services" means

any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

5. Amendment of section 10.

In section 10 of the Income-tax Act,—

(a) in clause (6), after sub-clause (x), the following sub-clause shall be inserted, namely:—

"(xi) the remuneration received by him as an employee of the Government of a foreign State during his stay in India in connection with his training in any establishment or office of, or in any undertaking owned by,—

(i) the Government; or

(ii) any company in which the entire paid-up share capital is held by the Central Government, or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments; or

(iii) any company which is a subsidiary of a company referred to in item (ii); or

(iv) any corporation established by or under a Central, State or Provincial Act; or

(v) any society registered under the Societies Registration Act, 1860 or under any other corresponding law for the time being in force and wholly financed by the Central Government, or any State Government or State Governments, or partly by the Central Government and partly by one or more State Governments;"

(b) in clause (15), after item (e) of sub-clause (iv), the following item shall be inserted with effect from the 1st day of June, 1976, namely:—

"(f) by an industrial undertaking in India on any moneys borrowed by it in foreign currency from sources outside India under a loan agreement approved by the Central Government having regard to the need for industrial development in India, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment.

Explanation.—For the purposes of this item, the expression "foreign currency" shall have the meaning assigned to it in the Foreign Exchange Regulation Act, 1973;"

(c) in clause (17), for the words "any Committee thereof", the words, brackets and

figures "any Committee thereof or any allowance received by a member of either House of Parliament under the Members of Parliament (Additional Facilities) Rules, 1975;" shall be substituted.

6. Amendment of section 13.

In section 13 of the Income-tax Act, in sub-section (5) [as directed to be inserted by clause (iii) of section 5 of the Taxation Laws (Amendment) Act, 1975], for clause (a) (iii), the following clause shall be substituted with effect from the 1st day of April, 1977, namely:—

"(iii) deposit in any account with the State Bank of India constituted under the State Bank of India Act, 1955 or any subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 or any nationalised bank, that is to say, any corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;"

7. Amendment of section 32.

In section 32 of the Income-tax Act, in sub-section (1),—

(1) in clause (iv), for the words "seven thousand five hundred rupees", the words "ten thousand rupees" shall be substituted with effect from the 1st day of April, 1977;

(2) in clause (vi),—

(a) for the words "any one or more of the articles or things specified in the list in the Ninth Schedule", the words, figures and brackets "any one or more of the articles or things specified in items 1 to 24 (both inclusive) in the list in the Ninth Schedule" shall be substituted;

(b) in the second proviso, —

(i) in clause (a), the word "and" shall be omitted;

(ii) in clause (b), the word "and" shall be inserted at the end;

(iii) after clause (b), the following clause shall be inserted, namely:—

"(c) any ship or aircraft acquired after the 31st day of March, 1976 or any machinery or plant installed after that date."

8. Insertion of new section 32A.

After section 32 of the Income-tax Act, the following section shall be inserted, namely:—
Investment allowance.

"32A. (1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in respect of

the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment allowance equal to twenty-five per cent. of the actual cost of the ship, aircraft, machinery or plant to the assessee;

Provided that no deduction shall be allowed under this section in respect of —

(a) any machinery or plant installed in any office premises or any residential accommodation including any accommodation in the nature of a guest-house;

(b) any office appliances or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable under section 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any one previous year.

(2) The ship or aircraft or machinery or plant referred to in sub-section (1) shall be the following, namely:—

(a) a new ship or new aircraft acquired after the 31st day of March, 1976 by an assessee engaged in the business of operation of ships or aircraft;

(b) any new machinery or plant installed after the 31st day of March, 1976—

(i) for the purposes of business of generation or distribution of electricity or any other form of power; or

(ii) for the purposes of business of construction, manufacture or production of any one or more of the articles or things specified in the list in the Ninth Schedule; or

(iii) in a small-scale industrial undertaking for the purposes of business of manufacture or production of any other articles or things.

Explanation.—For the purposes of this sub-section and sub-section (4),—

(1) "new ship" or "new aircraft" or "new machinery or plant" shall have the same meaning as in the Explanation to clause (vi) of sub-section (1) of section 32;

(2) an industrial undertaking shall be deemed to be a small-scale industrial undertaking, if the aggregate value of the machinery and plant (other than tools, jigs, dies and moulds) installed, as on the last day of the previous year, for the purposes of the business of the undertaking does not exceed

ten lakh rupees; and for this purpose the value of any machinery or plant shall be,—

(a) in the case of any machinery or plant owned by the assessee, the actual cost thereof to the assessee; and

(b) in the case of any machinery or plant hired by the assessee, the actual cost thereof as in the case of the owner of such machinery or plant.

(3) Where the total income of the assessee assessable for the assessment year relevant to the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, or, as the case may be, the immediately succeeding previous year [the total income for this purpose being computed after deduction of the allowances under section 33 and section 33A, but without making any deduction under sub-section (1) of this section or any deduction under Chapter VIA] is nil or is less than the full amount of the investment allowance,—

(i) the sum to be allowed by way of investment allowance for that assessment year under sub-section (1) shall be only such amount as is sufficient to reduce the said total income to nil; and

(ii) the amount of the investment allowance, to the extent to which it has not been allowed as aforesaid, shall be carried forward to the following assessment year, and the investment allowance to be allowed for the following assessment year shall be such amount as is sufficient to reduce the total income of the assessee assessable for that assessment year, computed in the manner aforesaid, to nil, and the balance of the investment allowance, if any, still outstanding shall be carried forward to the following assessment year and so on, so, however, that no portion of the investment allowance shall be carried forward for more than eight assessment years immediately succeeding the assessment year relevant to the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, as the case may be, the immediately succeeding previous year.

Explanation.—Where for any assessment year, investment allowance is to be allowed in accordance with the provisions of this sub-section in respect of any ship or aircraft acquired or any machinery or plant installed in more than one previous year, and the total income of the assessee assessable for that assessment year [the total income for this purpose being computed after deduction of the allowances under section 33 and section 33A, but without making any deduction under sub-section (1) of this section or any deduction under Chapter VIA] is less than the aggregate of the amounts due to be allowed in respect of the assets

aforesaid for that assessment year, the following procedure shall be followed namely:—

(a) the allowance under clause (ii) shall be made before any allowance under clause (i) is made; and

(b) where an allowance has to be made under clause (ii) in respect of amounts carried forward from more than one assessment year, the amount carried forward from an earlier assessment year shall be allowed before any amount carried forward from a later assessment year.

(4) The deduction under sub-section (1) shall be allowed only if the following conditions are fulfilled, namely:—

(i) the particulars prescribed in this behalf have been furnished by the assessee in respect of the ship or aircraft or machinery or plant;

(ii) an amount equal to seventy-five per cent. of the investment allowance to be actually allowed is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Investment Allowance Reserve Account") to be utilised—

(a) for the purposes of acquiring, before the expiry of a period of ten years next following the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1)] for the purposes of the business of the undertaking; and

(b) until the acquisition of a new ship or a new aircraft or new machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;

Provided that this clause shall have effect in respect of a ship as if for the word "seventy-five", the word "fifty" had been substituted.

Explanation.—Where the amount debited to the profit and loss account and credited to the Investment Allowance Reserve Account under this sub-section is not less than the amount required to be so credited on the basis of the amount of deduction in respect of investment allowance claimed in the return made by the assessee under section 139, but a higher deduction in respect of the investment allowance is admissible on the basis of the total income as proposed to be computed by the Income-tax Officer under section 143, the Income-tax Officer shall, by notice in writing in this behalf, allow the assessee an opportunity

to credit within the time specified in the notice or within such further time as the Income-tax Officer may allow, a further amount to the Investment Allowance Reserve Account out of the profits and gains of the previous year in which such notice is served on the assessee or of the immediately preceding previous year, if the accounts for that year have not been made up; and, if the assessee credits any further amount to such account within the time aforesaid, the amount so credited shall be deemed to have been credited to the Investment Allowance Reserve Account of the previous year in which the deduction is admissible and such amount shall not be taken into account in determining the adequacy of the reserve required to be credited by the assessee in respect of the previous year in which such further credit is made;

Provided that such opportunity shall not be allowed by the Income-tax Officer in a case where the difference in the total income as proposed to be computed by him and the total income as returned by the assessee arises out of the application of the proviso to sub-section (1) of section 145 or sub-section (2) of that section or the omission by the assessee to disclose his income fully and truly.

(5) Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act—

(a) if the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed; or

(b) if at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1)] for the purposes of the business of the undertaking; or

(c) if at any time before the expiry of the ten years aforesaid, the assessee utilises the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any assets outside India or for any other purpose which is not a purpose of the business of the undertaking.

and the provisions of sub-section (4A) of section 155 shall apply accordingly:

Provided that nothing in clause (a) shall apply—

(i) where the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956; or

(ii) where the sale or transfer of the ship, aircraft, machinery or plant is made in connection with the amalgamation or succession, referred to in sub-section (6), or sub-section (7).

(6) Where in a scheme of amalgamation, the amalgamating company sells or otherwise transfers to the amalgamated company any ship, aircraft, machinery or plant, in respect of which investment allowance has been allowed to the amalgamating company under sub-section (1),—

(a) the amalgamated company shall continue to fulfil the conditions mentioned in sub-section (4) in respect of the reserve created by the amalgamating company and in respect of the period within which such ship, aircraft, machinery or plant shall not be sold or otherwise transferred and in default of any of these conditions, the provisions of sub-section (4A) of section 155, shall apply to the amalgamated company as they would have applied to the amalgamating company had it committed the default; and

(b) the balance of investment allowance, if any, still outstanding to the amalgamating company in respect of such ship, aircraft, machinery or plant, shall be allowed to the amalgamated company in accordance with the provisions of sub-section (3), so, however, that the total period for which the balance of investment allowance shall be carried forward in the assessments of the amalgamating company and the amalgamated company shall not exceed the period of eight years specified in sub-section (3) and the amalgamated company shall be treated as the assessee in respect of such ship, aircraft, machinery or plant for the purposes of this section.

(7) Where a firm is succeeded to by a company in the business carried on by it as a result of which the firm sells or otherwise transfers to the company any ship, aircraft, machinery or plant, the provisions of clause (a) and (b) of sub-section (6) shall, so far as may be, apply to the firm and the company.

Explanation.—The provisions of this sub-section shall apply only where—

(i) all the property of the firm relating to the business immediately before the succession becomes the property of the company;

(ii) all the liabilities of the firm relating to

the business immediately before the succession become the liabilities of the company; and

(iii) all the shareholders of the company were partners of the firm immediately before the succession.

(8) The Central Government, if it considers necessary or expedient so to do, may, by notification in the Official Gazette, direct that the deduction allowable under this section shall not be allowed in respect of any ship or aircraft acquired or any machinery or plant installed after such date, not being earlier than three years from the date of such notification, as may be specified therein.

(9) For the removal of doubts, it is hereby declared that the deduction under sub-section (1) shall not be denied by reason only that the amount debited to the profit and loss account of the relevant previous year and credited to the Investment Allowance Reserve Account exceeds the amount of the profit of such previous year (as arrived at without making the debit aforesaid), in accordance with the profit and loss account.

9. Amendment of section 37.

In section 37 of the Income-tax Act,—

(a) in sub-section (2A),—

(i) in clause (i), for the words, figures and letters "section 33 or section 33A", the words, figures and letters "section 32A or section 33 or section 33A" shall be substituted;

(ii) in the *Explanation*, the words, brackets, figure and letter "and sub-section (2B)" shall be omitted with effect from the 1st day of April, 1977:

(b) sub-section (2B) shall be omitted with effect from the 1st day of April, 1977.

10. Insertion of new sections 44C and 44D.

In the Income-tax Act, in Chapter IV-D, after section 44B, the following sections shall be inserted, with effect from the 1st day of June, 1976, namely:—

Deduction of head office expenditure in the case of non-residents.

'44C. Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, no allowance shall be made, in computing the income chargeable under the head "Profits and gains of business or profession", in respect of so much of the expenditure in the nature of head office expenditure as is in excess of the amount computed as hereunder, namely:—

(a) an amount equal to five per cent. of the adjusted total income; or

(b) an amount equal to the average head office expenditure; or

(c) the amount of so much of the expenditure in the nature of head office expenditure incurred by the assessee as is attributable to the business or profession of the assessee in India,

whichever is the least :

Provided that in a case where the adjusted total income of the assessee is a loss, the amount under clause (a) shall be computed at the rate of five per cent. of the average adjusted total income of the assessee.

Explanation.—For the purposes of this section,—

(i) "adjusted total income" means the total income computed in accordance with the provisions of this Act, without giving effect to the allowance referred to in this section or in sub-section (2) of section 32 or the deduction referred to in section 32A or section 33 or section 33A or the first proviso to clause (ix) of sub-section (1) of section 36 or any loss carried forward under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) of section 74 or sub-section (3) of section 74A or the deductions under Chapter VIA;

(ii) "average adjusted total income" means,—

(a) in a case where the total income of the assessee is assessable for each of the three assessment years immediately preceding the relevant assessment year, one-third of the aggregate amount of the adjusted total income in respect of the previous years relevant to the aforesaid three assessment years;

(b) in a case where the total income of the assessee is assessable only for two of the aforesaid three assessment years, one-half of the aggregate amount of the adjusted total income in respect of the previous years relevant to the aforesaid two assessment years;

(c) in a case where the total income of the assessee is assessable only for one of the aforesaid three assessment years, the amount of the adjusted total income in respect of the previous year relevant to that assessment year ;

(iii) "average head office expenditure" means,—

(a) in a case where any expenditure in the nature of head office expenditure has been allowed as a deduction in computing the income of the assessee chargeable under the head "Profits and gains of business or profession" in respect of each of the three previous years relevant to the assessment years commencing on the 1st day of April, 1974, the 1st day of April, 1975 and the 1st day of April, 1976, one-third of the aggregate amount of the expenditure so allowed;

(b) in a case where such expenditure has been so allowed only in respect of two of the aforesaid three previous years, one-half of the aggregate amount of the expenditure so allowed;

(c) in a case where such expenditure has been so allowed only in respect of one of the aforesaid three previous years, the amount of the expenditure so allowed;

(iv) "head office expenditure" means executive and general administration expenditure incurred by the assessee outside India, including expenditure incurred in respect of—

(a) rent, rates, taxes, repairs or insurance of any premises outside India used for the purposes of the business or profession;

(b) salary, wages, annuity, pension, fees, bonus, commission, gratuity, perquisites or profits in lieu of or in addition to salary, whether paid or allowed to any employee or other person employed in, or managing the affairs of, any office outside India;

(c) travelling by any employee or other person employed in or managing the affairs of, any office outside India; and

(d) such other matters connected with executive and general administration as may be prescribed.

Special provisions for computing income by way of royalties, etc., in the case of foreign companies.

44D. Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company,—

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received from an Indian concern in pursuance of an agreement made by the foreign company with the Indian concern before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent. of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received from an Indian concern in pursuance of an agreement made by the foreign company with the Indian concern after the 31st day of March, 1976.

Explanation.— For the purposes of this section,—

(a) "fees for technical services" shall have the same meaning as in *Explanation* to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B.

(c) "royalty" shall have the same meaning as in the *Explanation* to clause (vi) of sub-section (1) of section 9;

(d) royalty received from an Indian concern in pursuance of an agreement made by a foreign company with the Indian concern after the 31st day of March, 1976 shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976 if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976.

11. Amendment of Section 47.

In section 47 of the Income-tax Act, after clause (viii), the following clause shall be inserted with effect from the 1st day of April, 1977, namely:—

'(ix) any transfer of a capital asset; being any work of art, archaeological, scientific or art collection, book, manuscript, drawing, painting, photograph or print, to the Government or a University or the National Museum, National Art Gallery, National Archives or any such other public museum or institution as may be notified by the Central Government in the Official Gazette to be of national importance or to be of renown throughout any State or States.

Explanation.— For the purposes of this clause, "University" means a University established or incorporated by or under a Central, State or Provincial Act and includes an institution declared under section 3 of the University Grants Commission Act, 1956 to be a University for the purposes of that Act.

12. Omission of section 54C

Section 54C of the Income-tax Act shall be omitted.

13. Amendment of section 57.

In section 57 of the Income-tax Act, the following proviso and *Explanation* shall be inserted at the end, with effect from the 1st day of June, 1976, namely:—

'Provided that nothing contained in clause (i) or clause (iii) shall apply in computing the income by way of dividends in the case of an assessee, being a foreign company.

Explanation.— For the purposes of this section and section 58, "foreign company" shall have the same meaning as in section 80B.

14. Amendment of section 58.

In section 58 of the Income-tax Act, after sub-section (2), the following sub-section shall be inserted, with effect from the 1st day of June, 1976, namely:—

'(3) In the case of an assessee, being a foreign company, the provisions of section 44D shall, so far as may be, apply in computing the income chargeable under the head "Income from other sources" as they apply in computing the income chargeable under the head "Profits and gains of business or profession".

15. Amendment of section 80A.

In section 80A of the Income-tax Act, after sub-section (3), the following sub-section shall be inserted with effect from the 1st day of April, 1977, namely:—

"(4) Notwithstanding anything contained in sub-section (1), no deduction under section 80G or section 80GG or section 80HH or section 80J or section 80L or section 80QQ shall be allowed in computing the total income of an assessee, being a Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year exceeds the maximum amount not chargeable to tax."

16. Amendment of section 80C.

In section 80C of the Income-tax Act, in clause (d), of sub-section (2) for the words "eight thousand rupees", the words "ten thousand rupees" shall be substituted with effect from the 1st day of April, 1977.

17. Amendment of section 80G.

In section 80G of the Income-tax Act,—

(a) for sub-section (1), the following sub-section shall be substituted with effect from the 1st day of April, 1977, namely:—

"(1) in computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section,—

(i) in a case where the aggregate of the sums specified in sub-section (2) includes any sum specified in sub-clause (vii) of clause (a) thereof, an amount equal to the whole of such sum plus fifty per cent. of the balance of such aggregate; and

(ii) in any other case, an amount equal to fifty per cent. of the aggregate of the sums specified in sub-section (2).";

(b) in clause (a) of sub-section (2), with effect from the 1st day of April, 1977,—

(i) in sub-clause (v), for the words "for any charitable purpose;", the words "for any charitable purpose other than the purpose of promoting family planning; or" shall be substituted;

(ii) after sub-clause (v), the following sub-clauses shall be inserted, namely:—

"(vi) any authority referred to in clause (20A) of section 10; or

(vii) the Government or to any such local authority, institution or association as may be approved in this behalf by the Central Government, to be utilised for the purpose of promoting family planning;"

(c) in sub-section (4), for the words, brackets and figures "sub-clauses (iv) and (v)", the words, brackets and figures "sub-clauses (iv), (v), (vi) and (vii)" shall be substituted with effect from the 1st day of April, 1977;

(d) after *Explanation 4*, the following *Explanation* shall be inserted, namely:—

"*Explanation 5*.—For the removal of doubts, it is hereby declared that no deduction shall be allowed under this section in respect of any donation unless such donation is of a sum of money."

18. Amendment of section 80M.

In section 80M of the Income-tax Act, for sub-section (1), the following sub-section shall be substituted with effect from the 1st day of April, 1977, namely:—

"(1) Where the gross total income of an assessee, being a domestic company, includes any income by way of dividends from a domestic company, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such income by way of dividends of an amount equal to—

(a) in respect of such income by way of dividends from a company formed and registered under the Companies Act, 1956 after the 28th day of February, 1975 and engaged exclusively or almost exclusively in the manufacture or production of any one or more of the articles or things specified in items 2 and 3, item 4 (excluding alloy, malleable and S. G. iron castings), items 7 to 15 (both inclusive), items 17 and 18, item 23 (excluding refractories) and items 24, 26, 27 and 29 in the list in the Ninth Schedule.

(b) in respect of such income by way of dividends other than the dividends referred to in clause (a)

19. Amendment of section 115.

In section 115 of the Income-tax Act, in clause (i) with effect from the 1st day of April, 1977,—

(a) in sub-clause (a) (1), for the words "forty-seven per cent.", the words "forty per cent." shall be substituted;

(b) in sub-clause (a) (2), for the words "fifty-five per cent.", the words "fifty per cent." shall be substituted; and

(c) in sub-clause (b) for the words "forty-five per cent.", the words "forty per cent." shall be substituted.

20. Insertion of new sections 115A and 115B.

In the Income-tax Act, after section 115, the following sections shall be inserted with effect from the 1st day of June, 1976, namely:—

Tax on dividends royalty and technical service fees in the case of foreign companies.

"115A. (1) Subject to the provisions of sub-section (2), where the total income of an assessee, being a foreign company, includes any income by way of—

(a) dividends; or

(b) royalty or fees for technical services received from an Indian concern in pursuance of an agreement made by the foreign company with the Indian concern after the 31st day of March, 1976 and approved by the Central Government,

the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the amount of income by way of dividends, if any, included in the total income, at the rate of twenty-five per cent.;

(ii) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income—

(1) on so much of the amount of such income as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, at the rate of twenty per cent.;

(2) on the balance of such income, if any, at the rate of forty per cent.;

(iii) the amount of income tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of forty per cent.; and

(iv) the amount of income-tax with which it would have been chargeable had its total income been reduced by the amount of income referred to in clause (a) and clause (b).

Explanation. — For the purposes of this section,—

(a) "fees for technical services" shall have the same meaning as in the *Explanation* to clause (vii) of sub-section (1) of section 9;

(b) "foreign company" shall have the same meaning as in section 80B;

(c) "royalty" shall have the same meaning as in the *Explanation* to clause (vi) of sub-section (1) of section 9.

(2) Nothing contained in sub-section (1) shall apply in relation to any income by way of royalty received by a foreign company from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1976 if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976; and the provisions of the annual Finance Act for calculating, charging, deducting or computing income-tax shall apply in relation to such income as if such income had been received in pursuance of an agreement made before the 1st day of April, 1976.

Tax on profits and gains of life insurance business.

115B. Where the total income of an assessee includes any profits and gains from life insurance business, the income-tax payable shall be the aggregate of—

(i) the amount of Income-tax calculated on the amount of profits and gains of the life insurance business included in the total income, at the rate of twelve and one-half per cent.; and

(ii) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of profits and gains of the life insurance business.

21. Amendment of section 155.

In section 155 of the Income tax Act, after sub-section (4), the following sub-section shall be inserted, namely:—

'(4A) Where an allowance by way of investment allowance has been made wholly or partly to an assessee in respect of a ship or an aircraft or any machinery or plant in any

assessment year under section 32A and subsequently—

(a) at any time before the expiry of eight years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person other than the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956, or in connection with any amalgamation or succession referred to in sub-section (6) or sub-section (7) of section 32A, or

(b) at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) of section 32A for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of the proviso to sub-section (1) of section 32A] for the purposes of the business of the undertaking; or

(c) at any time before the expiry of the ten years referred to in clause (b), the assessee utilises the amount credited to the reserve account under sub-section (4) of section 32A—

(i) for distribution by way of dividends or profits; or

(ii) for remittance outside India as profits or for the creation of any asset outside India; or

(iii) for any other purpose which is not a purpose of the business of the undertaking, the investment allowance originally allowed shall be deemed to have been wrongly allowed, and the Income-tax Officer may, notwithstanding anything contained in this Act, recompute the total income of the assessee for the relevant previous year and make the necessary amendment, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned.—

(i) in a case referred to in clause (a), from the end of the previous year in which the sale or other transfer took place;

(ii) in a case referred to in clause (b), from the end of the ten years referred to in that clause;

(iii) in a case referred to in clause (c), from the end of the previous year in which the amount was utilised.

Explanation. — For the purposes of clause (b), "new ship" or "new aircraft" or "new

machinery or plant" shall have the same meanings as in the Explanation to clause (vi) of sub-section (1) of section 32'.

22. Amendment of section 195

In the Income-tax Act, in section 195, in sub-section (2), for the words "other than interest including interest on securities" the words "other than interest on securities" shall be substituted with effect from the 1st day of June, 1976.

23. Amendment of First Schedule.

In the First Schedule to the Income-tax Act, with effect from the 1st day of April, 1977,—

(a) for rule 2, the following rule shall be substituted, namely :—

Computation of profits of life insurance business.

"2. The profits and gains of life insurance business shall be taken to be the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938, in respect of the last inter-valuation period ending before the commencement of the assessment year, so as to exclude from it any surplus or deficit included therein which was made in any earlier inter-valuation period.";

(b) rule 3 shall be omitted;

(c) in rule 7, in sub-rule (1), clauses (i) and (iii) shall be omitted.

24. Amendment of Eighth Schedule.

In the Eighth Schedule to the Income-tax Act,—

(a) against Bihar in column (1), for the existing areas specified in column (2), the following shall be substituted, namely :—

"The districts of Aurangabad, Begusarai, Bhagalpur, Bhojpur, Darbhanga, East Champaran, Gaya, Madhubani, Monghyr, Muzaffarpur, Nalanda, Nawadah, Palamau, Purnea, Saharsa, Samastipur, Santal Parganas, Saran, Sitamarhi, Siwan, Vaishali and West Champaran.";

(b) against Punjab in column (1), for the existing areas specified in column (2), the following shall be substituted, namely :—

"The district of Bhatinda; so much of the district of Faridkot as formed part of the district of Bhatinda on the 31st day of July, 1972; the districts of Ferozepur, Gurdaspur, Hoshiarpur and Sangrur.";

(c) after Rajasthan in column (1) and the entries relating thereto, the following shall be inserted, namely :—

"Sikkim: The whole of the State.";

(d) against Uttar Pradesh in column (1), for the existing areas specified in column (2), the following shall be substituted, namely :—

"The districts of Almora, Azamgarh, Baharaich, Ballia, Banda, Bara Banki, Basti, Budaun, Bulandshahr, Chamoli, Deoria, Etah, Etawah, Faizabad, Farrukhabad, Fatehpur, Garhwal, Ghazipur, Gonda, Hamirpur, Haridwar, Jalaun, Jaunpur, Jhansi, Mainpuri, Mathura, Moradabad, Pilibhit, Pithoragarh, Pratapgarh, Rae Bareilly, Rampur, Shahjahanpur, Sitapur, Sultanpur, Tehri-Garhwal, Unnao and Uttarakashi.";

(e) for the Explanation, the following Explanation shall be substituted, namely :—

"Explanation.—Save as otherwise expressly provided, reference to any district in this Schedule shall be construed,—

(i) in the case of the districts of Aurangabad, Begusarai, Bhojpur, Gaya, Monghyr, Nalanda and Nawadah in the State of Bihar; the district of Ferozepur in the State of Punjab; and the district of Rampur in the State of Uttar Pradesh, as a reference to the areas comprised in the district concerned on the 15th day of March, 1976, being the date of introduction of the Finance Bill, 1976 in the House of the People; and

(ii) in the case of any other district, as a reference to the areas comprised in that district on the 3rd day of September, 1973, being the date of introduction of the Direct Taxes (Amendment) Bill, 1973 in the House of the People."

25. Amendment of Ninth Schedule.

In the Ninth Schedule to the Income-tax Act,—

(a) for item 4, the following item shall be substituted, namely :—

"4. Steel castings and forgings and alloy, malleable and S. G. iron castings.";

(b) after item 24 and before the Explanation, the following items shall be inserted, namely :—

"25. Carbon and graphite products.

26. Inorganic heavy chemicals (other than soda ash and caustic soda mentioned in items 12 and 13 respectively).

27. Organic heavy chemicals.

28. Synthetic rubber and rubber chemicals (including carbon black).

29. Industrial explosives

30. Basic drugs.

31. Industrial sewing machines.

32. Finished leather and leather goods (including footwear made wholly or mainly of leather)".

26. Consequential amendments to certain sections.

The following amendments (being amendments of a consequential nature) shall be made in the Income-tax Act, namely:—

(a) in section 45, the figures and letter "54" shall be omitted;

(b) in clause (iv) of sub-section (2) of section 141A, for the words, brackets and figures "the deduction referred to in clause (ii) of sub-section (2) of section 33", the words, brackets, figures and letter "the deduction referred to in clause (ii) of sub-section (3) of section 32A or clause (ii) of sub-section (2) of section 33" shall be substituted;

(c) in sub-clause (iv) of clause (b) of sub-section (1) of section 143, for the words, brackets and figures "the deduction referred to in clause (ii) of sub-section (2) of section 33", the words, brackets, figures and letters "the deduction referred to in clause (ii) of sub-section (3) of section 32A or clause (ii) of sub-section (2) of section 33" shall be substituted;

(d) in clause (i) of sub-section (1) of section 160, the words, brackets and figure "clause (i) of" shall be omitted with effect from the 1st day of June, 1976;

(e) in the Ninth Schedule, for the brackets, words and figures "[See section 32 (1) (vi)]", the brackets, words, figures and letters "[See section 32(1)(vi) and section 32A (2) (b) (ii)]" shall be substituted.

Wealth-tax

27. Amendment of Act 27 of 1957.

In the Wealth-tax Act, 1957,—

(1) in section 3, for the words "at the rate or rates specified in the Schedule" the words and figure "at the rate or rates specified in Schedule I" shall be substituted with effect from the 1st day of April, 1977;

(2) in section 5, in sub-section (1),—

(a) after clause (ivb), the following clause shall be inserted with effect from the 1st day of April, 1977, namely:—

"(ive) one or more dwelling units (each such dwelling unit having a plinth area not exceeding eighty square metres) and the land appurtenant thereto, belonging to the assessee, where the construction of such dwelling unit or units is begun on or after the 1st day of April, 1976;

Provided that this exemption shall apply in respect of any dwelling unit or units and the land appurtenant thereto only for a period of five successive assessment years next following the date on which the construction of such dwelling unit or units is completed.

Explanation.—For the purposes of this clause,—

(a) "dwelling unit" means a unit of accom-

modation used solely for the purpose of residence;

(b) "land appurtenant", in relation to any dwelling unit or units comprising a building, means,—

(i) in an area where there is any law in force providing for the minimum extent of land contiguous to the land occupied by any building to be kept as open space for the enjoyment of such building, the minimum extent of land contiguous to the land occupied by the building comprising such dwelling unit or units required to be kept as open space under such law;

(ii) in any other area, an extent of land not exceeding one-third of the plinth area of the building comprising the dwelling unit or units at the ground level contiguous to the land occupied by such building;

(b) after clause (x), the following clause shall be inserted and shall be deemed to have been inserted with effect from the 1st day of April, 1975, namely:—

"(xa) the amount of any fee due to the assessee in respect of services rendered by him as a legal practitioner within the meaning of the Advocates Act, 1961;"

(c) after clause (xx), the following clause shall be inserted, namely:—

"(xxa) the value of any building belonging to the assessee, where the building is used solely for the purpose of residence of persons employed by the assessee in any plantation or industrial undertaking belonging to the assessee and the income of each such person chargeable under the head "Salaries" under the Income-tax Act is ten thousand rupees or less;"

(d) in the *Explanation* to clause (xxxi),—

(i) for the words "this clause", the words, brackets, figures and letter "clause (xxa), this clause" shall be substituted;

(ii) for the words, brackets and figures "and clause (xxxii)", the words, brackets and figures "clause (xxxii) and clause (xxxiv)" shall be substituted with effect from the 1st day of April, 1977;

(e) after clause (xxxii), the following clauses shall be inserted with effect from the 1st day of April, 1977, namely:—

"(xxxiii) in the case of an assessee, being a person of Indian origin who was ordinarily residing in a foreign country and who, on leaving such country, has returned to India with the intention of permanently residing therein, moneys and the value of assets brought by him into India and the value of the assets acquired by him out of such moneys;

Provided that this exemption shall apply only for a period of seven successive assessment years commencing with the assessment

year next following the date on which such person returned to India.

Explanation.—A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India;

(xxxiv) in the case of an individual, being a citizen of India, who is not resident in India during the year ending on the valuation date, the value of any equity shares in any company of the type referred to in clause (d) of section 45 which is engaged in the business of manufacture or production of any one or more of the articles or things specified in Schedule II or which is certified by the prescribed authority to have undertaken the export of such percentage of its total production as may be specified in this behalf by the prescribed authority, where such shares form part of the initial issue of the equity share capital made by the company after the 31st day of March, 1976, or where such shares form part of an issue of equity share capital which is certified by the prescribed authority to have been made by the company after the 31st day of March, 1976 for the purposes of expansion or diversification of its industrial undertaking.

Explanation.—An individual shall be deemed to be not resident in India during the year ending on the valuation date if in respect of that year the individual is not resident in India within the meaning of the Income-tax Act;

(3) in section 7,—

(a) in sub-section (3), for the words "the valuation date", the words, brackets and figure "the valuation date, or in the case of an asset being a house referred to in sub-section (4), the valuation date referred to in that sub-section" shall be substituted;

(b) after sub-section (3), the following sub-section shall be inserted, namely:

(4) Notwithstanding anything contained in sub-section (1), the value of a house belonging to the assessee and exclusively used by him for residential purposes throughout the period

of twelve months immediately preceding the valuation date may, at the option of the assessee, be taken to be the price which, in the opinion of the Wealth-tax Officer, it would fetch if sold in the open market on the valuation date next following the date on which he became the owner of the house, or on the valuation date relevant to the assessment year commencing on the 1st day of April, 1971, whichever valuation date is later:

Provided that where more than one house belonging to the assessee is exclusively used by him for residential purposes, the provisions of this sub-section shall apply only in respect of one of such houses which the assessee may, at his option, specify in this behalf in the return of net wealth.

Explanation—For the purposes of this sub-section—

(i) where the house has been constructed by the assessee, he shall be deemed to have become the owner thereof on the date on which the construction of such house was completed;

(ii) "house" includes a part of a house, being an independent residential unit;

(4) in section 21, in sub-section (4), for the words "the Schedule", at both the places where they occur, the word and figure "Schedule 1" shall be substituted with effect from the 1st day of April, 1977;

(5) in section 21A, in clause (a), for the words "the Schedule", the word and figure "Schedule I" shall be substituted with effect from the 1st day of April, 1977;

(6) the Schedule shall be numbered as Schedule I with effect from the 1st day of April, 1977 and with effect from that date—

(a) in the Schedule as so numbered, for Part I, the following Part shall be substituted, namely:—

"PART I

(1) In the case of every individual or Hindu undivided family, not being a Hindu undivided family to which item (2) of this Paragraph applies,—

(contd. on col. 2)

Rate of tax

- | | |
|--|--|
| (a) where the net wealth does not exceed Rs. 5,00,000 | $\frac{1}{2}$ per cent. of the net wealth; |
| (b) where the net wealth exceeds Rs. 5,00,000 but does not exceed Rs. 10,00,000 | Rs. 2,500 plus $1\frac{1}{2}$ per cent. of the amount by which the net wealth exceeds Rs. 5,00,000; |
| (c) where the net wealth exceeds Rs. 10,00,000 but does not exceed Rs. 15,00,000 | Rs. 10,000 plus 2 per cent. of the amount by which the net wealth exceeds Rs. 10,00,000; |
| (d) where the net wealth exceeds Rs. 15,00,000 | Rs. 20,000 plus $2\frac{1}{2}$ per cent. of the amount by which the net wealth exceeds Rs. 15,00,000 |

Provided that for the purposes of this item,—

- (i) no wealth-tax shall be payable where the net wealth does not exceed Rs. 1,00,000;
- (ii) the wealth-tax payable shall, in no case, exceed 5 per cent. of the amount by which

(contd. on col. 2)

- (a) where the net wealth does not exceed Rs. 5,00,000

- (b) where the net wealth exceeds Rs. 5,00,000 but does not exceed Rs. 10,00,000

- (c) where the net wealth exceeds Rs. 10,00,000

the net wealth exceeds Rs. 1,00,000.

- (3) In the case of every Hindu undivided family which has at least one member whose net wealth assessable for the assessment year exceeds Rs. 1,00,000,—

Rate of Tax $1\frac{1}{2}$ per cent of the net wealth.

Provided that for the purposes of this item,—

- (i) no wealth-tax shall be payable where the net wealth does not exceed Rs. 1,00,000;

- (ii) the wealth-tax payable shall, in no case, exceed 5 per cent. of the amount by which the net wealth exceeds Rs. 1,00,000.”;

- (b) after the Schedule as so numbered, the following Schedule shall be inserted, namely:—

'SCHEDULE II

[See section 5 (1) (xxxiv)]

LIST OF ARTICLES OR THINGS

1. Ferro alloys; steel castings and forgings; special steels; and non-ferrous metals and their alloys.

2. Boilers and Steam Generating Plants.

3. Prime Movers (other than Electrical Generators), being industrial turbines or internal combustion engines.

4. Equipment for transmission and distribution of electricity; electrical motors; electrical furnaces; X-ray equipment; and electronic components and equipment.

5. Mechanised sailing vessels up to 1000 DWT; ship ancillaries; and commercial vehicles.

6. Industrial machinery.

7. Machine tools.

8. Agricultural machinery, being tractors or power tillers.

9. Earth-moving machinery.

10. Industrial instruments, being indicating, recording and regulating devices for pressure, temperature, rate of flow, weights, levels and the like.

11. Scientific instruments.

12. Nitrogenous and phosphatic fertilisers falling under “(1) Inorganic fertilisers” mentioned under the heading “18. Fertilisers” in the First Schedule to the Industries (Development and Regulation) Act, 1951.

13. Chemicals (other than fertilisers), namely:—

- (1) Inorganic heavy chemicals.

- (2) Organic heavy chemicals.

- (3) Fine chemicals including photographic chemicals.

- (4) Synthetic resins and plastics.

- (5) Synthetic rubbers.

- (6) Man-made fibres.

- (7) Industrial explosives.

- (8) Insecticides, fungicides, weedicides and the like.

- (9) Synthetic detergents.

- (10) Miscellaneous chemicals (for industrial use only).

14. Drugs and pharmaceuticals.

15. Paper and pulp including paper products

16. Automobile tyres and tubes.

17. Plate glass.

18. Ceramics, being refractories or furnace lining bricks—acidic, basic and neutral.

19. Cement products, being portland cement or asbestos cement.

Gift-tax

28. Amendment of Act 18 of 1958.

In section 5 of the Gift-tax Act, 1958, in clause (iv) of sub-section (1) after the words “local authority”, the words, brackets, figures and letter “or any authority referred to in clause (20A) of section 10 of the Income-tax Act” shall be inserted with effect from the 1st day of April, 1977.

Surtax

29. Amendment of Act 7 of 1964.

In the Companies (Profits) Surtax Act, 1964,—

- (a) in section 2, in clause (8), for the words “ten per cent.”, at both the places where they occur, the words “fifteen per cent.” shall be substituted with effect from the 1st day of April, 1977;

- (b) in the First Schedule, in rule 3, for the Portion beginning with the words “by the aggregate of—” and ending with the brackets, figures and words “(ii) any expenditure”, the words “by the amount of any expenditure” shall be substituted with effect from the 1st day of April, 1977;

- (c) in the Second Schedule,—

- (i) in rule 1—

(1) in clause (ii), for the words, brackets and figures "sub-section (3) of section 34", the words, brackets, figures and letter "sub-section (4) of section 32A. or sub-section (3) of section 34" shall be substituted with effect from the 1st day of April, 1977; and

(2) clauses (iv) and (v) shall be omitted with effect from the 1st day of April, 1977;

(ii) after rule 1, the following rule shall be inserted, and shall be deemed to have been inserted with effect from the 1st day of April, 1975, namely:—

'1A. Where a company has not made any credit in any account in its books as on the first day of the previous year relevant to the assessment year which is of the nature of item (8) or item (9) under the heading "CURRENT LIABILITIES AND PROVISIONS" in the column relating to "LIABILITIES" in the "FORM OF BALANCE-SHEET," given in Part I of Schedule VI to the Companies Act, 1956, or where the Income-tax Officer is of opinion that the amount credited in such account falls short of the amount which should have reasonably been credited by it, the amount of its capital as computed under rule 1 shall be reduced by the amount which has not been so credited or, as the case may be, the amount of such shortfall.

Explanation.— For the purposes of this rule, the amount of credit which should have reasonably been made by a company in relation to any account of the nature of item (9) aforesaid, means the amount of dividend declared or paid by the company, on or after the first day of the previous year relevant to the assessment year, for the previous year immediately preceding the first mentioned previous year;'

(iii) in rule 2, in clause (i), the brackets, words and figures "[other than the debentures referred to in clause (iv) or moneys referred to in clause (v) of rule 1]" shall be omitted with effect from 1st day of April, 1977;

(iv) in rule 3, for the words, brackets and figures "or issue of the debentures referred to in clause (iv), or borrowing of any moneys referred to in clause (v), of rule 1 or is reduced by any amount on account of reduction of paid up share capital or redemption of such debentures or repayment of any such moneys," the words "or is reduced by any amount on account of reduction of paid-up share capital," shall be substituted with effect from the 1st day of April, 1977.

Interest-tax

30. Amendment of Act 45 of 1974.

In section 2 of the Interest-tax Act, 1974, in clause (7), with effect from the 1st day of April, 1977,—

(a) in sub-clause (i), the word "and" shall be omitted;

(b) in sub-clause (ii), the word "and" shall be inserted at the end;

(c) after sub-clause (ii), the following sub-clause shall be inserted, namely:—

"(iii) interest on moneys lent for the creation of a capital asset in India where the agreement under which such moneys are lent provides for the repayment thereof during a period of not less than seven years;"

CHAPTER IV

INDIRECT TAXES

31. Amendment of Act 32 of 1934.

The Indian Tariff Act, 1934 (hereinafter referred to as the Tariff Act, shall be amended in the manner specified in the Second Schedule.

32. Auxiliary duties of customs.

(1) In the case of goods mentioned in the First Schedule to the Tariff Act, or in that Schedule as amended from time to time, there shall be levied and collected as an auxiliary duty of customs an amount equal to twenty per cent. of the value of the goods as determined in accordance with the provisions of section 14 of the Customs Act, 1962 (hereinafter referred to as the Customs Act):

Provided that on and from the date on which the Customs Tariff Act, 1975 comes into force, this sub-section shall have effect subject to the modification that for the words "First Schedule to the Tariff Act," the words and figures "First Schedule to the Customs Tariff Act, 1975" shall be substituted.

(2) Sub-section (1) shall cease to have effect after the 30th day of June, 1977, except as respects things done or omitted to be done before such cesser, and section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The auxiliary duties of customs referred to in sub-section (1) shall be in addition to any duties of customs chargeable on such goods under the Customs Act, or any other law for the time being in force.

(4) The provisions of the Customs Act, and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the auxiliary duties of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations, as the case may be.

33. Amendment of Act 1 of 1949.

In the Indian Tariff (Amendment) Act, 1949, in sections 4 and 5, for the figures "1976," the figures "1977" shall be substituted.

34. Amendment of Act 51 of 1975.

The Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act), shall be amended in the manner specified in the Third Schedule.

35. Amendment of Act 1 of 1944.

The Central Excises and Salt Act, 1944 (hereinafter referred to as the Central Excises Act), shall be amended in the manner specified in the Fourth Schedule.

36. Auxiliary duties of excise.

(1) In the case of goods mentioned in the First Schedule to the Central Excises Act, or in that Schedule as amended from time to time, there shall be levied and collected as an auxiliary duty of excise an amount equal to twenty per cent. of the value of the goods as determined in accordance with the provisions of section 4 of the Central Excises Act.

(2) Sub-section (1) shall cease to have effect after the 30th day of June, 1977, except as respects things done or omitted to be done before such cesser, and section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The auxiliary duties of excise referred to in sub-section (1) shall be in addition to any duties of excise chargeable on such goods under the Central Excises Act, or any other law for the time being in force.

(4) The auxiliary duties of excise leviable under sub-section (1) in the financial year 1975-1976 shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States.

(5) The provisions of the Central Excises Act and the rules made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the auxiliary duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules, as the case may be.

37. Amendment of Act 58 of 1957.

The Additional Duties of Excise (Goods of Special Importance) Act, 1957 (hereinafter referred to as the Additional Duties of Excise Act); shall be amended in the manner specified in the Fifth Schedule.

38. Discontinuance of salt duty.

For the year beginning on the 1st day of April, 1976, no duty under the Central Excises Act or the Tariff Act or the Customs Tariff Act shall be levied in respect of salt manufactured in, or imported into, India.

39. Amendment of Act 16 of 1955.

In the Medicinal and Toilet Preparations (Excise Duties) Act, 1955,—

(a) for the words "opium, Indian hemp or other narcotic drug or narcotic," wherever they occur, the words "narcotic drug or narcotic" shall be substituted;

(b) in section 2,—

(i) after clause (a), the following clauses shall be inserted, namely:—

'(aa) "coca derivative" means—

(i) crude cocaine, that is, any extract of coca leaf which can be used, directly or indirectly, for the manufacture of cocaine;

(ii) ecgonine, that is, laevo-ecgonine having the chemical formula $C_9H_{15}NO_3$, and all the derivatives of laevo-ecgonine from which it can be recovered; and

(iii) cocaine, that is, methyl-benzoyl-laevo-ecgonine having the chemical formula $C_{17}H_{21}NO_4$, and its salts;

(ab) "coca leaf" means—

(i) the leaf and young twigs of any coca plant, that is, of *Erythroxylon coca* (Lamk.) and the *Erythroxylon novo-granatense* (Hiern.) and their varieties, and of any other species of this genus which the Central Government may, by notification in the Official Gazette declare to be coca plants for the purposes of this Act; and

(ii) any mixture thereof, with or without neutral materials;'

(ii) after clause (b), the following clause shall be inserted, namely:—

'(bb) "derivative of opium" means—

(i) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use;

(ii) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking, and the dross or other residue remaining after opium is smoked;

(iii) Morphine, that is, the principal alkaloid of opium having the chemical formula $C_{17}H_{19}NO_3$, and its salts and its derivatives;'

(iii) for clause (e), the following clause shall be substituted, namely:—

'(e) "Indian hemp" means—

(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis sativa* L), including all forms known as bhang, sidhi or ganja;

(ii) charas, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;

(iii) any mixture, with or without neutral materials, of any of the above forms of Indian hemp or any drink prepared therefrom, and

(iv) any extract or tincture of any of the above forms of Indian hemp;

(v) for clause (h), the following clause shall be substituted, namely:—

“(h) “narcotic drug” or “narcotic” means a substance which is coca leaf, or coca derivative, or opium, or derivative of opium, or Indian hemp and shall include any other substance, capable of causing or producing in human beings dependence, tolerance and withdrawal syndromes and which the Central Government may, by notification in the Official Gazette, declare to be narcotic drug or narcotic;”

(c) the Schedule shall be amended in the manner specified in the Sixth Schedule.

CHAPTER V MISCELLANEOUS

40. Amendment of Act 2 of 1839.

In the Indian Stamp Act, 1839, in Schedule I, in the column headed ‘Proper Stamp-duty,’ with effect from the 1st day of June, 1976,—

(a) in article No. 37, for the words “Fifteen naye paise,” the words “One rupee” shall be substituted;

(b) in article No. 52, for the words “Fifteen naye paise,” the words “Thirty paise” shall be substituted;

(c) in article No. 53, for the words “Ten naye paise,” the words “Twenty paise” shall be substituted.

41. Amendment of Act 31 of 1956.

After section 43 of the Life Insurance Corporation Act, 1956, the following section shall be inserted with effect from the 1st day of June, 1976, namely:—

Deduction of income-tax not to be made on interest or dividend.

“43A. Notwithstanding anything contained in section 193 or section 194 of the Income-

tax Act, 1961, no deduction of income-tax shall be made on any interest or dividend payable to the Corporation in respect of any securities or shares owned by it or in which it has full beneficial interest”.

42. Amendment of Act 52 of 1963.

In section 32 of the Unit Trust of India Act, 1963, in clause (b) of sub-section (1), for sub-clause (ii), the following sub-clause shall be substituted with effect from the 1st day of April, 1977, namely:—

“(ii) a Hindu undivided family, not being a Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year exceeds the maximum amount not chargeable to income-tax under the Income-tax Act, 1961, or”.

43. Amendment of Act 38 of 1974.

In the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974,—

(a) in section 3, in sub-section (1), for the words, figures and letters “and the assessment year commencing on the 1st day of April, 1976,” the words, figures and letters “, the assessment year commencing on the 1st day of April, 1976 and the assessment year commencing on the 1st day of April, 1977,” shall be substituted;

(b) in section 4, in sub-section (1), for the words “a compulsory deposit for that assessment year at the rates specified in the Schedule,” the following shall be substituted, namely:—

‘a compulsory deposit,—

(i) for the assessment year commencing on the 1st day of April, 1975 and the assessment year commencing on the 1st day of April, 1976, at the rates specified in Paragraph A of the Schedule; and

(ii) for the assessment year commencing on the 1st day of April, 1977, at the rates specified in Paragraph B of the Schedule.”;

(c) in the Schedule,—

(i) below the words “RATES OF COMPULSORY DEPOSIT” the word and letter “Paragraph A” shall be inserted; and

(ii) for the provisos, the following shall be substituted; namely:—

(contd. on col. 2)

“Paragraph B

(1) Where the current income exceeds Rs. 15,000 but does not exceed Rs. 25,000 4 per cent. of the current income;

(2) Where the current income exceeds Rs. 25,000 but does not exceed Rs. 70,000 Rs. 1,000 plus 10 per cent. of the amount by which the current income exceeds Rs. 25,000;

(3) Where the current income exceeds Rs. 70,000 Rs. 5,500 plus 12 per cent. of the amount by which the current income exceeds Rs. 70,000;

Provided that in a case (whether falling under Paragraph A or Paragraph B)—

(a) where the current income exceeds Rs. 15,000 but does not exceed Rs. 15,620, the compulsory deposit shall in no case ex-

ceed the amount by which the current income exceeds Rs. 15,000;

(b) where the amount of compulsory deposit calculated in accordance with the foregoing provisions is less than Rs. 100, it shall not be necessary for the depositor concerned to make such deposit."

THE FIRST SCHEDULE

(See section 2)

PART I

INCOME-TAX AND SURCHARGE ON INCOME-TAX

Paragraph A

Sub-Paragraph I

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which Sub Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 8,000 | <i>Nil</i> ; |
| (2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000 | 17 per cent. of the amount by which the total income exceeds Rs. 8,000; |
| (3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,190 <i>plus</i> 20 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 2,190 <i>plus</i> 30 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 3,690 <i>plus</i> 40 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (6) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000 | Rs. 5,690 <i>plus</i> 50 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (7) where the total income exceeds Rs. 50,000 but does not exceed Rs. 70,000 | Rs. 15,690 <i>plus</i> 60 per cent. of the amount by which the total income exceeds Rs. 50,000; |
| (8) where the total income exceeds Rs. 70,000 | Rs. 27,690 <i>plus</i> 70 per cent. of the amount by which the total income exceeds Rs. 70,000. |

Surcharge on income-tax

The amount of Income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1976 exceeds Rs. 8,000,—

Rates of income-tax

- | | |
|--|--|
| (1) where the total income does not exceed Rs. 8,000 | <i>Nil</i> . |
| (2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000 | 20 per cent. of the amount by which the total income exceeds Rs. 8,000; |
| (3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,400 <i>plus</i> 30 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 2,900 <i>plus</i> 40 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 4,900 <i>plus</i> 50 per cent. of the amount by which the total income exceeds Rs. 25,000; |

- (6) where the total income exceeds Rs. 7,400 plus 60 per cent. of the amount by which the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000
- (7) where the total income exceeds Rs. 19,400 plus 70 per cent. of the amount by which the total income exceeds Rs. 50,000

Surcharge on income tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 10,000 15 per cent. of the total income;
- (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000 Rs. 1,500 plus 25 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rs. 20,000 Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph C

Sub Paragraph I

In the case of every registered firm, not being a case to which Sub-Paragraph II of this Paragraph applies,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 10,000 Nil;
- (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 5 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 Rs. 750 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 Rs. 2,500 plus 15 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rs. 1,00,000 Rs. 10,000 plus 24 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-paragraph II

In the case of every registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent. of such total income,—

Rates of income-tax

- (1) where the total income does not exceed Rs. 10,000 Nil;
- (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 4 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 Rs. 600 plus 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 Rs. 2,350 plus 13 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rs. 1,00,000 Rs. 8,850 plus 22 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Explanation — For the purposes of this Paragraph, "registered firm" includes an un-registered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph E

In the case of the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

- (i) on that part of its total income which consists of profits and gains from life insurance business 52.5 per cent.;
- (ii) on the balance, if any, of the total income the rate of income tax applicable in accordance with Paragraph F of this Part, to the total income of a domestic company which is a company in which the public are substantially interested.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

Paragraph F

In the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

I. In the case of a domestic company,—

(1) where the company is a company in which the public are substantially interested.—

- (i) in a case where the total income does not exceed Rs. 1,00,000 45 per cent. of the total income;
- (ii) in a case where the total income exceeds Rs. 1,00,000 55 per cent. of the total income;

(2) where the company is not a company in which the public are substantially interested,—

- (i) in the case of an industrial company,—
 - (a) where the total income does not exceed Rs. 2,00,000 55 per cent. of the total income;
 - (b) where the total income exceeds Rs. 2,00,000 60 per cent. of the total income;
- (ii) in any other case 65 per cent. of the total income;

Provided that—

(i) the income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rs. 1,00,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 1,00,000 (the income of Rs. 1,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 1,00,000;

(ii) the income-tax payable by a domestic company, not being a company in which the public are substantially interested, which is an industrial company and the total income of which exceeds Rs. 2,00,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 2,00,000 (the income of Rs. 2,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 2,00,000.

II. In the case of a company other than a domestic company—

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, or

(b) fees for rendering technical services received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964, and where such agreement has, in either case, been approved by the Central Government

50 per cent.;

(ii) on the balance, if any, of the total income 70 per cent.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

PART II

Rates for deduction of tax at source in certain cases

In every case in which under the provisions of sections 193, 194, 194A, 194B, 194D and 195 of the Income-tax Act, tax is to be deducted at the rates in force, deduction shall be made from the income subject to deduction at the following rates:—

	Income-tax	
	Rate of income-tax	Rate of surcharge
1. In the case of a person other than a company—		
(a) where the person is resident in India—		
(i) on income by way of interest other than "Interest on securities"	10 per cent	Nil
(ii) on income by way of winnings from lotteries and crossword puzzles	30 per cent.	3 per cent.;
(iii) on income by way of insurance commission	10 per cent.	Nil;
(iv) on any other income (excluding interest payable on a tax-free security)	21 per cent.	2 per cent.;
(b) where the person is not resident in India—		
(i) on the whole income (excluding interest payable on a tax-free security)	income-tax at 30 per cent. and surcharge at 3 per cent. of the amount of the income.	

	Income tax	
	Rate of income-tax	Rate of surcharge
	or	
	income-tax and surcharge on income-tax in respect of the income at the rates prescribed in Sub.Paragraph I of Paragraph A of Part III of this Schedule, if such income had been the total income, whichever is higher:	
(ii) on income by way of interest payable on a tax-free security	15 per cent.	1·5 per cent.
2. In the case of a company—		
(a) where the company is a domestic company—		
(i) on income by way of interest other than "Interest on securities:"	20 per cent.	1 per cent ;
(ii) on any other income (excluding interest payable on a tax-free security)	22 per cent.	1 per cent.;
(b) where the company is not a domestic company—		
(i) on income by way of dividends payable by any domestic company	25 per cent.	Nil;
(ii) on income by way of royalties payable by an Indian concern in pursuance of an agreement made by it with the Indian concern and which has been approved by the Central Government,—		
(A) where the agreement is made after the 31st day of March, 1961 but before the 1st day of April, 1976	50 per cent.	2·5 per cent;
(B) where the agreement is made after the 31st day of March, 1976—		
(1) on so much of the amount of such income as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, or trade mark or similar property	20 per cent.	Nil;
(2) on the balance, if any, of such income	40 per cent.	Nil;
(iii) on income by way of fees for technical services payable by an Indian concern in pursuance of an agreement made by it with the Indian concern and which has been approved by the Central Government—		
(A) where the agreement is made after the 29th day of February, 1964 but before the 1st day of April, 1976	50 per cent.	2·5 per cent;
(B) where the agreement is made after the 31st day of March, 1976	40 per cent.	Nil;
(iv) on income by way of interest payable on a tax-free security	44 per cent.	2·2 per cent.;
(v) on any other income	70 per cent.	3·5 per cent.

PART III

Rates for calculating or charging income-tax in certain cases, deducting income-tax from income chargeable under the head "Salaries" or any payment referred to in sub.section (9) of section 80E and computing "advance tax".

In cases in which income-tax has to be calculated under the first proviso to sub-section (5) of section 132 of the Income-tax Act or charged under sub.section (4) of S. 172.

or sub-section (2) of section 174 or section 175 or sub-section (2) of section 176 of the said Act or deducted under section 192 of the said Act from income chargeable under the head "Salaries" or deducted under sub-section (9) of section 80E of the said Act from any payment referred to in the said sub-section (9) or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed, at the rate or rates in force, such income tax or, as the case may be, "advance tax" (not being "advance tax" in respect of any income chargeable to tax under Chapter XII or section 164 of the Income-tax Act at the rates as specified in that Chapter or section), shall be so calculated, charged, deducted or computed at the following rate or rates:—

Paragraph A

Sub-Paragraph 1

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which Sub-Paragraph II of this Paragraph or any other Paragraph of this Part applies,—

Rates of income-tax

(1) where the total income does not exceed Rs. 8,000	Nil;
(2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000	15 per cent. of the amount by which the total income exceeds Rs. 8,000;
(3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000	Rs. 1,050 plus 18 per cent. of the amount by which the total income exceeds Rs. 15,000;
(4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000	Rs. 1,950 plus 25 per cent. of the amount by which the total income exceeds Rs. 20,000;
(5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000	Rs. 3,200 plus 30 per cent. of the amount by which the total income exceeds Rs. 25,000;
(6) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000	Rs. 4,700 plus 40 per cent. of the amount by which the total income exceeds Rs. 30,000;
(7) where the total income exceeds Rs. 50,000 but does not exceed Rs. 70,000	Rs. 12,700 plus 50 per cent. of the amount by which the total income exceeds Rs. 50,000;
(8) where the total income exceeds Rs. 70,000 but does not exceed Rs. 1,00,000	Rs. 22,700 plus 55 per cent. of the amount by which the total income exceeds Rs. 70,000;
(9) where the total income exceeds Rs. 1,00,000	Rs. 39,200 plus 60 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every Hindu undivided family which at any time during the previous year has at least one Member whose total income of the previous year relevant to the assessment year commencing on the 1st day of April, 1977 exceeds Rs. 8,000,—

Rates of income-tax

(1) where the total income does not exceed Rs. 8,000	Nil;
(2) where the total income exceeds Rs. 8,000 but does not exceed Rs. 15,000	18 per cent. of the amount by which the total income exceeds Rs. 8,000;
(3) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000	Rs. 1,260 plus 25 per cent. of the amount by which the total income exceeds Rs. 15,000;
(4) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000	Rs. 2,510 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000;
(5) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000	Rs. 4,010 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000;
(6) where the total income exceeds Rs. 30,000 but does not exceed Rs. 50,000	Rs. 6,010 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000;

- (7) where the total income exceeds Rs. 16,010 *plus* 55 per cent. of the amount by which the total income exceeds Rs. 50,000;
 Rs. 50,000 but does not exceed Rs. 70,000
- (8) where the total income exceeds Rs. 27,010 *plus* 60 per cent. of the amount by which the total income exceeds Rs. 70,000;
 Rs. 70,000

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

- (1) where the total income does not exceed 15 per cent. of the total income
 Rs. 10,000
- (2) where the total income exceeds Rs. 1,500 *plus* 25 per cent. of the amount by which the total income exceeds Rs. 10,000;
 Rs. 10,000 but does not exceed Rs. 20,000
- (3) where the total income exceeds Rs. 4,000 *plus* 40 per cent. of the amount by which the total income exceeds Rs. 20,000;
 Rs. 20,000

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph C

Sub-Paragraph I

In the case of every registered firm, not being a case to which Sub-Paragraph II of this Paragraph applies,—

Rates of income-tax

- (1) where the total income does not exceed Nil;
 Rs. 10,000
- (2) where the total income exceeds 5 per cent. of the amount by which the total income exceeds Rs. 10,000;
 Rs. 10,000 but does not exceed Rs. 25,000
- (3) where the total income exceeds Rs. 750 *plus* 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
 Rs. 25,000 but does not exceed Rs. 50,000
- (4) where the total income exceeds Rs. 2,500 *plus* 15 per cent. of the amount by which the total income exceeds Rs. 50,000;
 Rs. 50,000 but does not exceed Rs. 1,00,000
- (5) where the total income exceeds Rs. 10,000 *plus* 24 per cent. of the amount by which the total income exceeds Rs. 1,00,000;
 Rs. 1,00,000

Surcharge on income tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Sub-Paragraph II

In the case of every registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent of such total income,—

Rates of income-tax

- (1) where the total income does not exceed Nil;
 Rs. 10,000
- (2) where the total income exceeds 4 per cent. of the amount by which the total income exceeds Rs. 10,000;
 Rs. 10,000 but does not exceed Rs. 25,000
- (3) where the total income exceeds Rs. 600 *plus* 7 per cent. of the amount by which the total income exceeds Rs. 25,000;
 Rs. 25,000 but does not exceed Rs. 50,000
- (4) where the total income exceeds Rs. 2,350 *plus* 13 per cent. of the amount by which the total income exceeds Rs. 50,000;
 Rs. 50,000 but does not exceed Rs. 1,00,000
- (5) where the total income exceeds Rs. 8,850 *plus* 22 per cent. of the amount by which the total income exceeds Rs. 1,00,000;
 Rs. 1,00,000

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Sub-Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Explanation.—For the purposes of this Paragraph, "registered firm" includes an unregistered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph E

In the case of a company,—

Rates of income-tax

I. In the case of a domestic company,—

(1) where the company is a company in which the public are substantially interested,—

(i) in a case where the total income does not exceed Rs. 1,00,000 45 per cent. of the total income;

(ii) in a case where the total income exceeds Rs. 1,00,000 55 Per cent. of the total income;

(2) where the company is not a company in which the public are substantially interested,—

(i) in the case of an industrial company,—

(a) where the total income does not exceed Rs. 2,00,000 55 per cent. of the total income;

(b) where the total income exceeds Rs. 2,00,000 60 per cent. of the total income;

(ii) in any other case 65 per cent. of the total income;

Provided that—

(i) the income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rs. 1,00,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 1,00,000 (the income of Rs. 1,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 1,00,000;

(ii) the income-tax payable by a domestic company, not being a company in which the public are substantially interested, which is an industrial company and the total income of which exceeds Rs. 2,00,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 2,00,000 (the income of Rs. 2,00,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 2,00,000.

II. In the case of a company other than a domestic company,—

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961 but before the 1st day of April, 1976, or

(b) fees for rendering technical services received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964 but before the 1st day of April, 1976,

and where such agreement has, in either case, been approved by the Central Government

(ii) on the balance, if any, of the total income 50 per cent.; 70 per cent.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge calculated at the rate of five per cent. of such income-tax.

PART IV

[See section 2 (9) (e)]

RULES FOR COMPUTATION OF NET AGRICULTURAL INCOME

Rule 1.—Agricultural income of the nature referred to in sub-clause (a) of clause (1) of section 2 of the Income tax Act shall be computed as if it were income chargeable to income-tax under that Act under the head "Income from other sources" and the provisions of sections 57 to 59 of that Act shall, so far as may be, apply accordingly:

Provided that sub-section (2) of section 58 shall apply subject to the modification that the reference to section 40A therein shall be construed as not including a reference to sub-sections (3) and (4) of section 40A.

Rule 2.—Agricultural income of the nature referred to in sub-clause (b) or sub-clause (c) of clause (1) of section 2 of the Income-tax Act [other than income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (c)] shall be computed as if it were income chargeable to income-tax under that Act under the head "Profits and gains of business or profession" and the provisions of sections 30, 31, 32, 34, 36, 37, 38, 40, 40A [other than sub-sections (3) and (4) thereof], 41, and 43 and 43A of the Income-tax Act shall, so far as may be, apply accordingly.

Rule 3.—Agricultural income of the nature referred to in sub-clause (c) of clause (1) of section 2 of the Income-tax Act, being income derived from any building required as a dwelling house by the receiver of the rent or revenue or the cultivator or the receiver of rent-in-kind referred to in the said sub-clause (c) shall be computed as if it were income chargeable to income tax under that Act under the head "Income from house property" and the provisions of sections 23 to 27 of that Act shall, so far as may be apply accordingly:

Provided that sub-section (2) of the said section 23 shall apply subject to that modification that the references to "total income" therein shall be construed as references to net agricultural income and that the words, figures and letter "and before making any deduction under Chapter VIA" shall be omitted.

Rule 4.—Notwithstanding anything contained in any other provisions of these rules, in a case where the assessee derives income from sale of tea grown and manufactured by him in India, such income shall be computed in accordance with rule 8 of the Income tax Rules, 1962, and sixty per cent. of such income shall be regarded as the agricultural income of the assessee.

Rule 5.—Where the assessee is a partner of registered firm or an unregistered firm assessed as a registered firm under clause (b) of section 183 of the Income-tax Act, which in the previous year has any agricultural income, or is a partner of an unregistered firm which has not been assessed as a registered firm under clause (b) of the said section 183 and which in the previous year has either no income chargeable to tax under the Income-tax Act or has total income not exceeding the maximum amount not chargeable to tax in the case of an unregistered firm but has any agricultural income, then the agricultural income or loss of the firm shall be computed in accordance with these rules and his share in the agricultural income or loss of the firm shall be computed in the manner laid down in sub-section (1), sub-section (2) and sub-section (3) of section 67 of the Income tax Act and the share so computed shall be regarded as the agricultural income or loss of the assessee.

Rule 6.—Where the assessee is a member of an association of persons or a body of individuals (other than a Hindu undivided family, a company or a firm) which in the previous year has either no income chargeable to tax under the Income-tax Act or has total income not exceeding the maximum amount not chargeable to tax in the case of an unregistered firm but has any agricultural income, then the agricultural income or loss of the firm shall be computed in accordance with these rules and his share in the agricultural income or loss of the firm shall be computed in the manner laid down in sub-section (1), sub-section (2) and sub-section (3) of section 67 of the Income tax Act and the share so computed shall be regarded as the agricultural income or loss of the assessee.

able to tax in the case of an association of persons or a body of individuals (other than a Hindu undivided family, a company or a firm) but has any agricultural income, then, the agricultural income or loss of the association or body shall be computed in accordance with these rules and the share of the assessee in the agricultural income or loss so computed shall be regarded as the agricultural income or loss of the assessee.

Rule 7.—Where the result of the computation for the previous year in respect of any source of agricultural income is a loss, such loss shall be set off against the income of the assessee, if any, for that previous year from any other source of agricultural income:

Provided that where the assessee is a partner of an unregistered firm which has not been assessed as a registered firm under clause (b) of section 183 of the Income tax Act or is a member of an association of persons or body of individuals and the share of the assessee in the agricultural income of the firm, association or body, as the case may be, is a loss, such loss shall not be set off against any income of the assessee from any other source of agricultural income.

Rule 8.—Any sum payable by the assessee on account of any tax levied by the State Government on the agricultural income shall be deducted in computing the agricultural income.

Rule 9.—(1) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1976, any agricultural income and the net result of the computation of the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1974 or the 1st day of April, 1975, or both, is a loss, then, for the purposes of sub-section (2) of section 2 of this Act,—

(i) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1974, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, and

(ii) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1976.

(2) Where the assessee has, in the previous year relevant to the assessment year commencing on the 1st day of April, 1977 or, if

by virtue of any provision of the Income-tax Act, income-tax is to be charged in respect of the income of a period other than that previous year, in such other period, any agricultural income and the net result of the computation of the agricultural income of the assessee for any one or more of the previous years relevant to the assessment years commencing on the 1st day of April, 1974 or the 1st day of April, 1975 or the 1st day of April, 1976, is a loss, then, for the purposes of sub-section (7) of section 2 of this Act,—

(i) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1974, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, or the 1st day of April, 1976,

(ii) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1975, to the extent, if any, such loss has not been set off against the agricultural income for the previous year relevant to the assessment year commencing on the 1st day of April, 1976, and

(iii) the loss so computed for the previous year relevant to the assessment year commencing on the 1st day of April, 1976, shall be set off against the agricultural income of the assessee for the previous year relevant to the assessment year commencing on the 1st day of April, 1977 or the period aforesaid.

(3) Where a change has occurred in the constitution of a firm, nothing in sub-rule (1) or sub-rule (2) shall entitle the firm to set off so much of the loss proportionate to the share of a retired or deceased partner computed in the manner laid down in sub-section (1), sub-section (2) and sub-section (3) of section 67 of the Income tax Act as exceeds his share of profits, if any, of the previous year in the firm, or entitle any partner to the benefit of any portion of the said loss (computed in the manner aforesaid) which is not apportionable to him.

(4) Where any person deriving any agricultural income from any source has been succeeded in such capacity by another person, otherwise than by inheritance, nothing in sub-rule (1) or sub-rule (2) shall entitle any person, other than the person incurring the loss, to have it set off under sub-rule (1) or, as the case may be, sub-rule (2).

(5) Notwithstanding anything contained in this rule, no loss which has not been determined by the Income-tax Officer under the provisions of these rules, or the rules contain-

ed in part IV of the First Schedule to the Finance Act, 1974, or of the First Schedule to the Finance Act, 1975, shall be set off under sub-rule (1) or as the case may be, sub-rule (2).

Rule 10.—Where the net result of the computation made in accordance with these rules is a loss, the loss so computed shall be ignored and the net agricultural income shall be deemed to be *nil*.

Rule 11.—The provisions of the Income-tax Act relating to procedure for assessment (including the provisions of section 288A relating to rounding off of income) shall, with the necessary modifications, apply in relation to the computation of the net agricultural income of the assessee as they apply in relation to the assessment of the total income.

Rule 12.—For the purposes of computing the net agricultural income of the assessee, the Income-tax Officer shall have the same powers as he has under the Income-tax Act for the purposes of assessment of the total income.

THE SECOND SCHEDULE

(See section 31)

PART I

In the First Schedule to the Tariff Act,—

(i) in Item No. 47 (2), for the entry in the fourth column, the entry "100 per cent *ad valorem* Rs. 20.00 per kilogram" shall be substituted;

(ii) in Item No. 63(20A), for the figures "200" in the fourth column, the figures "300" shall be substituted;

(iii) in Item No. 64, for the figures "60" and "50" in the fourth and fifth columns, the figures "100" and "90" shall, respectively, be substituted;

(iv) in Item Nos. 64(1) and 64(2), for the figures "40" in the fourth column against each of them, the figures "100" shall be substituted;

(v) in Item Nos. 64(3) and 64(5), for the figures "50" and "60" in the fourth column against each of them, the figures "90" and "100" shall respectively, be substituted;

(vi) in Item No. 64(4), for the figures "40", "30" and "30" in the fourth, fifth and sixth columns, the figures "100", "90" and "90" shall, respectively, be substituted;

PART II

Item No.	Name of article	Nature of duty	Standard rate of duty	Preferential rate of duty if the article is the product or manufacture of	Duration of protective rates of duty	
				The United Kingdom	A British Colony	
1	2	3	4	5	6	7

In the First Schedule to the Tariff Act,—

(i) after Item No. 28B, the following Item shall be inserted, namely:—

'28C	Caprolactam and Dimethyl terephthalate,	Preferential Revenue.	150 per cent. <i>ad valorem</i> .	140 per cent. <i>ad valorem</i> .	140 per cent. <i>ad valorem</i> .	..";
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(ii) for Item No. 63 (30), the following Item shall be substituted, namely:—

'63 (30)	Alloy steel and high carbon steel products, the following, namely, ingots,	Revenue.	60 per cent. <i>ad valorem</i> .	...	...	...
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1	2	3	4	5	6	7
		blooms, billets, slabs, bars, flats, rods, coils, angles, shapes, sections, sheets plates, hoops, strips and wire, but excluding articles specified in Item Nos. 63 (14A) and 63 (20A).				

Explanation I. — This Item is to be taken to apply to the goods mentioned therein even though they may be covered by any other Item in this Schedule.

Explanation II. — For the purposes of this Item, the expressions "alloy steel" and "high carbon steel" have the meanings respectively assigned to them in Note 1 (d) and 1 (e) of Chapter 73 of the First Schedule to the Customs Tariff Act, 1975.

THE THIRD SCHEDULE

[See section 34]

PART I

In the First Schedule to the Customs Tariff Act,—

(i) in Heading No. 51'01/03, for the entry in column (3), the entry "100% plus Rs. 20 per kilogram" shall be substituted;

(ii) in Heading No. 56'05/06, for the entry in column (3), the entry "100% plus Rs. 20

per kilogram" shall be substituted;

(iii) in Heading No. 74'01/02, for the entry in column (3), the entry "100% shall be substituted;

(iv) in Heading No. 74'03,—

(1) in sub-heading No. (1), for the entry in column (3), the entry "100%" shall be substituted;

(2) in sub-heading No. (2), for the entries in columns (3) and (4), the entries "100%" and "90%" shall, respectively, be substituted;

(v) in Headings Nos. 74'04/05 and 74'06, for the entry in column (3) against each of them, the entry "100%" shall be substituted;

(vi) in Heading No. 74'07/08, in sub-heading No. (1), for the entry in column (3), the entry "100%" shall be substituted;

(vii) in Heading No. 74'09/19, for the entry in column (3), the entry "100%" shall be substituted.

PART II

Heading No.	Sub-heading No. and description of article	Rate of duty			Duration when rates of duty are pro- tective
		Standard	U. K.	Other Preferen- tial Areas	
(1)	(2)	(3)	(4)	(5)	(6)

In the First Schedule to the Customs Tariff Act,—

(i) in Heading No. 29'01/45, after sub-heading No. (19), the following sub-heading shall be inserted, namely:—

"(20)	Caprolactam and Dimethyl terephtha- late	150%	140%	140%	... "
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(ii) for Heading No. 73'15, the following Heading shall be substituted, namely:—
"73'15 Alloy steel and high
carbon steel in the

(1)	(2)	(3)	(4)	(5)	(6)
	forms mentioned in Headings Nos. 73'06/07 to 73'14 :				
	(1) Not elsewhere specified.	60%	...	...	...
	(2) Coils for re-rolling, strips, sheets and plates, of stainless steel.	300%	...	...	...

PART III

In the Second Schedule to the Customs Tariff Act, in Heading No. 1, for the entry in column (3), the entry "Rs. 300 per quintal" shall be substituted.

PART IV

Heading No.	Description of article	Rate of duty
(1)	(2)	(3)

In the Second Schedule to the Customs Tariff Act, the following Heading shall be inserted at the end, namely:—

"20.

Groundnut—

(i) Groundnut kernel	...	...	Rs. 800 per tonne.
(ii) Groundnut in shell	...	...	Rs. 600 per tonne."

THE FOURTH SCHEDULE

[See section 35]

PART I

In the First Schedule to the Central Excises Act,—

(i) in Item No. 4, under "II. Manufactured tobacco—", for the entry in the third column against sub-item (1), the entry "One hundred and fifty-five per cent. *ad valorem*." shall be substituted;

(ii) in Item No. 6, for the entry in the third column, the entry "Two thousand two hundred rupees per kilolitre at fifteen degrees of Centigrade thermometer." shall be substituted;

(iii) in Item No. 8, for the entry in the third column against sub-item (a), the entry "One thousand rupees per kilolitre at fifteen degrees of Centigrade thermometer." shall be substituted;

(iv) in Item No. 10, for the entry in the third column, the entry "One hundred and fifty rupees per kilolitre at fifteen degrees of Centigrade thermometer." shall be substituted;

(v) in Item No. 11, for the entry in the third column against sub-item (1), the entry "Two hundred rupees per metric tonne." shall be substituted;

(vi) in Item No. 11A, for the entries in the third column against sub-items (3) and (4), the entries "Twenty per cent. *ad valorem plus* six hundred rupees per metric tonne." and "Twenty per cent. *ad valorem plus* two thousand rupees per metric tonne." shall, respectively, be substituted;

(vii) in Item No. 11B, for the entry in the third column, the entry "Twenty per cent. *ad valorem plus* two thousand rupees per metric tonne." shall be substituted;

(viii) in Item No. 14E, for the entry in the third column, the entry "Twelve and a half per cent. *ad valorem*." shall be substituted;

(ix) in item No. 18, after *Explanation III*, the following *Explanation* shall be inserted, namely:—

"*Explanation IV*. — This item does not include mineral fibres and yarn."

(x) in Item No. 19, in the second column, for the words "impregnated or coated", wherever they occur, the words "impregnated, coated or laminated" shall be substituted;

(xi) in Item No. 22,—

(a) in the second column, for the words "impregnated or coated", wherever they occur, the words "impregnated, coated or laminated" shall be substituted;

(b) the *Explanation* shall be numbered as "*Explanation I*," and after the *Explanation* as so numbered, the following *Explanation* shall be inserted, namely:—

"*Explanation II*. — This item does not include glass fabrics."

(xii) in Item No. 22B, in the second column, for the words "IMPREGNATED OR COATED", the words "IMPREGNATED, COATED OR LAMINATED" shall be substituted;

(xiii) in Item No. 22C, in the second column, for the words "IMPREGNATION OR COATING", the words "IMPREGNATION, COATING OR LAMINATION" shall be substituted;

(xiv) in Item No. 33A,—

(a) for the entries in the third column against sub-items (2) and (3), the entries "Four hundred rupees per set." and "Four hundred rupees per set." shall, respectively, be substituted;

(b) for the entry in the second column against sub-item (3), the entry 'Radiograms (including radio or transistor sets with extra space in cabinet for fitting in record players or record changers) and combination sets of radios (including transistor sets) and tape recorders (including cassette recorders and tape

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decks)" shall be substituted;

(xv) in Item No. 33D, in the second column,—

(a) the words and brackets "COMPUTERS (INCLUDING CENTRAL PROCESSING UNITS AND PERIPHERAL DEVICES)" shall be omitted;

(b) after the words "OR UNASSEMBLED CONDITION", the words "NOT ELSEWHERE SPECIFIED" shall be inserted;

(xvi) in Item No. 35, in the second column, for the words "CYCLES, PARTS OF CYCLES", the words "PARTS OF CYCLES" shall be substituted;

(xvii) Item No. 45 shall be omitted.

PART II

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)

In the First Schedule to the Central Excises Act,—

(i) for Item No. 1D, the following Item shall be substituted, namely:—

"1D

AERATED WATERS, WHETHER OR NOT FLAVOURED OR SWEETENED AND WHETHER OR NOT CONTAINING VEGETABLE OR FRUIT JUICE OR FRUIT PULP—

(1) Aerated waters, in the manufacture of which blended flavouring concentrates in any form are used—

(a) For each unit container containing 200 millilitres or less. Twenty-five paise.

(b) For each unit container containing more than 200 millilitres. Twenty-five paise plus ten paise for every hundred millilitres or fraction thereof in excess of 200 millilitres.

(c) All others. Fifty-five per cent. *ad valorem*."

(2) All others. Twenty per cent. *ad valorem*."

(ii) after Item No. 15B, the following Item shall be inserted, namely:—

"150

STARCH (INCLUDING DEXTRIN AND OTHER FORMS OF MODIFIED STARCH), ALL SORTS, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER.

Ten per cent. *ad valorem*."

(iii) for Item No. 17, the following Item shall be substituted namely:—

"17

PAPER AND PAPER BOARD ALL SORTS (including pasteboard, millboard, strawboard, cardboard and corrugated board) in or in relation to the manu-

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)
	ufacture of which any process is ordinarily carried on with the aid of power—	
	(1) Uncoated and coated printing and writing paper (other than poster paper).	Twenty-five per cent. <i>ad valorem</i>
	(2) Paper board and all other kinds of paper (including paper or paper boards which have been subjected to various treatments such as coating, impregnating, corrugation, creping and design printing), not elsewhere specified.	Thirty per cent. <i>ad valorem</i> .”;
	(iv) in Item No. 19, for sub-Item I (2), the following sub-item shall be substituted, namely:	
	“(2) Others—	
	(a) Cotton fabrics superfine—that is to say, fabrics in which the average count of yarn is 61s or more	Fifteen per cent. <i>ad valorem</i> ,
	(b) Cotton fabrics, fine—that is to say, fabrics in which the average count of yarn is 41s or more but is less than 61s.	Fifteen per cent. <i>ad valorem</i> .
	(c) Cotton fabrics, medium A—that is to say, fabrics in which the average count of yarn is 26s or more but is less than 41s.	Three per cent. <i>ad valorem</i> .
	(d) Cotton fabrics, medium B—that is to say, fabrics in which the average count of yarn is 17s or more but is less than 26s.	Three per cent. <i>ad valorem</i> .
	(e) Cotton fabrics, coarse—that is to say, fabrics in which the average count of yarn is less than 17s.	Three per cent. <i>ad valorem</i> .
	(f) Cotton fabrics not otherwise specified.	Fifteen per cent. <i>ad valorem</i> .”;
	(v) after Item No. 22E, the following Item shall be inserted, namely :—	
“22F	MINERAL FIBRES AND YARN, AND MANUFACTURES THEREFROM, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER.	Fifteen per cent. <i>ad valorem</i> .”;
	<i>Explanation.</i> —“Mineral fibres and yarn, and manufactures therefrom” shall be deemed to include—	
	(i) glass fibre and yarn including glass tissues and glass wool;	
	(ii) asbestos fibre and yarn;	
	(iii) any other mineral fibre or yarn, whether continuous or otherwise such as slag-wool and rock wool, and	
	(iv) Manufactures containing mineral fibres and yarn, other than asbestos cement products.	
	(vi) for Item No. 23, the following Item shall be substituted, namely :—	
“23	CEMENT ALL VARIETIES—	
	(1) Grey portland cement (including ordinary portland cement, pozzolana cement and blast furnace slag cement), masonry cement, rapid hardening cement, low heat cement and waterproof (hydrophobic) cement	Rupees one hundred per metric tonne.
	(2) All others.	Thirty-five per cent. <i>ad valorem</i> .”.

Item No.	Description of goods	Rate of duty
(1)	(2)	(3)

(vii) after Item No. 33D, the following Item shall be inserted, namely :—

"33 DD	COMPUTERS (INCLUDING CENTRAL PROCESS. ING UNITS AND PERIPHERAL DEVICES), ALL SORTS.	Fifteen per cent. <i>ad valorem</i> ."
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THE FIFTH SCHEDULE

[See section 37]

In the First Schedule to the Additional Duties of Excise Act,—

(i) in Item No. 4, under "II *Manufactured tobacco* —", for sub-item (1), the following sub-item shall be substituted, namely :—

"(1) Cigars and cheroots. Fifty per cent. *ad valorem*."

(ii) in Item No. 19,—

(a) in the second column, for the words "impregnated or coated", wherever they occur, the words "impregnated, coated or laminated" shall be substituted;

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(b) for the entries in the third column, against subitems I(2) (a), I(2) (b), I(2) (c), I(2) (d), I(2) (e) and I(2) (f), the entries "Two and a half per cent. *ad valorem*.", "Two and a half per cent. *ad valorem*.", "Two per cent. *ad valorem*.", "One per cent. *ad valorem*." "One-half per cent. *ad valorem*." and "Two and a half per cent. *ad valorem*." shall, respectively, be substituted;

(iii) in Item No. 22, in the second column, for the words "impregnated or coated", wherever they occur, the words "impregnated, coated or laminated" shall be substituted.

THE SIXTH SCHEDULE

[See section 39 (c)]

In the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, for the headings and the items and entries relating thereto, occurring before the *Explanations*, the following shall be substituted, namely:—

Item No.	Description of dutiable goods	Rate of duty
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Medicinal preparations

1. Allopathic Medicinal Preparations :—

(i) Medicinal preparations containing alcohol which are not capable of being consumed as ordinary alcoholic beverages—

(a) Patent or proprietary medicines.

Twenty per cent. *ad valorem* or rupees three and seventy-five paise per litre of the strength of London proof spirit, whichever is higher.

(b) Others.

Rupees three and seventy-five paise per litre of the strength of London proof spirit.

(ii) Medicinal preparations containing alcohol which are capable of being consumed as ordinary alcoholic beverages—

(a) Medicinal preparations which contain known active ingredients in therapeutic quantities.

Twenty per cent. *ad valorem* or rupees seven and fifty paise per litre of the strength of London proof spirit, whichever is higher.

(b) Others.

Rupees thirty per litre of the strength of London proof spirit.

(iii) Medicinal preparations not containing alcohol but containing narcotic drug or narcotic.

Twenty per cent. *ad valorem*.

Item No.	Description of dutiable goods	Rate of duty
2.	Medicinal preparations in Ayurvedic, Unani or other indigenous systems of medicine—	
	(i) Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages.	Nil.
	(ii) Medicinal preparations containing self-generated alcohol which are capable of being consumed as ordinary alcoholic beverages.	Rupee one per litre of the strength of London proof spirit.
	(iii) All others containing alcohol which are prepared by distillation or to which alcohol has been added.	Rupees thirty per litre of the strength of London proof spirit.
	(iv) Medicinal preparations not containing alcohol but containing narcotic drug or narcotic.	Twenty per cent. <i>ad valorem</i> .
3.	Homoeopathic preparations containing alcohol.	Rupees seven and fifty paise per litre of the strength of London proof spirit.
<i>Toilet preparations</i>		
4.	Toilet preparations containing alcohol or narcotic drug or narcotic.	Sixty per cent. <i>ad valorem</i> or rupees seven and fifty paise per litre of the strength of London proof spirit whichever is higher."

THE IRON ORE MINES AND MANGANESE ORE MINES LABOUR WELFARE FUND ACT, 1976

[Act No. 61 of 1976]*

[10 April, 1976]

An Act to provide for the financing of activities to promote the welfare of persons employed in the iron ore mines and manganese ore mines.

Be it enacted by Parliament in the twenty-seventh Year of the Republic of India as follows:—

1. Short title, extent and commencement.

(1) This Act may be called **THE IRON ORE MINES AND MANGANESE ORE MINES LABOUR WELFARE FUND ACT, 1976**.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States:

[*] Received the assent of the President on 10.4.1976. Act published in Gaz. of India 10.4.1976 Part II-S. 1 Ext. P. 537.

For Statement of Objects and Reasons, see Gaz. of India; 5.2.1976 Part II-S. 2, Ext. P. 576.

Provided that the Central Government may, by notification in the Official Gazette, apply in the first instance the provisions of this Act, only to iron ore mines, or only to manganese ore mines, in a State with effect from such date as may be specified in the notification, and if that Government is satisfied that it is necessary or expedient so to do, it may extend this Act to all iron ore mines and manganese ore mines in that State with effect from such date as may be specified in the notification published in the Official Gazette.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "agent" and "owner" have the meanings respectively assigned to them in clauses (c) and (l) of sub-section (1) of section 2 of the Mines Act, 1952;

(b) "contractor" has the meaning assigned to it in clause (c) of sub-section (1) of section 2 of the Contract Labour (Regulation and Abolition) Act, 1970;

(c) "factory" and "occupier" have the meanings respectively assigned to them in clauses (m) and (n) of section 2 of the Factories Act, 1948;

(d) "Fund" means the Iron Ore Mines and Manganese Ore Mines Labour Welfare Fund formed under section 3;

(e) "manager" means the manager referred to in section 17 of the Mines Act, 1952;

(f) "manganese ore" includes ferrogenous manganese ore or ferro-manganese ore;

(g) "metallurgical factory" means—

(i) a factory in which iron or steel or manganese is being processed or manufactured;

(ii) any other factory, being a factory in which iron ore or manganese ore is used for any purpose which the Central Government may, by notification in the Official Gazette, declare to be a metallurgical factory for the purposes of this Act;

(h) a person is said to be employed in an iron ore mine or manganese ore mine,—

(1) if he is employed within the premises or in the vicinity of such mine by the owner, agent or manager of such mine or by a contractor or any other agency exclusively in any one or more of the following, namely:—

(i) any iron ore or manganese ore mining operation;

(ii) the operation, servicing, maintenance or repair of any machinery or any part thereof used in or about such mine;

(iii) the loading, unloading or despatch of iron ore or manganese ore or any other material connected with the mining of iron ore or manganese ore;

(iv) any work in any office, canteen or other place situated within the precincts of such mine;

(v) any welfare, health, sanitary or conservancy services or any watch and ward duties at any place situated within such premises or vicinity, not being a place occupied by any residential building; or

(2) if, in any such area as may be notified by the Central Government in the Official Gazette in this behalf, he is employed by the owner, agent or manager of such mine or by a contractor or any other agency exclusively in the loading, unloading or despatch of iron ore or manganese ore or any other material connected with the mining of iron ore or manganese ore;

(i) "prescribed" means prescribed by rules made under this Act.

3. Iron Ore Mines and Manganese Ore Mines Labour Welfare Fund.

There shall be formed a Fund, to be called the Iron Ore Mines and Manganese Ore Mines Labour Welfare Fund, and there shall be credited thereto—

(a) an amount which the Central Government may, after due appropriation made by Parliament by law in this behalf, provide from and out of the proceeds of duty of customs and duty of excise credited under section 5 of the Iron Ore Mines and Manganese Ore Mines Labour Welfare Cess Act, 1976, after deducting

therefrom, the cost of collection as determined by Central Government under this Act;

(b) any income from investment of the amount credited under the Act referred to in clause (a) and any other moneys received by the Central Government for the purposes of this Act.

4. Application of Fund.

The Fund shall be applied by the Central Government to meet the expenditure incurred in connection with the measures which, in the opinion of that Government, are necessary or expedient to promote the welfare of persons employed in the iron ore mines and manganese ore mines, and in particular—

(a) to defray the cost of measures for the benefit of persons employed in the iron ore mines or manganese ore mines directed towards—

(i) the provision and improvement of public health and sanitation, the prevention of disease and the provision and improvement of medical facilities;

(ii) the provision and improvement of water supplies and facilities for washing;

(iii) the provision and improvement of educational facilities;

(iv) the provision and improvement of housing and recreational facilities including standards of living, nutrition and amelioration of social conditions;

(v) the provision of transport to and from the place of work;

(b) to grant loan or subsidy to a State Government, a local authority or the owner of an iron ore mine or of a manganese ore mine, in aid of any scheme approved by the Central Government for any purpose connected with the welfare of persons employed in iron ore mines or manganese ore mines;

(c) to pay annually grants-in-aid to such of the owners of iron ore mines or manganese ore mines who provide to the satisfaction of the Central Government welfare measures of the prescribed standard for the benefit of persons employed in their mines, so, however, that the amount payable as grants-in-aid to such owners shall not exceed—

(i) the amount spent by them in the provision of welfare measures as determined by the Central Government or any person specified by it in this behalf, or

(ii) such amount as may be prescribed, whichever is less;

Provided that no grant-in-aid shall be payable in respect of any welfare measures provided by the owner of an iron ore mine or of a manganese ore mine where the amount spent thereon determined as aforesaid is less than the amount prescribed in this behalf;

(d) to meet the allowances, if any, of the members of the Advisory Committee and the Central Advisory Committee constituted under section 5 and section 6 respectively and the salaries and allowances, if any, of persons appointed under section 8;

(e) any other expenditure which the Central Government may direct to be defrayed from the Fund.

5. Advisory Committees.

(1) The Central Government may.—

(a) constitute for each State which produces iron ore or manganese ore an Advisory Committee, or

(b) where both iron ore and manganese ore are produced in a State, constitute, for such State, an Advisory Committee in respect of iron ore only or manganese ore only, or in respect of both,

to advise the Central Government on such matters arising out of the administration of this Act as may be referred to it by that Government, including matters relating to the application of the Fund.

(2) Each Advisory Committee shall consist of such number of persons as may be appointed to it by the Central Government of whom one shall be a woman and the members shall be chosen in such manner as may be prescribed:

Provided that each Advisory Committee shall include an equal number of members representing Government, the owners of iron ore mines and manganese ore mines and the persons employed in the iron ore mines and manganese ore mines.

(3) The Chairman of each Advisory Committee shall be appointed by the Central Government.

(4) The Central Government shall publish in the Official Gazette the names of the members of every Advisory Committee.

6. Central Advisory Committee.

(1) The Central Government may constitute a Central Advisory Committee to co-ordinate the work of the Advisory Committees constituted under section 5 and to advise the Central Government on any matter arising out of the administration of this Act.

(2) The Central Advisory Committee shall consist of such number of persons as may be appointed by the Central Government of whom one shall be a woman and the members shall be chosen in such manner as may be prescribed;

Provided that the Central Advisory Committee shall include an equal number of members representing the Government, the owners of iron ore mines and manganese ore

mines and the persons employed in the iron ore mines and manganese ore mines.

(3) The Chairman of the Central Advisory Committee shall be appointed by the Central Government.

(4) The Central Government shall publish in the Official Gazette the names of the members of the Central Advisory Committee.

7. Power to co-opt, etc.

(1) The Advisory Committee or the Central Advisory Committee may, at any time and for such period as it thinks fit, co-opt any person or persons to the Advisory Committee.

(2) A person co-opted under sub-section (1) shall exercise all the powers and functions of a member under this Act but shall not be entitled to vote.

(3) The Advisory Committee or the Central Advisory Committee may, if it considers it necessary or expedient so to do, invite any person to attend its meeting and when such person attends any meeting, he shall not be entitled to vote thereat.

8. Appointment of Welfare Commissioners, etc., and their powers.

(1) The Central Government may appoint as many Welfare Commissioners, Welfare Administrators, Inspectors and such other officers and staff as it thinks necessary for the purposes of this Act and the Iron Ore Mines and Manganese Ore Mines Labour Welfare Cess Act, 1976.

(2) The Central Government may, by general or special order, direct a Welfare Commissioner to appoint such staff as is considered necessary for the purposes of this Act and the Iron Ore Mines and Manganese Ore Mines Labour Welfare Cess Act 1976.

(3) Every person so appointed shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

(4) Any Welfare Commissioner, Welfare Administrator or Inspector may,—

(a) with such assistance, if any, as he may think fit, enter at any reasonable time, any place which he considers it necessary to enter for carrying out the purposes of this Act;

(b) do within such place anything necessary for the proper discharge of his duties; and

(c) exercise such other powers as may be prescribed.

9. Power of Central Government to exempt.

Notwithstanding anything contained in this Act, if the Central Government is satisfied that there is in force in any State or part thereof a law making adequate provision for

the financing of activities to promote the welfare of persons employed in the iron ore mines or manganese ore mines, it may, by notification in the Official Gazette, direct that all or any of the provisions of this Act shall not apply or shall apply to such State or part thereof subject to such exceptions and modifications as may be specified in the notification.

10. Annual report of activities financed under the Act.

The Central Government shall, as soon as may be after the end of each financial year, cause to be published in the Official Gazette a report giving an account of its activities financed under this Act during the previous financial year, together with a statement of accounts.

11. Power to call for information.

The Central Government may require an occupier of a Metallurgical factory or the owner, agent or manager of an iron ore mine or of a manganese ore mine to furnish, for the purposes of this Act, such statistical and other information in such form and within such period as may be prescribed.

12. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette and subject to the condition of previous publication, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the manner in which the Fund may be applied for the measures specified in section 4;

(b) the conditions governing the grant of loan or subsidy under clause (b) of section 4;

(c) the standard of welfare measures to be provided by owners of iron ore mines or manganese ore mines for the purposes of clause (c) of section 4;

(d) the determination of the amount referred to in sub-clause (ii) of clause (a) of section 4 and in the proviso to that clause;

(e) the composition of the Advisory Committees and the Central Advisory Committee constituted under section 5 and section 6 respectively, the manner in which the members thereof shall be chosen, the term of office of such members, the allowances, if any, payable to them including co-opted members and invitees, and the manner in which the said Advisory Committees and the Central Advisory Committee shall conduct their business;

(f) the recruitment, conditions of service and the duties of all persons appointed under section 8;

(g) the powers that may be exercised by a Welfare Commissioner, Welfare Administrator or an Inspector under section 8;

(h) the furnishing to the Central Government by the occupiers of metallurgical factories and the owners, agents or managers of iron ore mines or of manganese ore mines, of such statistical and other information as may be required to be furnished, from time to time, by that Government under section 11;

(i) the form in which and the period within which statistical and other information are to be furnished under clause (h);

(j) any other matter which has to be or may be prescribed, or provided for, by rules under this Act.

(3) In making any rule under clause (h) or clause (i) of subsection (2), the Central Government may direct that a breach thereof shall be punishable with fine which may extend to five hundred rupees.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

THE BEEDI WORKERS WELFARE FUND ACT, 1976

[Act No. 62 of 1976]*

[10th April, 1976]

An Act to provide for the financing of measures to promote the welfare of persons engaged in beedi establishments.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title, extent and commencement.

(1) This Act may be called THE BEEDI WORKERS WELFARE FUND ACT 1976.

[*] Received the assent of the President on 10-4-1976 Act published in Gaz. of India; 10-4-1976 Part II-S. 1, Ext. P. 545. For Statement of Objects and Reasons, see Gaz. of India; 9-1-1976 Part II-S. 2, Ext. P. 222.

(2) It extends to the whole of India.

(3) It shall come into force in a State on such date, as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different areas in the State and for different provisions of this Act.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Fund" means the Beedi Workers Welfare Fund formed under section 3;

(b) a person is said to be engaged in an establishment if he is engaged in that establishment directly or through any agency, whether for wages or not for doing any work, skilled, unskilled, manual or clerical and includes—

(i) any person who is given raw materials by an employer or a contractor for being made into beedi at home, and

(ii) any person not engaged by an employer or a contractor but working with the permission of, or under agreement with, the employer or contractor;

(c) "prescribed" means prescribed by rules made under this Act;

(d) words and expressions used but not defined in this Act and defined in Beedi and Cigar Workers (Conditions of Employment) Act, 1966, shall have the meanings respectively assigned to them in that Act in so far as they relate to a person engaged in beedi establishments.

3. Beedi Workers Welfare Fund.

There shall be formed a Fund to be called the Beedi Workers Welfare Fund and there shall be credited thereto—

(a) an amount which the Central Government may, after due appropriation made by Parliament by law in this behalf, provide from and out of the proceeds of cess credited under section 4 of the Beedi Workers Welfare Cess Act, 1976, after deducting the cost of collection as determined by the Central Government under this Act;

(b) any income from investment of the amount credited under the Act referred to in clause (a) and any other moneys received by the Central Government for the purposes of this Act.

4. Application of Fund.

(1) The Fund shall be applied by the Central Government to meet the expenditure incurred in connection with measures and facilities which, in the opinion of that Government, are necessary or expedient to promote the welfare of persons engaged in beedi establishment; and in particular—

(a) to defray the cost of measures for the benefit of such persons directed towards—

(i) the improvement of public health and sanitation, the prevention of disease and the provision and improvement of medical facilities;

(ii) the provision and improvement of water supplies and facilities for washing;

(iii) the provision and improvement of educational facilities;

(iv) the provision and improvement of housing and recreational facilities including standards of living, nutrition and amelioration of social conditions;

(v) the provision and improvement of such other welfare measures and facilities as may be prescribed;

(b) to grant loan or subsidy to a State Government, a local authority or an employer in aid of any scheme approved by the Central Government for the purpose connected with the welfare of persons engaged in beedi establishments;

(c) to pay annually grants-in-aid to a State Government, or a local authority or to an employer who provides to the satisfaction of the Central Government welfare measures and facilities of the prescribed standard for the benefit of persons engaged in beedi establishments, so, however, that the amount payable as grants-in-aid to any such State Government, local authority or employer shall not exceed—

(i) the amount spent in providing welfare measures and facilities as determined by the Central Government or any person specified by it in this behalf, or

(ii) such amount as may be prescribed, whichever is less;

Provided that no grant-in-aid shall be payable in respect of any such welfare measures and facilities where the amount spent thereon determined as aforesaid is less than the amount prescribed in this behalf;

(d) to meet the allowances, if any, of the members of the Advisory Committees and the Central Advisory Committee constituted under sections 5 and 6 respectively and the salaries and allowances, if any, of persons appointed under section 8;

(e) any other expenditure which the Central Government may direct to be defrayed from the Fund.

(2) The Central Government shall have power to decide whether any particular expenditure is or is not debitable to the Fund, and its decision shall be final.

5. Advisory Committees.

(1) The Central Government may constitute as many Advisory Committees as it thinks fit.

but not exceeding one for each of the principal beedi producing States, to advise the Central Government on such matters arising out of the administration of this Act as may be referred to it by that Government, including matters relating to the application of the Fund.

(2) Each Advisory Committee shall consist of such number of persons as may be appointed to it by the Central Government and the members shall be chosen in such manner as may be prescribed:

Provided that each Advisory Committee shall include an equal number of members representing Government, the employers and persons engaged in beedi establishments and that at least one member of such Committee shall be a woman.

(3) The Chairman of each Advisory Committee shall be appointed by the Central Government.

(4) The Central Government shall publish in the Official Gazette the names of all members of every Advisory Committee.

6. Central Advisory Committee.

(1) The Central Government may constitute a Central Advisory Committee to co-ordinate the work of the Advisory Committees constituted under section 5 and to advise the Central Government on any matter arising out of the administration of this Act.

(2) The Central Advisory Committee shall consist of such number of persons as may be appointed to it by the Central Government and the members shall be chosen in such manner as may be prescribed:

Provided that the Central Advisory Committee shall include an equal number of members representing the Government, the employers and persons engaged in beedi establishments and that at least one member of such Committee shall be a woman.

(3) The Chairman of the Central Advisory Committee shall be appointed by the Central Government.

(4) The Central Government shall publish in the Official Gazette the names of all members of the Central Advisory Committee.

7. Power to co-opt.

(1) An Advisory Committee or the Central Advisory Committee may, at any time and for such period as it thinks fit, co-opt any person or persons to the Advisory Committee.

(2) A person co-opted under sub-section (1) shall exercise all the powers and functions of a member under this Act but shall not be entitled to vote.

(3) The Advisory Committee or the Central Advisory Committee may, if it considers it necessary or expedient so to do, invite any person to attend its meeting and when such person attends any meeting, he shall not be entitled to vote thereat.

8. Appointment of Welfare Commissioners, etc., and their powers.

(1) The Central Government may appoint as many Welfare Commissioners, Welfare Administrators, Inspectors and such other officers and staff as it thinks necessary for the purposes of this Act and the Beedi Workers Welfare Cess Act, 1976.

(2) The Central Government may, by general or special order, direct a Welfare Commissioner to appoint such staff as is considered necessary for the purposes of this Act and the Beedi Workers Welfare Cess Act, 1976.

(3) Every person appointed under this section shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

(4) Any Welfare Commissioner, Welfare Administrator or Inspector may,—

(a) with such assistance, if any, as he may think fit, enter at any reasonable time, any place which he considers it necessary to enter for carrying out the purposes of this Act;

(b) do within such place anything necessary for the proper discharge of his duties; and

(c) exercise such other powers as may be prescribed.

9. Power of Central Government to exempt.

Notwithstanding anything contained in this Act, if the Central Government is satisfied that there is in force in any State or part thereof a law making adequate provision for the financing of activities to promote the welfare of persons engaged in beedi establishments, it may, by notification in the Official Gazette, direct that all or any of the provisions of this Act shall not apply or shall apply to such State or part thereof subject to such exemptions and modifications as may be specified in the notification.

10. Annual report of activities financed under the Act.

The Central Government shall, as soon as may be, after the end of each financial year, cause to be published in the Official Gazette, a report giving an account of its activities financed under this Act during the previous financial year together with a statement of accounts.

11. Power to call for information.

The Central Government may require a State Government or a local authority or an employer to furnish, for the purposes of this Act, such statistical and other information in such form and within such period as may be prescribed.

12. Power to make rules.

(1) The Central Government may by notification in the official Gazette, and subject to the condition of previous publication, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the manner in which the Fund may be applied for the measures and facilities specified in sub-section (1) of section 4;

(b) the conditions governing the grant of loan or subsidy under clause (b) of sub-section (1) of section 4;

(c) the conditions governing grant-in-aid under clause (c) of sub-section (1) of section 4;

(d) the standard of welfare measures and facilities to be provided under clause (c) of sub-section (1) of section 4;

(e) the determination of the amounts referred to in sub-clause (ii) of clause (c) of sub-section (1) of section 4 and the proviso to that clause;

(f) the composition of the Advisory Committees and the Central Advisory Committee constituted under sections 5 and 6 respectively, the manner in which the members thereof shall be chosen, the term of office of such members, the allowances, if any, payable to them, and the manner in which the Advisory Committees and the Central Advisory Committee shall conduct their business;

(g) the recruitment, conditions of service and the duties of all persons appointed under section 8;

(h) the power that may be exercised by a Welfare Commissioner, a Welfare Administrator or an Inspector under section 8;

(i) the furnishing to the Central Government by a State Government or a local authority or an employer of such statistical and other information as may be required to be furnished under section 11;

(j) the forms in which and the period within which statistical and other information are to be furnished under clause (i);

(k) any other matter which has to be or may be prescribed, or provided for, by rules under this Act.

(3) In making any rule under clause (i) or clause (j) of sub-section (2), the Central Gov-

ernment may direct that a breach thereof shall be punishable with fine which may extend to five hundred rupees.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

THE BETWA RIVER BOARD ACT, 1976

(Act No. 63 of 1976)

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THE BETWA RIVER BOARD ACT, 1976

[Act No. 63 of 1976]*

[10th April, 1976]

An Act to provide for the establishment of a Board for the creation of a reservoir at Rajghat by construction, on behalf of the Governments of Madhya Pradesh and Uttar Pradesh, of a dam on the Betwa river at Rajghat and for the regulation of such reservoir.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and commencement.

(1) This Act may be called THE BETWA RIVER BOARD ACT, 1976.

(2) It shall come into force on such date as the Central Government may, after consultation with the Governments of Madhya Pradesh and Uttar Pradesh, by notification in the Official Gazette, appoint

2. Declaration as to expediency of control by the Union.

It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the regulation and development of the Inter-State Betwa River and River Valley to the extent hereinafter provided.

[*] Received the assent of the President on 10-4-1976, Act published in Gaz. of India, 10-4-1976, Part II-S. 1, Ext., p. 551.

For Statement of Objects and Reasons, see Gaz. of India, 6-1-1976 Part II, S. 2, Ext. p. 81.

3. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Board" means the Betwa River Board established under section 4;

(b) "Chairman" means the Chairman of the Board;

(c) "Executive Committee" means the Executive Committee constituted under section 5;

(d) "member" means a member of the Board and includes the Chairman;

(e) "prescribed" means prescribed by rules made by the Central Government under section 22;

(f) "Rajghat Dam" means the Dam described in the Schedule;

(g) "Rajghat Reservoir" means the reservoir created by the construction of the Rajghat Dam;

(h) "regulations" means regulations made by the Board under section 23;

(i) "rules" means rules made by the Central Government under section 22.

CHAPTER II

ESTABLISHMENTS OF THE BOARD

4. Establishment and incorporation of the Betwa River Board.

(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established for the purposes of this Act, a Board to be called the Betwa River Board.

(2) The Board shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall by the said name sue and be sued.

(3) The Union Minister in charge of Irrigation shall be the Chairman of the Board and the other members of the Board shall be the following namely:

(a) the Chief Ministers of Madhya Pradesh and Uttar Pradesh;

(b) the Ministers of Madhya Pradesh and Uttar Pradesh incharge of Finance and Irrigation;

Provided that when a proclamation made under article 356 of the Constitution is in force in relation to the State of Madhya Pradesh or Uttar Pradesh, the Central Government may appoint three persons to represent such State on the Board and the persons so appointed shall vacate their offices upon the revocation or cesser of operation of such proclamation.

(4) The Board may permit any officer of the Central Government or the Government of Madhya Pradesh or Uttar Pradesh to attend any of its meetings and take part in the proceedings but such officer shall not be entitled to vote.

(5) The Board may associate with itself, in such manner and for such purposes as may be determined by regulations, any person whose assistance or advice it may desire in complying with any of the provisions of this Act and a person so associated shall have the right to take part in the discussions of the Board relevant to the purpose for which he has been associated, but shall not be entitled to vote.

5. Executive Committee.

(1) The Central Government may, by notification in the Official Gazette, constitute an Executive Committee consisting of officers of that Government and officers of the Governments of Madhya Pradesh and Uttar Pradesh.

(2) The composition of the Executive Committee shall be such as may be prescribed :

Provided that—

(a) an officer of the Central Government shall be the Chairman of the Committee;

(b) the Governments of Madhya Pradesh and Uttar Pradesh shall have equal representation.

(3) Subject to the general superintendence and control of the Board, the management of the affairs of the Board shall vest in the Executive Committee and the Chairman and other members of the Committee shall assist the Board in such manner as the Board may require.

(4) Subject to the rules, and to the directions of the Board, the Executive Committee may exercise any power and do any act or thing which may be exercised or done by the Board.

(5) The procedure to be followed by the Executive Committee and all other matters relating to the Executive Committee shall be such as may be prescribed.

6. Vacancies, etc., not to invalidate proceedings of the Board or the Executive Committee.

No act or proceeding of the Board or the Executive Committee shall be invalidated by reason of—

(a) any vacancy in the Board or the Executive Committee;

(b) any defect in the composition of, or in any appointment to, the Board or the Executive Committee;

(c) any irregularity in the procedure of the Board or the Executive Committee not affecting the merits of the case.

7. Chief Engineer and Financial Adviser.

(1) The Central Government may, after consultation with the Governments of Madhya Pradesh and Uttar Pradesh, appoint an Engineer (to be the Chief Engineer of the Board and to be known as the Chief Engineer, Rajghat Dam Project), and a Financial Adviser, and a Secretary, to the Board from amongst the officers of the Governments of Madhya Pradesh and Uttar Pradesh:

Provided that the Central Government shall, so far as practicable, ensure that officers from the same State do not hold the posts of Chief Engineer and Secretary at the same time.

(2) Subject to the general superintendence and control of the Board and the Executive Committee, the Chief Engineer of the Board appointed under sub-section (1) shall be the Chief Executive Officer of the Board and shall exercise and discharge—

(a) such powers and duties as may be prescribed or as may be delegated to him by the Board;

(b) such other powers and duties as may be determined by regulations.

(3) The Financial Adviser appointed under sub-section (1) shall be the Chief Accounts Officer of the Board.

(4) The terms and conditions of service of the Chief Engineer of the Board, and of the Financial Adviser, and the Secretary, to the Board shall be such as may be prescribed.

8. Other officers and employees of the Board.

(1) Subject to the rules, the Board may appoint such officers and employees as it may deem necessary for the efficient discharge of its functions :

Provided that the Board shall, as far as practicable, utilise the services of the officers and employees offered by the Governments of Madhya Pradesh and Uttar Pradesh in such a manner that equal representation is given to the two States.

(2) The terms and conditions of service of the officers and employees of the Board shall be such as may be determined by regulations.

9. Advisory Committees.

Subject to the rules, the Board may from time to time, constitute one or more Advisory Committees to assist the Board and the Executive Committee in the efficient discharge of their functions.

CHAPTER III

FUNCTIONS AND POWERS OF THE BOARD

10. Functions of the Board.

Subject to the other provisions of this Act and the rules, the Board may, if satisfied that the Governments of Madhya Pradesh and Uttar Pradesh have complied with or arranged to comply with the conditions specified in section 11,—

(a) carry out surveys and investigations in the Betwa Inter-State river valley and prepare a comprehensive project report for the construction of Rajghat Dam and appurtenant works and finalise the same after consulting the Governments of Madhya Pradesh and Uttar Pradesh and taking into account the suggestions if any made by those Governments;

(b) prepare detailed reports and estimates in respect of the Project and allocate the cost among the Governments of Madhya Pradesh and Uttar Pradesh;

(c) draw up standards and specifications for implementation of the project and for the maintenance thereof;

(d) construct the Rajghat Dam and the common carrier from the dam to irrigate areas in Madhya Pradesh and Uttar Pradesh;

(e) lay down rules of operation and management of Rajghat Dam;

(f) perform any other function which is supplemental, incidental, or consequential to all or any of the functions specified in clauses (a) to (e).

11. Conditions subject to which the Board may exercise its functions.

(1) The exercise by the Board of the functions specified in section 10 shall be subject to the following conditions, namely:—

(i) that the Governments of Madhya Pradesh and Uttar Pradesh shall at all times make, to the satisfaction of the Board, suitable provisions as to the moneys, land facilities and electrical power for construction and all other things required by the Board;

(ii) that the liability for the entire expenditure on the Rajghat Dam including appurtenant works and all other expenditure incurred by the Board in the discharge of its functions shall be shared by the Governments of Madhya Pradesh and Uttar Pradesh in such proportion as may be specified by the Board;

Provided that the Board may specify different proportions for different works or matters having regard to the benefits which may accrue to the States and other relevant factors;

(iii) that the Governments of Madhya Pradesh and Uttar Pradesh shall extend full co-operation to the Board and shall in particular make available to the Board the land and electric power required by it for construction purposes as expeditiously as possible.

(2) For the purposes of clause (ii) of subsection (1), the expenditure on the Rajghat Dam shall include the expenditure incurred by the Government of Uttar Pradesh on the Rajghat Dam Project before the establishment of the Board and the Board shall determine the amount of expenditure so incurred by the Government of Uttar Pradesh and the extent to which it shall be reimbursed by the Government of Madhya Pradesh.

12. Powers of the Board.

(1) Subject to the provisions of this Act and the rules, the Board shall have the power to do anything which may be necessary or expedient for the purpose of carrying out its functions under this Act.

(2) Without prejudice to the generality of the foregoing provision, such power shall include the powers—

(a) to acquire, hold and dispose of such properties both movable and immovable as the Board deems necessary;

(b) to publish statistics or other information relating to the various aspects of flood control and drainage in the Betwa River Valley and the regulation of Rajghat Reservoir;

(c) to require the Governments of Uttar Pradesh and Madhya Pradesh to furnish such information as the Board may require in the discharge of its functions.

CHAPTER IV

FINANCE, ACCOUNTS AND AUDIT

13. Betwa River Board Fund.

(1) There shall be constituted a Fund to be called the Betwa River Board Fund and there shall be credited thereto the sums paid to the Board by the Governments of Madhya Pradesh and Uttar Pradesh and all other sums received by the Board.

(2) The Fund shall be applied—

(a) for meeting the salaries, allowances and other remuneration of the officers and other employees of the Board and other administrative expenses of the Board;

(b) for meeting the expenditure on surveys and investigations undertaken by the Board;

(c) for meeting the cost of construction of the Rajghat Dam and appurtenant works;

(d) for meeting the other expenses of the Board in the discharge of its functions under this Act.

14. Budget.

The Board shall prepare in such form and at such time each year as may be prescribed its budget for the next financial year showing the estimated expenditure, the amount of expenditure which the State Governments of Madhya Pradesh and Uttar Pradesh have undertaken to provide for and forward the same to the Central Government and the said State Governments.

15. Annual report.

(1) The Board shall prepare in such form and at such time each year as may be prescribed its annual report giving a full account of its activities during the previous year and forward copies thereof to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

(2) The Board shall forward copies of its annual reports to the Governments of Madhya Pradesh and Uttar Pradesh.

16. Accounts and audit.

The accounts of the Board shall be maintained and audited in such manner as may, in consultation with the Comptroller and Auditor-General of India, be prescribed.

CHAPTER V**MISCELLANEOUS****17. Directions by Central Government.**

In the discharge of its functions, the Board shall be guided by such directions and instructions on questions of policy as may be given to it by the Central Government.

18. Disputes between the Board and the State Governments.

If any dispute arises between the Board and the Government of Madhya Pradesh or Uttar Pradesh or both regarding any matter covered by this Act or touching or arising out of it, it shall be referred to the Central Government and the decision of the Central Government shall be final and binding on the Board and the said Governments.

19. Power to enter.

Subject to any rules made in this behalf, any officer of the Board generally or specially authorised by the Board in this behalf may, at all reasonable times, enter upon any land or premises and there do such things as may be reasonably necessary for the purpose of lawfully carrying out any works or of making any surveys, examination or investigation, preliminary or incidental to the exer-

cise of any power or the performance of any function by the Board under this Act:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house, unless with the consent of the occupier thereof, without previously giving such occupier at least seven days' notice in writing of his intention to do so.

20. Members, officers and employees of the Board to be public servants.

All members of the Board and the Executive Committee and all officers and employees of the Board shall be deemed, when acting or purporting to act in pursuance of any of the provisions of this Act to be public servants within the meaning of section 21 of the Indian Penal Code.

21. Protection of action taken in good faith.

(1) No suit, prosecution or other legal proceedings shall lie against the Central Government or the Government of Madhya Pradesh or Uttar Pradesh or any member of the Board or the Executive Committee or any officer or employee of the Board for anything which is in good faith done or intended to be done under this Act or the rules or regulations.

(2) No suit or other legal proceedings shall lie against the Board for any damage caused, or likely to be caused by anything in good faith done or purported to be done under this Act or the rules or regulations and, in particular, it shall not be the responsibility of the Board to provide for relief measures necessitated by floods or by breaches and failure of works.

22. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the composition of, and the procedure to be followed, by the Executive Committee and all other matters relating to the Executive Committee, under sub-sections (2) and (5) of section 5;

(b) the powers and duties which may be exercised or discharged by the Chief Engineer of the Board, under clause (a) of sub-section (2) of section 7;

(c) the terms and conditions of service of the Chief Engineer of, and the Financial Adviser and the Secretary to, the Board, under sub-section (4) of section 7;

(d) appointment of officers and employees of the Board, under sub-section (1) of section 8;

(e) the form in which and the time at which the budget and annual report of the Board shall be prepared, under section 14, and sub-section (1) of section 15;

(f) the manner in which the accounts of the Board shall be maintained and audited, under section 16;

(g) the form and manner in which disputes may be referred under section 18 to the Central Government and the procedure to be followed by the Central Government for the settlement of such disputes.

23. Power to make regulations.

(1) The Board may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with this Act and the rules, for enabling it to discharge its functions under this Act.

(2) Without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(a) the manner in which and the purposes for which the Board may associate with itself any persons, under sub-section (5) of section 4;

(b) the powers which may be exercised and the duties which may be discharged by the Chief Engineer of the Board, under sub-section (2) (b) of section 7;

(c) the terms and conditions of service of the officers (other than the Chief Engineer of the Board, Financial Adviser and Secretary to the Board) and other employees of the Board, under sub-section (2) of section 8.

24. Rules and regulations to be laid before Parliament.

Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or successive sessions aforesaid, both Houses in making any modification in the rule or regulation, as the case may be, or both Houses agree that the rule or regulation, as the case may be, should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

THE SCHEDULE

[See section 3 (f)]

DESCRIPTION OF RAJGHAT DAM

The Dam is to be built across the Betwa river about one furlong upstream of Lalitpur Chanderi Causeway at Rajghat on the river Betwa, District Lalitpur, of Uttar Pradesh. The Dam will comprise a masonry section in the river bed and earthen flanks on both sides. It will also include the earth dam to be constructed in the saddles on either side for creating a reservoir.

THE APPROPRIATION (No. 4) ACT, 1976

(Act No. 64 of 1976)

[20th May, 1976]

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the services of the financial year 1976-77.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

(Text of the Act not printed.)

THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1976

(Act No. 65 of 1976)*

[21st May, 1976]

An Act further to amend the Workmen's Compensation Act, 1923.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1976.

(2) Sections 2 and 4 shall be deemed to have come into force on the 1st day of October, 1975 and the remaining provisions shall come into force at once.

2. Amendment of section 2.

In section 2 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the principal Act), in sub-section (1), in sub-clause (ii) of clause (n), for the words "five hundred rupees", the words "one thousand rupees" shall be substituted.

[*] Received the assent of the President on 21-3-1976 Act published in Gaz. of India, 22-5-1976, Part II-S. 1. Ext., p. 627.

For Statement of Objects and Reasons, see Gaz. of India, 31-3-1976, Part II-S. 2, Ext., p. 791.

"RELATION OF INTERNATIONAL LAW TO INTERNAL LAW IN INDIA"

By S. K. KAPOOR, M.A., LL.M., *Lecturer in Law, Lucknow University.*

Position before Independence :

After the establishment of the British rule, India lost her individual entity and personality so far as international law was concerned. During this period she was simply a British colony, a mere portion of the British Empire. Her rights and duties in the international field were those of Britain. India's position, however, began to change since 1919. In her internal relations she began to function as a separate entity. India was one of the original members of the League of Nations. She was also a signatory to the Treaty of Versailles. She was also a member of the International Labour Organisation and ratified some of the Labour Conventions in 1921. She also possessed treaty-making powers.¹ When India became independent in 1947, she was already a party to 627 treaties, conventions, agreements, etc. and a member of as many as fifty-one international organisations.

(2) It is, however, pertinent to enquire as to what was the character of India's personality during 1919-1947. Under the Government of India Act, 1919, a High Commissioner for India was appointed in Britain for the first time. In 1941, an Agent-General for India was attached to the British Embassy in Washington and an American Commissioner was appointed in New Delhi. As pointed out earlier, India even possessed treaty-making power. Her membership in the international organisations was subjected to severe criticism at some quarters.² A. B. Keith observed, "The justification for League membership was autonomy, it could fairly be predicted of the Great Dominions; of India it had no present truth, and it could hardly be said that its early fulfilment was possible. In these cir-

cumstances it would have been wiser candidly to admit that India could not be given then a place in the League, while leaving it open for her when autonomous to be accorded distinct membership."³ With a view to give credibility to the continuity of international personality of India, it is argued at some quarters that when India became independent in 1947, this profound change was of no significance to international law.⁴ This view does not seem to be correct. This profound change was of far-reaching consequence and "it would be more accurate to describe her as constituting a new international person after 1947."⁵

(3) As a matter of fact, India's international personality remained 'anomalous',⁶ so long as she remained as an integral part of Great Britain. Even when she was admitted as a member of the League of Nations, her external relations were still controlled by Great Britain and was regarded as a part of the British Empire.⁷ It has been rightly remarked, "..... the uncritical view generally prevailing that what happened in India in 1947 with the adoption of the Indian Independence Act was merely a constitutional change to introduce another form of Government of an already existing state seems to be unsatisfactory."⁸ Further, "In International Law the distinction between a dependent state and an independent state is still maintained. In theory, there is substantial and functional difference between the international personality of a dependent state and of an independent state. There was never any doubt about the fact that India was a dependent state till 1947. Yet to treat such an entity as though it was a state was certainly inappropriate.....Strictly speaking, the term state is a misnomer in the case of depen-

1. In the words of Mc Nair :

"India is in a special position she is a member of the League of Nations and concludes treaties substantially in the same manner as any of the self-governing Dominions"

The Law of Treaties, British Practice and Opinions (1938), p. 67.

2. For example Benjamin Akzin remarked :

"Indeed, at times as if the placing of an entity under the heading of 'states' or of territories other than states, for the purpose of making it eligible for membership in an inter-governmental organisation at any stages is dictated by political and prestige considerations, pure and simple."

New States and International Organisations (1955), p. 13, see also Dickinson, The Equality of States in International Law (1920), p. 366.

3. Constitutional History of India, 1600-1935 (1935), p. 473.

4. See B. N. Rau, India's Constitution in the Making (1960), p. 416.

5. T. S. Rama Rao, "Some Problems of International Law in India," Indian Year Book of International Affairs (1957), p. 9.

6. See L. Oppenheim, International Law, Vol. I, 8th edition (1970 Reprint), p. 209. n. 4; Charles Chaney Hyde, International Law 2nd Ed. (1951), p. 35.

7. See V. P. Menon, The Transfer of Power (1957), p. 16; see also P. J. Noel Baker, The Present Juridical Status of the British Dominions in International Law (1929), p. 360..

8. Dr. T. T. Poulse, "India as an Anomalous International Person (1919-1947) BYBIL Vol. XLIV (1970), p. 201 at p. 210.

dent areas which are advancing towards statehood. If they have any form of government at all, it is only the colonial form of administration. In their case the metropolitan state is the real state.....From the theoretical point of view what happened in 1947 was, therefore, the transformation of the limited personality of India into a full-fledged and normal international personality."⁹

(4) In 1945, India along with other states, became the original member of the United Nation which otherwise admitted only sovereign states. The other two exceptions were those of Byelo-Russia and Ukraine. This could be possible because of her original membership in the League of Nations and by virtue of her signing the U. N. Declaration in 1942. India was accorded dominion status in 1947 which marked the beginning of her internal and external sovereignty and entitled her to all the rights and duties of international law. After emerging as a sovereign state in 1947, India has been very active in the international field and has made her contribution for the development of International Law. As pointed out by Dr. Nagenra Singh: "In modern times, after India's independence in 1947, non-alignment and peaceful co-existence have been the watchwords of this country's foreign policy. In this direction India's contribution can best be summarised in her advocacy of the concept of *Panchsheel*."¹⁰ Further, "Apart from India's emphasis on *Panchsheel* and all that it implies connected with peaceful co-existence or co-operation among nations which is so essential for the evolution of public order in the international community of states, there is the firm belief which India has demonstrated in the growth of international organisations and the conviction that if world peace descends on earth it will be through the instrumentality of an international organisation rather than on the basis of hegemony of one-world power or of one world religion or allegiance to one political or economic belief whether capitalism or communism."¹¹ Moreover, "From the days of Manu, India has always regarded the sanction of public opinion as the most effective instrument for the enforcement of law. India's faith in international organisations and respect for public opinion are her contributions to the development of law and its enforcement in a realm where *lex* has to be governed as *rex* for the salvation of mankind."¹²

Indian Constitution and International Law.

(5) Before the adoption of Indian Constitution the Indian practice in respect of relation of international law to internal law was similar to the British practice. After the adoption of the Constitution of India, everything depended upon the provisions of the Constitution. In order to know the position of International Law in the post-constitution period, it is necessary to examine the relevant provisions of the Constitution of India. The most relevant provision is contained in Article 51 which runs as follows:—

"The State shall endeavour to —

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and

(d) encourage settlement of international disputes by arbitration."

(6) For the purposes of the present discussion, the most important provision is contained in Article 51 (c) noted above. It is, however, significant to note that this article specifically mentions "international law" and "treaty obligations." It has been aptly pointed out:

"Paragraph (c) of the article (i.e. Article 51), which specifically refers to international law and treaty obligations, calls for a comment. It seems somewhat paradoxical that separate mention should be made of 'treaty obligations' as they undoubtedly constitute an integral part of international law. No explanation is to be found in the Constituent Assembly debates either as to intent of Article 51 or the meaning and scope of the terms 'international law' and 'treaty obligations'. Prof. C. H. Alexandrowicz says that the expression 'international law' in this paragraph connotes customary international law and that 'treaty obligations' stands for treaties. This interpretation would seem to be the most logical in the context of the article as well as of the attitude of the Indian Courts to questions of international law."¹³

(7) But Article 51 does not give any clear guidance regarding the position of international law in India as well as the relationship of

9. Ibid, at pp. 211-12.

10. Indian and International Law (1969) p. 72.

11. Ibid at p. 77.

12. Ibid, at pp. 85-86.

13. M. K. Nawaz, "International Law in the Contemporary Practice of India : Some Perspectives", *Proc. A. S. I. L.*, April 25-27 (1963), p. 275 at p. 278; see also C. H. Alexanderowicz "International Law in India", *I. C. L. Q.* (1952), p. 292.

municipal law and international law because this article is contained in Part IV of the Constitution of India. Part IV of the Constitution deals with the *Directive Principles of State Policy*. Article 37 of this Part clearly provides that "the provisions contained in this Part shall not be enforceable by any court...." As pointed out by Prof. S. K. Agarwala :

"This Article (Article 51) falls in the Chapter on '*Directive Principles of State Policy*' which are non-justiciable. Secondly, it is doubtful if the expression 'state' includes the courts also within its ambit and if the Directive Principles have been addressed to them too."¹⁴

(8) However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which provides that provisions contained in Part IV of the Constitution are non-justiciable, adds in unmistakable terms that "the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws." The majority of constitutional experts in the country now subscribe to the view that simply because the principles contained in Part IV are non-justiciable, it cannot be successfully contended that they are of no significance or even of less significance than the fundamental rights contained in Part III which are justiciable. Amendments of the Constitution in recent years, and particularly XXIV and XXV Amendments, confirm this view.

(9) Nevertheless, a pertinent question arises as to whether the Constitution of India has altered the position prevailing in pre-constitution period. In this connection, Article 372(1) clearly provides :

"Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the *law in force* in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

(10) It is obvious that this article has no operation to the laws that had previously been

repealed or which had died a natural death.¹⁵ The words "law in force" as used in Article 372 "are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law." It is, however, necessary that "an order must be a legislative and not an executive order before it can come within the definition of law."¹⁶

(11) Article 372 further provides, for the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications and these adaptations or modifications shall not be questioned in any court of law.¹⁷ But the President is not empowered to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution.¹⁸ He is also not empowered to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.¹⁹ By clause 2 of Article 372, the President is authorised to adapt existing laws; but the application of the existing laws is not conditioned by the making of modifications or adaptation in that law by the President.²⁰

(12) The concluding words of Article 372(2) preclude an attack on the adaptation order only on the ground that it does more than merely bringing the state law into conformity with the constitution and is, in consequence, ultra vires the powers conferred by that Article. It may, however, be noted as made clear by the Supreme Court, that it would be wrong to contend that a law as adapted under Article 372 (2) is not open to attack on the ground that it contravenes some constitutional provision.²¹

15. *The State of U. P. v. Seth Jagamander Das and others*, AIR 1954 S C 683 at p. 686=(1954 Cri L J 1736).

16. *Edward Mills Co. Ltd., Beawar & others v. State of Ajmer and another*, AIR 1955 S C 25 at p. 31; Further there is not any material difference between the expressions 'existing law' and the 'law in force.' The definition of existing law in Article 366 (1) as well as definition of an Indian law contained in S. 3 (29) of the General Clauses Act make this provision clear. [*Madhaurao Phalke v. State of M. B.*, AIR 1961 S C 298 at p. 302].

17. Article 372 (2).

18. Article 372 (3) (a).

19. Article 372 (3) (b).

20. *M. G. Desai v. State of Bombay*, AIR 1960 S C 1312 at p. 1316.

21. *M. P. V. Sundararamier & Co. v. The State of Andhra Pradesh*, AIR 1958 S C 468 at p. 488.

14. "India's Contribution to the Development of International Law — the Role of Indian Courts" appearing in *Asian States and the Development of Universal International Law*, Ed. by R. P. Anand (1972), p. 73.

(13) Before the adoption of the Constitution of India, the British practice that customary rules of international law are part of the law of the land, applied in India also. This practice continued even after the adoption of the Constitution by virtue of the provisions of Art. 372 until it was altered or repealed or amended by a competent Legislature or other competent authority²². It has, therefore, been aptly remarked, "It does not mean that the doors of Indian Courts are entirely closed to the wide absorption of international customary law into municipal law. Under the British rule in India, the English Common Law doctrines were widely applicable in many fields. The Constitution of India did not alter that position but provided for the continued operation of the 'law in force' immediately preceding the commencement of the Constitution. Therefore, on the analogy of the English Common Law, the municipal Courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation, and the well-recognised principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the dualist view of international law which has been commenced by the British and Indian Courts, viz., that international law can become a part of municipal law only by specific incorporation."²³

(14) Prof. M. K. Nawaz has also aptly remarked :

"..... Article 51 of the Constitution of India, in so far as it requires the various organs of state 'to foster respect for international law' and treaties would seem to strengthen rather than weaken the legacy of the common law principle that international law is a part of the law of the land. This is so, notwithstanding the imprecise formulation of Art. 51. And constitutional declarations in India are not mere embellishments on paper. They reflect 'law in action'."²⁴

(15) Thus so far as customary rules of international law are concerned, the position prevailing immediately preceding the commencement of the Constitution, continues even after the coming into force of the constitution. Thus

22. See *T. K. Varred v State of Travancore-Cochin*, AIR 1956 SC 142 at p. 145 = (1956 Cri L J 315).

23. S. K. Agarwala, "India's Contribution to the Development of International Law — the Role of Indian Courts" in *Asian States and the Development of International Law* (1972), p. 73.

24. "International Law in the Contemporary Practice in India: Some Perspectives", *Proc. A. S. I. L.*, April 25-27 (1963), p. 275.

in India also customary rules of international law are parts of the municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India.

(16) As regards the treaty rules also, India follows more or less the British dualist view. That is to say, ordinarily, international law can become a part of municipal law of India if it has been specifically incorporated. In *State of Madras v. C. G. Menon*,²⁵ the Supreme Court held :

"The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act of the British Parliament has been left severely alone. The provisions of the Act could only be made applicable to India by incorporating them with the appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on these lines it seems difficult to hold that section 12 or S. 14 of the Fugitive Offenders Act has force in India by reason of the provisions of Article 372 of the Constitution."²⁶

In this case, Mr. and Mrs. Menon were Advocates in Singapore (then a British colony). Mrs. Menon had also served as a member of the Legislative Council of Singapore. They came to India in July, 1952. The Colonial Secretary of Singapore requested the Government of India for their extradition for there were certain charges against them according to the law of Singapore. Rejecting the request for their extradition, the Supreme Court held:

"The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone; India is no longer a British possession and no order-in-council can be made to group it with other British possessions. Those of the countries which still form part of British possessions and which along with British-India were put into a group may legitimately decline to reciprocate with India in the matter of surrender of fugitive offenders on the ground that notwithstanding Article 372 of our Constitution India was no longer a British possession and, therefore, the Fugitive Offenders Act, 1881, did not apply to India and they were not bound in the absence of a new treaty to surrender their nationals who may have committed extraditable offences in the territories of India."²⁷

The Supreme Court, therefore, concluded: "In these circumstances it is not possible to

25. AIR 1954 SC 517 = (1954 Cri L J 1337).

26. Ibid., at p. 519.

27. Ibid.

work out the sections of the Fugitive Offenders Act and apply them to the situation that has arisen after the coming into force of the Constitution of India."²⁸ It would, however, be wrong to contend that the implementation of every treaty would require legislative aid. This was held by the Delhi High Court in *Shiv Kumar Sharma v. The Union of India*.²⁹ This case dealt with the implementation of the "Kutch Award" and the question was whether it involved cession of Indian territory. It also dealt with the question whether a constitutional amendment or legislation was necessary for implementation of the "Kutch Award". The court held that there was no cession of any territory belonging to India and no constitutional amendment was necessary for the implementation of the Kutch Award.³⁰ S. K. Kapur, J. held that constitutional amendment would be necessary only if any alteration in Article 1 is involved. "If there is a dispute as to what in fact the territory of India is and that dispute is settled on the basis that certain territory never belonged to India it does not, in my opinion, entail any cession of Indian territory requiring a constitutional amendment."³¹ In this case the petitioners argued that a treaty can be implemented only by legislation. Mr. Palkhiwala, counsel for the respondents, referred the case of *Attorney General for Canada v. Attorney General for Ontario*,³² wherein the Privy Council held that the performance of obligations under the treaty, if they entailed alteration of the domestic law, required legislative sanction. Mr. Palkhiwala suggested that this statement of law was exhaustive on the subject and in no other case was legislation necessary for implementation of treaties. On the other hand, Mr. Bobde, counsel for the petitioners relied on *Civilian War Claimants Association Ltd. v. The King*,³³ *Walker v. Baird*³⁴ and *West Rand Central Gold Mining Company Ltd. v. The King*³⁵ to show that the Privy Council decision in (1937) A C 326 was not exhaustive of the position and legislation was required even where the fulfilment of obligations under a treaty affected the right of or conferred benefits on the subjects of the concerned country or necessitated alteration in domestic laws.

(17) S. K. Kapur, J., of the Delhi High Court made it clear that every treaty does not require legislative aid. His Lordship observed:

"The position, to my mind, appeared to be this that if a treaty either requires alteration or addition to existing law, or affects the rights of the subjects or are treaties on the basis of which obligations between the treaty making state and its subjects have to be made enforceable in Municipal Courts, or which involves raising or expending of money or conferring new powers on the government recognizable by the Municipal Courts, a legislation will be necessary. Of course, if it involves cession of territory then so far as India is concerned constitutional amendment may also be necessary. It is not possible to prepare an exhaustive list as to which treaties can be implemented by legislation..... There may be other treaties where implementation by law is necessary and, therefore, the Privy Council decision cannot be treated as an exhaustive statement of law on the subject. To my mind one thing is, however, clear that where the implementation of a treaty merely involves the ascertainment of the disputed boundaries with a foreign state, no legislation would be necessary. Legislation in the instances mentioned heretofore is necessary because in India treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary raises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of a treaty, settling a dispute like the present, has to be handed over to another country. In that case legislation may be necessary."³⁶

(18) On the basis of the above principles, the Delhi High Court held that implementation of the Kutch Award did not amount to cession and, therefore, no constitutional amendment or legislation was necessary and in result dismissed the petitions accordingly. The same view was taken by the Supreme Court in *Maghanbhai Ishwarbhai Patel v. Union of India*.³⁷ The Supreme Court said that a settlement of a boundary dispute cannot be held to be a cession of territory. The Supreme Court observed:-

"Ordinarily an adjustment of a boundary which international law regards as valid between two nations, should be recognised by the Courts and the implementation thereof can always be with the executive unless a clear case of cession is involved when Parliamentary intercession can be expected and

28. Ibid, at p. 520.

29. A. I. R. 1969 Delhi 64.

30. Ibid at p. 72.

31. Ibid, at p. 71.

32. (1937) A. C. 326 = A I R 193u P C 82.

33. (1932) A. C. 14.

34. (1892) A. C. 491.

35. (1905) 2 K.B. 391.

36. AIR 1969 Delhi 64 at p. 74.

37. AIR 1969 S C 783; also appearing in I. J. I. L. Vol. 9 (1969) at pp. 234-278.

should be had. This has been the custom of nations whose constitutions are not sufficiently elaborate on this subject."³⁸

(19) In this case the Supreme Court seems to have followed the American practice regarding the distinction between 'self executing' and 'non-self executing' treaties.³⁹ While elaborating the law, the Supreme Court observed:

"A treaty really concerns the political rather than the judicial wing of the State. When a treaty or award after arbitration comes into existence, it has to be implemented and this can only be if all the three branches of Gov-

38. *Ibid*, at p. 255; In re *Berubari Union and Exchange of Enclaves*, AIR 1960 S C 845, the Supreme Court had to decide whether any legislation was necessary for the Agreement relating to Berubari Union. Since it involved the cession of Indian territory, the highest tribunal answered in affirmative. The Supreme Court observed:

"...the question as to how treaties can be made by a sovereign state in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the constitution of the country. Stated broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by the constitutional amendment will naturally depend on the provisions of the Constitution itself." *Ibid* at p. 857.

39. Besides the provisions of the American Constitution according to which all treaties entered into under the authorities of the U. S. are the Supreme Law of the Land (along with the provisions of the American Constitution and all laws made in pursuance thereof), in America treaties are divided into two categories—'Self-executing' and 'non-self-executing' treaties. Self-executing treaties are those which do not require any specific adoption and directly become applicable in the field of municipal law. Non-self-executing treaties are those treaties which can be applied in the field of municipal law only after their specific adoption by the Congress.

ernment to wit the Legislature, the Executive and the Judiciary, or any one of them, possesses the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some jurisdictions the treaty or the compromise read with the award acquires full effect automatically in the Municipal Law, the other body of Municipal Law notwithstanding. Such treaties and award are 'self-executing'. Legislation may nevertheless be passed in aid of implementation but is usually not necessary."⁴⁰

As pointed out by Prof. Agarwala, "If the domestic courts have to be viewed as agents of emerging international legal order, the responsibility of the higher courts in any state in deciding disputes involving questions of international law becomes enormous. Perhaps the Indian Courts are not as yet alive to and conscious of their vital role with respect to international law questions as they are with respect to constitutional law issues. Probably this may be true of the municipal court generally throughout the world."⁴¹

(20) Thus despite the imprecise formulation of Article 51, the doors of Indian Courts are not closed to the absorption of customary rules of international law and to the application and interpretation of treaty rules if and when the cases involving such questions are presented before them. However, it cannot but be conceded that unlike their counterparts in England and America, Indian Courts are not yet alive to their enormous responsibilities in this field.

40. I. J. I. L. Vol. 9 (1969), p. 244; emphasis added.

41. India's contribution to the Development of International Law — The Role of "Indian Courts" in Asian States and the Development of International Law, Edited by R. P. Anand (1972), p. 72 at p. 93.

PARIKH'S SIMPLIFIED TEXT-BOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. (For classrooms and court rooms). By Dr. C. K. Parikh. From the Department of Forensic Medicine and Toxicology, Seth G. S. Medical College, Bombay; Corresponding Member (Forensic Pathology), American Academy of Forensic Sciences; Medicolegal Consultant, Bombay. With Forewords by Dr. D. J. Reddy, Vice-Chancellor, Sir Venkateswara University, Tirupati; Dr. David M. Spain, University Medical Centre and Consultant in Pathology to Westchester County Medical Examiner's Office, U.S.A; and Dr. Monroe E. Trout, Former President, American College of Legal Medicine & Special Lecturer in Legal Medicine, Dickinson School of Law, U. S. A. Second Edition, January 1976. Medical Publications, 6 Owners Court, Colaba, Bombay. Pp. XXXVII & 976. Price, Rs. 35.

"Extraordinary work", "standard text-book", "comprehensive and authoritative" — These are high tributes from competent critics, but no more than deserved by the above publication, which has now run into the second edition. Largely re-written, eminent forensic specialists have contributed some chapters to it. The current state of knowledge is ably summarised and each chapter is up-to-date, profusely illustrated, and fully covers every aspect of the subject. Even the questions that are likely to be asked in the Court are listed, and several line drawings make it easier to understand the subject and increase the usefulness of the book. The various illustrative case reports, charts and tables are near perfect. The usefulness of the volume should extend well beyond the confines of Indian law and problems peculiar to this country. The section on medico-legal aspects of death is very complete and includes a dissertation on the important questions of transplantation and the determination of the time of death.

2. The present edition includes three new chapters and several new case reports have been included to emphasise the application of forensic principles. Some old illustrations have been removed and 137 new ones added. As usual attention has been paid to the examination requirements of students, and medico-legal requirements of personnel connected with the administration of law. Part 1 of the book covers medical jurisprudence, Part 2 toxicology, Part 3 Appendix, followed by Index.

3. The first three sections cover, inter alia, the medico-legal aspects of autopsy, medico-legal aspects of death, and medico-legal

aspects of injuries, which are classified into regional injuries, traffic accidents and thermal injuries. A whole section is devoted to sex and offences connected with it, while there are separate chapters on forensic psychiatry (insanity), law in relation to medical men, and forensic science laboratories & crime detection. The second Part covers poisons, acid, metallic, non-metallic vegetable and animal poisons and others, while, last but not the least, comes Part 3, the Appendix. It contains important information on a variety of matters, medico-legal documents pro formas & labels, the Indian Penal Code, the Criminal Procedure Code 1973, and the Indian Evidence Act 1872, followed by the Index.

4. Medical officers, police officers, lawyers and others who have to deal with the subject of forensic medicine should find this monograph a trustworthy companion in their official work. R.S.S.

THE LAW OF WAKFS. By Syed Abdul Mansur Habibullah, M. A., LL. B., Advocate Calcutta High Court. 1976 Dilkusha Chambers, 79 Dilkusha Street, Calcutta 17. Pp. (xii), (xvi), & 191, Price, Rs. 20.

In India before the Wakf Validating Act 1913, the law as laid down by Abu Yusuf and Fatwa-i-Alamgiri was being followed generally and the Courts and the Privy Council further enunciated and interpreted the law according to those authorities. There are two types of wakf, one for a religious or charitable public purpose, and the other for the benefit of the settlor's family and descendants. In the introduction to the present publication the author has tried to trace the history and developments of wakf laws in India.

2. The book contains the Bengal Wakf Act 1934, including the latest amendments, the Rules upto January 1976, bye-laws and case references. Consisting of 96 sections the Bengal Act has chapters on constitution of board and appointment of Commissioner of the Board of Wakfs, functions of the Commissioner and the Board, enrolment of wakfs, wakf accounts, transfer of wakf property, mutwallis, finance, and judicial proceedings and Appendices A to P embracing the rules.

3. This is followed by the Central Wakf Act 1954, with State amendments, Central Wakf Council Rules, comments and Case references. The seventy sections of this Act are grouped under the headings of survey of wakfs, Central Wakf Council, establishment of

boards and their functions, registration of wakfs, mutwallis and wakf accounts, finance of the Board, and judicial proceedings. We have also the Wakf Validating Act 1913, the Mussalman Wakf Act 1930, and the Public Wakf (Extension of Limitation) Act 1959.

4. The Central Act of 1954 has been so amended in the State of Tamil Nadu by the Madras Wakf (Supplementary) Act 19 of 1961 as to include in a wakf all property given or endowed by a person of any religion for the support of mosques, idgahs, imambaras, dargahs, maqbaras, graveyards, and charities of persons professing Islam.

R.S.S.

A MANUAL OF THE LAW OF REAL PROPERTY. By the Hon. Sir Robert Megarry, M. A., LL. D. (Cantab.), Hon. LL. D. (Hull), F. B. A., Hon. Fellow of Trinity Hall, Cambridge; One of Her Majesty's Judges of the Chancery Division of the High Court of Justice Fifth Edition, 1975, By P. V. Baker, Q. C., B. C. L., M. A., Editor of the Law Quarterly Review, Lecturer in the Law of Land in the Inns of Court Stevens (Tripathi), Pp. Lx & 609. Price Rs. 115.80.

In the six years since the last edition there have been a number of statutes and court decisions, and the present edition has been extensively revised to incorporate them. The bulk of the new material is in the latter half of the book, in particular, the chapters on "Registration" and "Ownership and its Limits." The types of registration, the registration of incumbrances and the registration of title are dealt with. The Land Registration Act 1925, which has been amended by the Land Registration Act 1936, the Land Registration Act 1966 and the Land Registration Land Charges Act 1971 are covered. Among the topics discussed are the general rights of owners. Common law restrictions on ownership, planning and miscellaneous controls, compulsory purchase, minerals, protection of tenants, effect of increased taxation and the changes effected by the 1925 property legislation.

2. The book deals with tenures & estates, law & equity, future interests, settled land and trusts for sale, co-ownership, trusts and powers, wills and intestacy, contracts and conveyancing, and leases and tenancies. The book covers also inheritable rights in land not accompanied by physical possession, and the disabilities such as the restrictions imposed on infants and lunatics in the exercise of their rights over land and the statutes of limitation. The changes

in the law in the last 60 years in the interests of social justice are also discussed.

8. With its tables of cases, statutes and statutory instruments, glossary & index, this modern & complete text should be of great value to students and practitioners alike. Concise & comprehensive, it is couched in language which all can understand.

R.S.S.

PRINCIPLES OF EVIDENCE — By Frank Bates, LL.M., Senior Lecturer in Law, University of Tasmania. The Law Book Co., Ltd., Sydney (Tripathi). 1976. Pp. XIX & 151. Price Rs. 90.00.

This slender volume presents the law of evidence in a reasonable compass, emphasising principle yet also drawing the reader's attention to points of difficulty. The law of evidence being a practical subject, the author has related the statement of principle to the facts of decided cases, showing how these principles operate in fact. In view of the existence of various Evidence Acts in the States of the Commonwealth, the author has been forced to select one jurisdiction, i. e. Victoria, for reference in the text. But the book is not on that account solely Victorian; the author has referred to other jurisdictions in notes at the end of each chapter and points out in the text where there is a significant difference.

2. The book deals with the province and function of the law of evidence, the functions of judge and jury, the burden and standard of proof and presumptions. Competence and compatibility of witnesses, corroboration, examination of witnesses and privilege are discussed. The book covers the rule against hearsay, opinion evidence, evidence relating to character, estoppel, and documentary evidence. In addition to the table of cases and index, there is at the end of each chapter a bibliography of useful periodical articles to encourage further study of the subject.

3. The law of evidence is believed to have evolved in the main through decisions of the Courts. Codification of the law does not seem to have been effected in either England or Australia, though the Indian Evidence Act 1872 is an attempt at such codification. The Evidence Acts of the Australian States deal with procedural matters and provide additions to the case law. Some other State Acts also contain provisions relating to the law of evidence.

4. Although designed primarily for undergraduates, this book should prove useful also to police officers, social workers and legal practitioners.
R.S.S.

CASES AND MATERIALS ON SUCCESSION.

Second Edition by the Hon. Francis Charles Hutley. One of Her Majesty's Judges of the Supreme Court of New South Wales Appeal Division, R. A. Woodman, LL. M (Syd). Barrister-at-Law, Associate Professor of Law, Temple University, Philadelphia 1969-70; Olive Wood, B.A. LL.B. Dip. Ed., Barrister-at-Law, Senior Lecturer in Law, Sydney. With a foreword by the Hon. Sir Bernard Sugerman, LL. B. (Syd.), formerly President of the Supreme Court of New South Wales Appeal Division. The Law Book Co. Ltd. Sydney (Tripathi). P. P. XXXVIII & 640 : Price : Hard Cover, Rs. 360; Paper Back Rs. 270.

The present collection of cases, statutes, and other materials, together with useful explanations, aims at providing the basic materials, in a readily available form for a course in Succession. The subject covers the topics of the making of the will and the subsequent administration of the estate until the dead person's affairs are wound up. The basic framework within which the authors have worked has been provided by the course in Succession in the Law School, University of Sydney.

2. The selection of material for a case book on Succession is believed to involve problems not found when dealing with other legal subjects. This is one reason why introductory remarks to each chapter have been provided as back-ground material to the cases. These introductory remarks have also provided the opportunity to make occasional pleas for changes in the law.

3. There are over twenty chapters in the book, apart from the tables of cases and statutes, the four Appendices and the index. The book deals with the jurisdiction of the Probate Division of the Supreme Court, property being a pre-requisite to grant of representation, the definition and nature of a will, capacity and intention of testator, and the formal requirements of a valid will. It is concerned with the revocation of wills, obliterations and alterations, re-publication and revival of wills estates pending grants of representation and their procedural aspects, and the powers and duties of the legal per-

sonal representative. It covers the administration of estates, protection of life policies, death duties, insolvent estates, testator's family maintenance legacies, aspects of distribution and special pleas and immunities of executors.

4. The modern students' case book includes relevant statutes and other materials as well as introductory notes, references for further reading, and problems for solution as well as an occasional passage from a practitioner's notebook. The cases naturally form the bulk of the work but the authors have tried to provide what the foreword calls a "well-rounded introduction" to the subject. Although primarily intended for the use of students, these case-books may be useful also to practitioners as providing a quick reference to the authorities.
R.S.S.

THE SUPREME COURT PRACTICE 1976.

General Editor : I. H. Jacob, LL. B., Senior Master of the Supreme Court and Queen's Remembrancer; Fellow and Visiting Professor of English Law, University College London. Published, jointly by Sweet & Maxwell Stevens & Sons & Butterworth; Vol. 1, Part 1. Pp. cxxvii & 1867. Vol. 2, Pp. xx & 1464. First Supplement up-to-date to 1st August 1975. Price Rs. 945.25.

This is the Fourth Edition of a publication which originally appeared in 1883 as the Annual Practice. Through the years it has captured both the permanent and passing features of the judicial process and reflected the fundamental continuity as well as the radical changes in the practice and procedure of the Supreme Court. It has always provided the latest and fullest guidance in all matters relating to practice and procedure. The present Edition has the unique distinction of being published on the hundredth anniversary of the passing of the Supreme Court of Judicature Act 1875. The Judicature Act 1873-75 laid the foundation of the administration of civil justice in the Supreme Court upon which the present system is still built.

2. Since the last Edition, there have been many changes and developments, as is manifested by the fact that the Sixth Cumulative Supplement of the last edition was itself a large volume containing over 400 pages. During the last three year period, there have been many amendments of the Rules of the Supreme Court, some 200 reported cases, several Statutes and Statutory Instruments, some 20 Practice Directions, several Practice Forms and

much other material. All this new material has been included in the present Edition, with necessary elucidatory and explanatory annotations.

3. To mention a few of the important changes. New Rules have been made under the Civil Evidence Act 1972 governing the admissibility of oral expert evidence at the trial of actions, and at the same time the machinery for adducing hearsay evidence has been extended to statements of opinion. New Rules have been introduced governing the enforcement of EEC Judgments, and a new Order has been made governing references to the European Court; the Court has now been empowered to allow judgments to be entered in the currency of Member States of EEC as well as of others. The passing of the Matrimonial Causes Act 1973 has replaced both the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970, a new set of Matrimonial Causes Rules 1973 has been introduced, and the Guardianship Act 1973 and the Domicile and Matrimonial Proceedings Act 1973 have been enacted. Other changes include the increase of the monetary jurisdiction of the County Courts, the redefinition of the powers of the Chancery Masters, the introduction of the new Tables of Fixed Costs, and the passing of the Solicitors Act 1974 and of the Legal Aid Act 1974.

4. Volume 1 deals with Orders 1 to 114 of the Rules of the Supreme Court and includes a full index and tables of cases and statutes. Volume 2, which contains Parts 2 to 9, deals with Forms, Appendices to the Rules of the Supreme Court, Court Fees & Stamps, Practice Directions & Tables, Pay Office Rules & Practice, Matrimonial Causes, Miscellaneous Parties and Proceedings, Solicitors, Miscellaneous Statutes and Rules & Judicature Acts and other Statutes. The First Supplement to the two volumes has also been issued. It draws attention to the replacement of the Supreme Court Fees Order 1970 (as amended) by a completely new Supreme Court Fees Order 1975, which came into operation on 1st October, 1975. Order 110 relating to the Limitation Act 1963 has ceased to have any force or effect since 1st September 1975. The Limitation Act 1975, which came into effect on 1st September 1975, applies to personal injury actions, the conduct of which will be greatly affected. It confers on the Court a new important power to override the statutory time limits where it would be equitable to do so as between the plaintiff and the defendant.

The policy of publishing successive editions of the Supreme Court Practice at three year

intervals with supplements appearing once in six months provides a complete and up-to-date service, and it should form an invaluable part of the working equipment of every practitioner. The latest Edition like its predecessors, presents therefore a fresh point of departure for the conduct of Civil proceedings in the Supreme Court.
R.S.S.

MONOPOLY LAWS. By Bharat B. Merchant B.A. (Hons.), LL.M. (Bom), LL.M. (Cornell). N. M. Tripathi Private Limited, Bombay, 1976 Pp. XVI, 175, Price Rs. 30.

With rapid expansion of industrial growth the traditional juristic norms relating to power and ownership are undergoing a fundamental change. The developing economic jurisprudence is separating power from ownership and the power that flows from ownership is itself becoming property.

The Constitution has also directed that the State shall direct its policy towards securing that the operation of the economic system shall not result in the concentration of wealth and means of production to the common detriment. The Monopolies and Restrictive Trade Practices Act has been passed to ensure that the economic system does not result in the concentration of economic power to the common detriment, and for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected or incidental thereto. This declared policy is an attempt to fulfil the mandate of the Constitution.

The Act has introduced new juristic concepts that were unknown till its enactment to the lawyers in India. This Act dealing with two distinct branches of law viz., restrictive trade practices and monopolies heavily relies on experience of English and American laws. Both in England and in the United States, laws in this field, have developed piecemeal and acquaintance with the concepts that have developed in these two countries is bound to provide a very useful background in understanding the provisions of the Monopolies and Restrictive Trade Practices Act.

The book before us, attempts to do exactly this. This is a comparative study of the anti-trust laws of India and the United States of America. The method adopted by the author is unique in that the author has used cases actually decided in the United States to illustrate comparisons and indicate differences between the two legal systems. The presentation is in four parts: the First seeks to

describe the objects of the two systems, the Second and Third are a brief resume of the legislative schemes in India and the U. S. A. and the Fourth part covers selected leading decisions on different aspects of the anti-trust laws. At the end are given the authors' conclusions and suggestions. The scheme adopted for the presentation of the subject would be useful not only to the lawyers and businessmen but also to the students of law.

The author who is a practising solicitor in the Bombay High Court originally prepared this as a thesis for the Cornell University School of Law for which the author was awarded the Degree of LL.M. The thesis was submitted to the University early in 1975. Hence many of the decisions subsequently rendered do not find place in this work.

A study of this nature is relevant in so far as the legislation owes its conceptual origin to the British legislation and various enactments in the United States. Time is now ripe for rewriting the work with emphasis on the Indian law supplemented by the British and American cases. Such a study will go a long way to meet the needs of all those concerned with this legislation. We wish the author every success in such a venture. R.S.K.

THE LAW RELATING TO CEILING AND REGULATION OF URBAN LAND IN INDIA. By Vedula Jagannadha Rao, Advocate, Andhra Pradesh High Court. With a foreword by Hon'ble Chief Justice Sri S. Obul Reddi, A. P. High Court. 1976 Asia Law House, opposite High Court, Hyderabad. Pp. 92+102. Price Rs. 15.

The small book under notice contains the Urban Land (Ceiling and Regulation) Act 1976, with Notifications, Rules, Forms, and Lists of Urban agglomerations in India. It includes the text of the A. P. Vacant Land in Urban Area (Prohibition of Alienation) Act 1972 and Rules for exemption under that Act, and exhaustive commentary with up-to-date and unreported cases.

2. With the growth of population and increasing urbanisation, the need for the orderly development of areas has been felt and measures have been found necessary for exercising social control over the scarce resource of urban land with a view to ensuring its equitable distribution among the various sections of society, and this is only one plank in our programme of establishing a socialist society.

3. The present commentary is designed to explain the meaning of certain terms in the Act with reference to decided cases and also indicate analogous laws and their exposition by judicial decisions. The case law is up-to-date. All sections are analysed and explained with the object of making them understandable by the layman. Great pains have been taken to analyse the essential ingredients of the Act and in elucidating the scope and effect of the same in the light of relevant judicial precedents. Some provisions of the Act seem to present a little difficulty and the author has given explanatory notes to clarify them.

4. The book is in two parts, the first one giving the text and commentary on the 47 sections of the Act, and the second part containing Notes on clauses, appendices, and index. Some consider the present legislation a rather hasty measure. R. S. S.

COMMENTARIES ON THE GUJARAT SALES TAX ACT, 1969 (with case Laws, Notifications, and Gujarat Sales Tribunal Regulations 1973). By R. D. Pathak, Advocate, and B. M. Gandhi, B.A., LL.B. (Bom.), LL.M. (Guj.), Principal, D.D. Law College, Navsari, Foreword by the Hon'ble Mr. Justice, B. K. Mehta, Judge, High Court of Gujarat. The New Gujarat Law House, Three Gates, Ahmedabad 1976. Pp. 38+87 and 392. Price Rs. 48/-.

Sales tax legislation has passed through several changes right from the Sales Tax Act 1946 of the erstwhile State of Bombay, of which Gujarat had been a part and from which it separated in 1960, and the different sales tax Acts which were put on the statute book from time to time make an interesting historical background of the subject, whose basic structure may remain unaltered for a considerable time, although undergoing frequent amendments. In the present book the authors have incorporated the notifications under Section 49 (2), the Gujarat Sales Tax Tribunal Notifications, and important decisions under Section 62 of the Act, together with a summary and comments on the latest and unreported decisions of the Gujarat High Court on important topics.

2. The book contains the text and commentaries of the text of the Gujarat Sales Tax Act, 1969 as well as the President's Amending Act of 1976, with an useful introductory note. The Act contains chapters on incidence and levy of tax, sales tax authorities and Tribunal, registrations, licences recognition and permits, declarations, returns,

assessments, payments, penalty and recovery and refund of tax, liability to produce accounts and supply information, proceedings, and offences and penalties.

3. A proper grounding in civil law and law of partnership, law of sale of goods and law of contract is desirable and the present authors analyse the principles of these laws and their effect on the provisions of the Sales Tax Act. They have attempted to clearly enunciate the principles of case law and offered their own comments when they have not agreed with the principles so enunciated. In the confusing jungle of sales tax legislation by the different States, the authors have made a bold attempt to steer clear and arrive at what justice calls "remarkable clarity."

R.S.S.

LAW RELATING TO SEARCH AND SEIZURE. (Under Gold Control Taxation Law, Customs, Central Excise & Salt and Criminal Procedure Code). By Babulal Gulabchand Merchant, B. Sc (Hons), LL. B. Advocate, Gujarat High Court, and Miss Amrapali M. Merchant, M. A LL. B. Lecturer in N. S. P. Mahila Arts. College, Anand, 1976. Vora Prakashan Ahmedabad, Pp. 170. Price Rs. 10/-.

Government have been lately taking more rigorous measures against tax evasion, smuggling and other economic offences, and this publication should enable the commercial classes and others to know the preliminary provisions regarding search and seizure, particularly under the taxing statutes as well as the Gold Control Act and the Customs Act. The author has tried in this small brochure to explain and elaborate in simple language the provisions regarding search and seizure under the different Acts.

2. The book deals with search and seizure constitutional validity of search and seizure, the Gold Control Act, 1968, the Income Tax Act 1961, The Customs Act, 1962, The Criminal Procedure Code, 1973. The Sales Tax Act 1969, The Central Excise and Salt Act. 1944, and The Wealth Tax Act, 1957. There is also a Case Law and Referencer.

3. The provisions regarding search and seizure are more or less similar under the different taxing statutes. The provisions of the Code of Criminal Procedure 1973 are generally, however, made applicable to all the proceedings under all the different taxing statutes, and this has been dealt with in detail. This brochure should be useful to the Commercial Classes and others faced with search & seizure under these Acts.

R. S. S.

CRIMINOLOGY AND ADMINISTRATION OF CRIMINAL JUSTICE: (Based on Vold, Taft, Gillin, Sutherland & Sen). By. Dr. N. V. Paranjape. M. A., LL. M. Ph. D, Asst Professor of Law, Government Hamidia Law College, Bhopal. 2nd Edn. 1976. Central Law Agency. 11, University Road, Allahabad. Pp. 269; Price Rs. 12.50.

This is a comprehensive text book on criminology for the benefit of LL. B. students in Indian Universities. There is no doubt that, with the development of modern techniques for the handling of criminals, a summing up of the criminological findings to date will be extremely useful to the student community. The first edition of this book appeared in 1973. In the present edition the author has tried to make the book up-to-date by incorporating all the important changes that have taken place in the field of criminology and penology since the first edition appeared. The text of the book has been thoroughly revised and enlarged. Certain new chapters have been added, and particular care has been taken to restate the procedure relating to criminal trials in view of the recent changes introduced by the Code of Criminal Procedure, 1973.

2. The subject matter of the book has been split up into three Parts. Part I deals with the origin & development of criminal science under the heads of the concept, nature and scopes and the schools of criminology. Part II discusses elaborately the causation of crime under the heads of hereditary influences, sociological concept of crime, tentative theory of crime, economic conditions & criminality, organised crimes and white collar criminality, sex offences, alcoholism, drug addiction and criminality. Part III contains information regarding Penology and modern techniques, the subject being approached from the legal standpoint, with emphasis being placed on recent developments in the correctional field.

3. Because the various problems are dealt with in an Indian perspective, the book should be specially useful to LL. B. students. Relevant case law has been noticed and all those concerned with the problem of crime and punishment should find the book useful. Both teachers and taught should benefit by it.

R.S.S.

HAND BOOK ON PROFESSION TAX (Being Commentaries on Gujarat State Tax on Professions, Trades, Callings, and Employments Act 1976—With Explanatory Notes and Schedules.) By B. C. Merchant & Miss A. M. Merchant 1976. Vora Prakashan, Ahmedabad. Pp. 58. Price. Rs. 4/-.

Last year the Government of Maharashtra introduced a profession tax, and the Government of Gujarat has now followed suit. Although a short Act, it affects the people in a number of ways and they should be familiar with its provisions. The provisions under the Act are simple and brief but their implications are wider. The authors have tried to explain these provisions, with comments under each section. An appendix gives the text of Article 276 of the Constitution which empowers a State to levy the tax. The reasons for the enactment are also explained in the Appendix.

2. The brochure contains a historical background, a general review, and the text of the Act with Commentary. The Act, which has 29 sections and two Schedules deals with the levy and charge of tax, the employer's liability to deduct the tax from salary, registration of employers, filing of monthly return and assessment of registered employer. The recovery of the tax as arrears of land revenue and as per returns and assessment are covered. Appeal, revision, and rectification of mistake are provided for and authorities mentioned for the implementation and administration of the Act. Provision is made for maintenance of accounts, their production and inspection, and for penalties for offences under the Act. The powers conferred on the authorities are described and proceedings in a Civil Court are barred in respect of orders passed under this Act. Other provisions relate to refund, the powers of the Commissioner to delegate his powers, and the rule-making powers of the State Government.

R.S.S.

COMMENTARIES ON COMPANIES ACT 1956. Second Edition, 1976. By Jagdish Swarup, Senior Advocate, Supreme Court of India, Eastern Book Co., 34, Lalbagh, Lucknow. Vol. 1 (Ss. 1 to 483). Pp xxviii & 1010; Vol. 2 (Ss. 484 to end). Pp. xix & 1012 to 2076. Price Rs. 140 per set.

The first edition of this exhaustive treatise on Company Law, which discusses most of the important aspects of the subject, was reviewed on page 77 of AIR Journal Section in 1964. Since then there have been considerable changes in the law. The powers of the High Court have been curtailed and in many cases the Company Law Board exercises those powers, and the book has therefore been completely revised.

2. In England the first Companies Act was passed in 1862 and the English Law reports bring out how the law has developed in England. For a proper understanding of the Indian Act a knowledge of English decisions is indispensable, and the principles enunciated

have been here reproduced in the Judges' own language. The legislative base of the Indian Companies Act is the English Companies Act, and for the exposition of the principles of the Company Law one has often to look to the decisions of the English Courts. And yet the book is not a mere digest of cases; only all the important cases which have laid down some principle of law have been laid down where appropriate.

3. With its 658 sections and 13 Schedules the Companies Act 1956 is perhaps the most exhaustive enactment on the statute book. Sections 11 to 145 deal with incorporation, prospectus and allotment of shares, share capital and registration of charges, while Sections 561 to 658 cover the application of the Act to Companies formed under other laws, winding up of unregistered Companies, registration officers, offices and fees, and collection of information and statistics. Management, administration and winding up are considered in as much as two-thirds of the Act, viz., Sections 146-560.

4. The book, which includes about 34 appendices and a table of cases and subject index, covers such topics as registration and incorporation, memorandum and articles of association, prospectus, promoters, shares, share holders and share capital, directors and meetings, dividends, audit and accounts. Borrowing, lending and investment, majority powers, kinds of companies and winding up of companies are also dealt with, the commentary on each section being accompanied by an adequate and useful synopsis. There is an Addenda in the second volume which includes Companies (Central Government's) General Rules and Forms (Third Amendment) Rules, 1975 as also the (Fourth Amendment) Rules, 1975, and Companies (Appeals to the Central Government) Amendment Rules, 1975.

R.S.S.

THE ESTATE DUTY ACT. By D. H. Nanavati, B.A., LL.B., Solicitor, & H. D. Nanavati, B. A. LL. B., (Bom.), LL. M. (Harvard). Solicitor, Third Edition, N. M. Tripathi, 1976. Pp. lvi & 934 Price, Rs. 90/-.

There is little background of the law relating to Estate Duty in India, which closely follows the language of the English statute on the subject, so that the Indian lawyer faces several difficulties and problems which this book attempts to solve. The Commentary in this standard work has been thoroughly revised in the light of the recent rulings of the Courts in India & U. K., which have been fully discussed, with the principles underlying them explained in detail. As before, the com-

mentary is given subject-wise and the text of the Act has been printed separately, but cross-references have been given beneath each section in the text to indicate the pages where the subject-matter of the section is discussed. There are chapters on the change of estate duty, controlled companies, aggregation of property and rates of duty, valuation, deductions, collection of the duty and procedure and incidence, as well as a table of cases & index. The Estate Duty Rules have been incorporated with the relative forms, and the case law has been stated as at 31st December 1975. There are also a comparative table of Indian and U. K. provisions as well as several useful appendices.

2. Some of the decisions of the English Courts on the subject of passing of property are important, vide the House of Lords decision in *Ralli Bros Ltd. v. I. R. C.*, which depicts a method whereby estate duty could be avoided in cases where it would become payable on the death of an elderly person. This and other cases relating to discretionary trusts have been discussed in details, and the border-line between some of the cases with apparently similar facts but with opposite results has been explained. The facts of each case have been set out as well as the principles enunciated in them, and a summary of the conclusions given to show how the cases are distinguished from one another.

3. Among the Indian decisions given since the publication of the previous edition, the majority relate to the interpretation of section 10 of the Indian Act. There has been a plethora of decisions, some favouring Government and others favouring the assessee. In the meanwhile the Legislature has added a proviso to section 10, under which the husband is allowed to reside with his wife in the family house gifted by him to her, and incorporated a new clause which provides for an exemption from duty in case the deceased survives for a period of five years after making a gift. Finally, in *Controller of Estate Duty, Madras v. Kanakasabai*, the Supreme Court of India reversed the decisions of the Madras High Court, holding that for the charge of duty to attach under section 10 the benefit reserved to the deceased must have issued out of the gifted property itself.

4. Since the publication of the previous edition, provision has been made for deducting capital gains tax from the estate duty, for exemption of certain government pensions and annuities, and for exemption of National Defence Gold Bonds, 1980.

This newly revised edition should be as welcome to the Bench and the Bar, to Char-

tered Accountants and estate duty practitioners and to students as the earlier editions.

R.S.S.

THE BOMBAY PREVENTION OF FRAGMENTATION AND CONSOLIDATION OF HOLDINGS ACT, 1947. (With the Bombay Prevention of Fragmentation and Consolidation of Holdings Rules 1959) & Notifications, with Comments and Case Law upto 1976 (As applicable to the States of Gujarat and Maharashtra). By C. B. Trivedi, B.A., LL.B., 1976 Vora Prakashan, Ahmedabad. Pages 131, Price Rs. 10/-.

The thirty eight sections of the Bombay Act under notice include chapters on the determination of standard and local areas and the treatment of land fragments, the procedure for consolidation, effect of consolidation proceedings and of consolidation of holdings, powers and procedure of consolidation officers in Maharashtra, and miscellaneous subjects. There are thirty four Rules framed in 1959 under the Act and also a number of forms. The present book, which contains an index and table of cases, also includes in the appendices several Notifications and the Saurashtra Prevention of Fragmentation and Regulation of Holdings Act 1954.

2. The object of the Bombay Act is to allot compact areas in lieu of scattered holdings, so that large scale cultivation may be possible. So it places restrictions on transfer, partition, court sale and on alienation and subdivision of consolidated holdings after allotment and redistribution, and this is held to be a law relating to agrarian reforms, and as such it was held immune from challenge under Arts. 14, 19 and 31 of the Constitution. The Act provides for penalty for contravention, summary eviction of unauthorised tenants, appointment of consolidation officers and preparation of consolidation scheme, compensation, redistribution and certificate of transfer.

3. The present book, which contains upto date case law, rules, forms, appendices and commentary in the form of notes should be useful to advocates and others concerned. It is worthy of note that the author has made certain suggestions for reform which deserve consideration.

R.S.S.

LAW OF PRESS CENSORSHIP IN INDIA, Soli J. Sorabjee, Senior Advocate, Supreme Court of India, Foreward by M. Hidayatullah, N. M. Tripathi Private

Ltd., Bombay. Pp. xvi & 272. Price Rs. 35/-.

An availability of unpolluted sources of news is the hall-mark of democracy. Rudyard Kipling said that he kept six honest serving-men and they taught him all he knew. Their names were what and why and when and how and where and who. The objective reporting though highly desirable is difficult. The reporting of news is bound to be coloured by the sensations and emotions of the reporter. Even objective reporting may become altogether objectionable in certain circumstances. A dilemma before every free society is therefore how far to permit free speech and expression and how far to go in preventing free speech and expression and in punishing the abuse thereof.

Freedom of speech and expression has always held pride of place in civilized societies and has been humanity's ideal, in times, ancient and modern. Our Founding Fathers attached great importance to this freedom and very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression. As observed by Patanjali Sastri, J. in *Romesh Thappar V. State of Madras* (AIR 1950 S C 124) "a freedom of such magnitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison, that 'it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits'. But when the democracy goes off the rails, and protests, non-co-operation with the government and resistance are conceived to destroy the very fabric of society and undo the stability of political system, posing a threat to democracy itself, it would be foolish to expect the government to wait 'till the catalyst is added'".

In this perspective the learned author has examined the various judgments of the Supreme

Court and the High Courts on the ambit of the Freedom of the Press within the framework of the Indian Constitution, the permissible restrictions which can be placed upon this Freedom and the circumstances in which this Freedom may have to be seriously curtailed for subserving the larger interest of Public Safety and Public Order in even a Democratic Society. Various aspects of precensorship as such and the Censorship Order promulgated on 26th June, 1975 are examined, including the role of the censoring authorities and the limits of their power under the Censorship Order. There is a critical and exhaustive examination of the judgments of the Supreme Court and the High Courts regarding the principles to be applied in assessing the nature of a writing, the reasons for which a writing can be prohibited and the grounds on which judicial interference with the decisions of the censoring authorities is possible.

The learned Author has put in appendices, for ready reference, the texts of these provisions, and the congeries of Rules and Guidelines issued under it, including also the text of the Prevention of Publication of Objectional Matter Act, 1976. Included also are the texts of the Judgments of the Bombay High Court in cases in which the Author appeared and was successful in getting a few censorship orders quashed in test cases.

To conclude, the author though not subscribing to the theory of absolute freedom of speech has passionately appealed that in normal times law should be more penal than preventive. As observed by M. Hidayatullah, Ex-Chief Justice of India, in his foreword the learned author has certainly put the legal fraternity in his debt by providing in one place all the texts of the laws and in assessing their ambit.

R.S.K.

BOOKS RECEIVED

QUESTIONS AND ANSWERS — URBAN LAND CEILING ACT. By N. K. Acharya, Advocate, Opp. Secretariat, Saifabad, Hyderabad—500004. 1976. Pp. 102. Price Rs. 10/-.

The book is divided into two parts; the first part containing Questions and Answers on the Act, and the second part containing the text of the Act and in addition, Statement of Objects and Reasons, notes on clauses appended to the Bill and other relevant enactments and conversion tables and factors for square measure.

ANTI-PALKHIYALA. By N. K. Acharya, Advocate, Opp. Secretariat, Saifabad, Hyderabad—500004. 1976. Pp. 165, Price Rs. 10/-.

The book is divided into two parts. The first part contains a critique on Our Constitution Defaced and Defiled, and the necessity of further amendment of the Constitution. The second part contains the pattern of voting in Parliament and the Statement of Objects and Reasons on all the 39 Constitutional amendments.

Shri RAJA RAM AGRAWAL,
Recently appointed Advocate-General of U. P.



Shri R. R. Agrawal, recently appointed as Advocate-General of the State of U. P., took over charge of his office on 12.3.1976. He had a brilliant academic career in school and also at the University level. He secured postgraduate degree in Economics in 1950 and took LL. B. degree in 1952. After working with late Munshi Ambika Prasad and late Shree Nath Pathak he was enrolled as an advocate in 1953. Since then he has been practising in the Allahabad High Court with great distinction, merit and forensic skill. He has specialised in Constitution, Tax, Civil and Company Laws. He has adorned the office of the Chairman, U. P. State Bar Council. During his tenure as Chairman, U. P. Advocates' Welfare Trust was created and Group Insurance of all advocates of U. P. was undertaken. Since 1975 he is also representing the State of U. P. in the All India Bar Council. His field is not limited to law but he takes interest in social activities too. As a member of the delegation of the Indian Council of World Affairs he has visited Middle East and U. K. and other European countries. He is a gentleman par excellence. By sheer dint of merit, industry and integrity, he has risen to the top of his legal profession.

hence was dividend within the meaning of Section 2 (6-A) (c) of the Act. The assessee's appeal was allowed to that extent.

8. Both the assessee company as well as the Commissioner applied to the Tribunal for reference of certain questions arising from the order of the Tribunal to the High Court. The Tribunal thereupon referred the question reproduced above in a composite reference to the High Court.

9. Dealing with Items 1 and 4 mentioned in the question, the High Court held as under:

"As both the learned counsel agree that the same treatment should be given to the reserves created on writing up the value of the assets as to the excess and/or profit realised on sale either of the lands or of the assets of the tea estates, it should be sufficient to consider the case of such excess arising from the sale and/or transfer by the two tea companies. Whether the excess of the price realised over the book value of the lands as shown in the land account balance and as envisaged in the question referred or whether the excess on the sale of the entire tea estates over the book value of the assets are to be considered for inclusion in the 'accumulated profits' under Section 2 (6-A) (c), there can be no doubt that such excess or profit is a realisation of capital rise and not profit of the business. As according to the decision of the Supreme Court in *Short Brothers'* case 60 ITR 83 = (AIR 1967 SC 81), unless such appreciation has been included in capital gains, a distribution thereof by the liquidator will not be deemed to be dividend for the purpose of the Income-tax Act, we have to find out how much of such excess or profit has been included in the computation of capital gains of the two tea companies on the transfer of the tea estates in 1947. In his order the Appellate Assistant Commissioner has recorded that for the assessment year 1949-50 the assessment order on Dibru Darang Tea Company Ltd. showed that the company was not liable to capital gains tax, while the assessment order for that year of M/s Taikrong Tea Co. Ltd. showed that a sum of Rs. 2,47,921 was brought under tax under the head of 'capital gains'. It must therefore, be held that it is only the sum of Rs. 2,47,921 which could be included in 'accumulated profits' for the purpose of determining the dividend under Section 2 (6-A) (c). Mr. B. L. Pal contended that there was no conclusive finding

in the order of the Appellate Assistant Commissioner as to the capital gains of the two tea companies in respect of the transfer of the tea estates and the proper determination of capital gains payable in respect thereof had not been established. We are unable to accept this contention. Accordingly, so far as the first and last items in the referred question are concerned the answer would be that only the sum of Rs. 2,47,921/- was includible in the accumulated profits within the meaning of Section 2 (6-A) (c)."

Regarding Items 2 and 3 in the question the finding of the High Court was as under:

"The balance in the profit and loss account is arrived at after deducting or providing for all outgoings including the estimated liability for both income-tax and agricultural income-tax. Therefore, the balance carried to the balance-sheet is pure profit, that is to say, the commercial profit of the undertaking. We are unable to accept Mr. Ray's contention that each item in the balance-sheet contains in itself the proportion of the income attributable to the business activity and to the agricultural activity of the tea companies and must be disintegrated into its component parts at the time of inclusion in dividends. Tea companies carry on a business activity though such activity may include agricultural operation as part thereof. Overall excess of incomings over outgoings, as reflected in the balance of profit and loss account, would represent the commercial profits of the business undertaking of the tea companies and though a bifurcation is necessary for the purpose of assessment and imposition of tax no further bifurcation could be made once the balance of profit was finally determined. Of such balance it could not be said that a part represents agricultural income and the rest represents income from business. So far as the general and taxation reserve is concerned, Mr. Ray agrees that such reserve is usually built up out of the profits to meet future liabilities but contends that as in this case also such reserve had been built up of 60 per cent. agricultural profit such reserve should again be disintegrated into the component parts. We are entirely unable to accept this contention. As pointed out by Mr. Pal, the Supreme Court in *Girdhardas's* case 63 ITR 300 = (AIR 1967 SC 795) advocated disintegration of the amount distributed into two components, namely, capital and accumulated profits. There is no scope for fur-

ther disintegration of profits into its component parts."

The amounts mentioned in Items 2 and 3 of the question were accordingly held to be wholly includible in the accumulated profits within the meaning of Section 2 (6-A) (c) of the Act.

10. Before dealing with the contentions advanced by the counsel for the parties, it would be convenient to set out the relevant provisions of the Act. Section 2 (1) defines "agricultural income" to mean, inter alia,

"(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in the taxable territories or subject to a local rate assessed and collected by officers of the Government as such;

(b) any income derived from such land by—

(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii).

(c)

"Capital asset" in Section 2 (4-A) means property of any kind held by an assessee, whether or not connected with his business, profession or vocation, but does not include—

(i)

(ii)

(iii) any land from which the income derived is agricultural income.

"Dividend", according to Section 2 (6-A) (c), includes "any distribution made to the share-holders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not". The explanation to Section 2 (6-A) reads as under:

"Explanation. — The expression 'accumulated profits', wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948, and before the 1st day of April, 1956."

"Income" has been defined in Section 2 (6-C) to include dividend. "Total in-

come" has been defined in Section 2 (15) to mean the total amount of income, profits and gains referred to in sub-section (1) of Section 4 computed in the manner laid down in the Act. Section 3 provides inter alia that income-tax shall be charged for a year in respect of the total income of the previous year of every individual and company. Section 4 relates to total income of a previous year of any person. According to clause (8) of sub-section (3) of that section, agricultural income shall not be included in the total income chargeable to tax under Section 3 of the Act. Section 6 enumerates the six heads of income to be:

(i) salaries, (ii) interest on securities, (iii) income from property, (iv) profits and gains of business, profession or vocation, (v) income from other sources, and (vi) capital gains.

According to Sec. 12 (1-A), income from other sources shall include dividends. Under Section 12-B, as it stood at the relevant time, capital gains tax shall be charged in respect of any profits or gains arising from the sale, exchange, relinquishment or transfer of a capital asset effected after the 31st day of March 1946 and before the 1st day of April 1948 and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange, relinquishment or transfer took place. Section 59 empowers the Central Board of Revenue, subject to the control of the Central Government, to make rules for carrying out the purposes of the Act. Indian Income-tax Rules, 1922 were framed in pursuance of that section. Rule 23 of the said rules provides for assessment of income which is partly agricultural and partly income chargeable to income-tax. Rule 24, with which we are concerned, reads as under:

"Income derived from the sale of tea grown and manufactured by the seller in the taxable territories shall be computed as if it were income derived from business, and 40 per cent. of such income shall be deemed to be income, profits and gains liable to tax"

There is a proviso to this rule, but it is not necessary to reproduce the same.

11. In appeal filed by the assessee-company, its learned counsel, Mr. Ray, has contended before us in respect of Items 2 and 3 of the question that 60 per cent. of the amounts mentioned in these items were agricultural income and as such were not income for the purpose of the Act. To that extent, it is urged

the amounts did not constitute accumulated profits within the meaning of Section 2 (6-A) (c) of the Act. The High Court, according to the contention, was in error in holding to the contrary. The above contention has been controverted by Mr. Hardy on behalf of the revenue and, in our opinion, is not well founded.

12. In *Inland Revenue Commr. v. George Burrell*, (1924) 2 KB 52, it was held that super-tax was not payable on the undivided profits, of past years and of the year in which the winding up of a company occurred which were distributed among the share-holders, because in the winding up they had ceased to be profits and were assets only. It was further observed in Burrell's case that the only thing the liquidator of a company in liquidation may do is to turn the assets into money, and divide the money among the share-holders in proportion to their shares. Surplus of trading profit made in a particular year are distributable rateably among all the share-holders as capital, and it is not right to split up the sums received by the share-holders into capital and income, and thus disintegrate the sums received by the share-holders subsequently into component parts based on an estimate of what might possibly have been done, but was not done. As the Indian Companies Act, 1913, closely followed the scheme of the English Companies Act, and the view expressed in Burrell's case applied to the Indian Income-tax Act, a special definition of "dividend" was devised by the legislature by the enactment of the Income-tax (Amendment) Act 7 of 1919 with a view to undo the effect of Burrell's case. Clause (c) of sub-section (6-A), as originally enacted, stood as follows:

"'Dividend' includes—

(c) any distribution made to the share-holders of a company out of accumulated profits of the company on the liquidation of the company:

Provided that only the accumulated profits so distributed which arose during the six previous years of the company preceding the date of liquidation shall be so included."

By the Finance Act, 1955, the proviso to sub-clause (c) of clause (6-A) was omitted. There was a further amendment made by the Finance Act, 1956, and cl. (c) to the amended section read as follows:

"2. 'Dividend' includes—

... ..

(c) any distribution made to the share-holders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not."

As a result of the above, distribution which is attributable to the accumulated profits of the company immediately before its liquidation is deemed to be dividend and as such liable to be taxed.

13. Sixty per cent. of the profits made by DDT Co. and TT Co. by sale of tea grown and manufactured by them were not liable to be taxed under the Act in view of Rule 24 of 1922 Rules because they were to be treated as agricultural income of those two companies. The question with which we are concerned, however, is that even though 60 per cent. of the said profits constituted agricultural income in the hands of DDT Co. and TT Co., once those profits got accumulated with those two companies, did they answer to the description of "accumulated profits" as used in the definition of dividend in Section 2 (6-A) (c)? The answer to this question, in our opinion, should plainly be in the affirmative. We are unable to accede to the contention of Mr. Ray that as only 40 per cent. of the profits which got accumulated were liable to be taxed in the hands of DDT and TT companies under the Act and 60 per cent were not liable to be so taxed, only 40 per cent of the amount of accumulated profits should be treated as accumulated profits for the purpose of Section 2 (6-A) (c). The acceptance of the contention would necessarily postulate reading in Section 2 (6-A) (c) the words "accumulated profits as are liable to be taxed under the Act". The words "as are liable to be taxed under the Act" are not there in the definition and it would not, in our opinion, be permissible to so construe the clause as if those words were a part of that clause. There is also nothing in the language or context of that clause as would warrant such a construction. Accumulated profits would retain their character as such even though a part of them were not taxed as profits under the Act. It is pertinent to mention in this connection that we are concerned in the appeal of the assessee with Items 2 and 3 of the question which relate to accumulated profits in the ordinary sense and not to accumulated profits arising out of capital

gains which are dealt with by the explanation to Section 2 (6-A) of the Act.

14. There can also be no doubt that whatever amount has been distributed to the assessee company and is attributable to accumulated profits in Items 2 and 3 mentioned in the question would constitute dividend in the hands of the assessee and the whole of the amount so received would be liable to be taxed as such. This is clear from the Constitution Bench decision of this Court in the case of *Mrs. Bacha F. Guzedar, Bombay v. Commr. of Income-tax, Bombay*, 27 ITR 1 = (AIR 1955 SC 74). The assessee in that case was a share-holder in certain tea companies, 60 per cent. of whose income was exempt from tax as agricultural income under Section 4 (3) (viii) of the Indian Income-tax Act. The assessee claimed that 60 per cent. of the dividend income received by her on her shares in those companies was also exempt from tax as agricultural income. This claim was rejected and it was held that the dividend income received by the assessee was not agricultural income but was income assessable under Section 12 of the Act. Agricultural income as defined in the Act, according to that decision, was intended to refer to revenue received by direct association with the land which is used for agricultural purposes and not by indirectly extending it to cases where that revenue or part thereof changes hands either by way of distribution of dividends or otherwise.

15. Mr. Ray has assailed the correctness of the view taken by the Constitution Bench of this Court in the above decision and has submitted that the matter should be reconsidered. Apart from the fact that this Bench is bound by the decision of the Constitution Bench, we find nothing in that decision as warrants reconsideration of the matter. We would, therefore, uphold the answer given by the High Court in respect of Items 2 and 3 of the question.

16. In appeal by the Commissioner of Income-tax his learned counsel, Mr. Hardy, has submitted in respect of Items 1 and 4 that as 60 per cent. of the income from the land held by DDT Co. and TT Co. was to be treated as agricultural income in view of Rule 24 of 1922 Rules, the said land to the extent of only 60 per cent. would not answer to the description of capital asset as defined in Section 2 (4-A) of the Act. As 40 per cent. of the income derived from that land was not agricultural income, 40 per cent. interest

in that land, according to the submission, should be held to be capital asset for the purpose of Section 2 (4-A) of the Act. Forty per cent. interest in that land, it is further submitted, would not be taken out of the definition of capital asset by virtue of clause (iii) of Section 2 (4-A) and any appreciation in the value of the land to the extent of 40 per cent. would constitute capital gain. As such gain arose during the period from April 1, 1946, to March 31, 1948, the same, according to Mr. Hardy, would answer to the description of accumulated profits as mentioned in the explanation to Section 2 (6-A) of the Act.

17. The above contention of Mr. Hardy, in our opinion, is not well founded. Income which is realised by sale of tea by a tea company which grows tea on its land and thereafter subjects it to manufacturing process in its factory is an integrated income. Such income consists of two elements or components. One element or component consists of the agricultural income which is yielded in the form of green leaves purely by the land over which tea plants are grown. The second element or component consists of non-agricultural income which is the result of subjecting green leaves which are plucked from the tea plants grown on the land to a particular manufacturing process in the factory of the tea company. Rule 24 prescribes the formula which should be adopted for apportioning the income realised as a result of the sale of tea after it is grown and subjected to the manufacturing process in the factory. Sixty per cent. is taken to be agricultural income and the same consists of the first element or component, while 40 per cent. represents non-agricultural income and the same comprises the second element or component.

18. We are fortified in the above conclusion by two decisions of this Court in the cases of *Karimtharuvi Tea Estates Ltd. v. State of Kerala*, 48 ITR (SC) 83 = (AIR 1963 SC 760) and *Anglo-American Direct Tea Trading Co. Ltd. v. Commr. of Agricultural Income-tax, Kerala*, 69 ITR 667 = (AIR 1968 SC 1213). In the case of *Karimtharuvi Tea Estates Ltd.*, it was observed while dealing with the income derived from the sale of tea grown and manufactured by the seller in the context of Rule 24:

"Of the income so computed, 40 per cent. is, under Rule 24, to be treated as income liable to income-tax and it would follow that the other 60 per cent. only

will be deemed to be 'agricultural income' within the meaning of that expression in the Income-tax Act."

In the case of Anglo-American Direct Tea Trading Co. Ltd., the Constitution Bench of this Court held that income from the sale of tea grown and manufactured by the assessee is derived partly from business and partly from agriculture. This income has to be computed as if it were income from business under the Central Income-tax Act and the Rules made thereunder. Forty per cent. of the income so computed is deemed to be income derived from business and assessable to non-agricultural income-tax. The balance of 60 per cent. of the income so computed is agricultural income within the meaning of the Central Income-tax Act.

19. So far as the lands held by DDT Co. and TT Co. were concerned, they yielded purely agricultural income in the shape of green tea leaves. Forty per cent. of the income on sale of tea which was received by DDT Co. and TT Co. was not income from land. It was income which should be ascribed to manufacturing process to which the green tea leaves were subjected in the factories of those companies. As the lands held by DDT Co. and TT Co., yielded agricultural income, it would follow that those lands did not constitute capital asset as defined in Section 2 (4-A) of the Act. Clause (iii) appended to Section 2 (4-A) expressly states that capital asset does not include any land from which income derived is agricultural income. Any gain arising from the transfer of such land would not constitute capital gain under the Act and consequently would not be liable to be taxed as such. The distribution of that amount on the liquidation of the companies would also not partake of the character of dividend. It may be apposite in this context to refer to the case of First Income-tax Officer, Salem v. Short Brothers (P.) Ltd., (AIR 1967 SC 81) (supra) wherein this Court dealt with the sale of a coffee estate by a company which went into liquidation. It was held by this Court that the capital appreciation in respect of the lands from which the income was derived as agricultural income and was not taxable in the hands of the company as capital gains would not on distribution be liable to be so taxed as dividend under Section 12 of the Act. We, therefore, see no reason to interfere in the appeal filed by the Commissioner of Income-tax with the answer given by the High Court in respect of items 1 and

4 of the question. It is the common case of the parties that items 1 and 4 share the same fate.

20. As a result of the above, we dismiss both the appeals. In view of the divided success, we leave the parties to bear their own costs of both the appeals. Appeals dismissed.

AIR 1976 SUPREME COURT 1797

(From: Punjab and Haryana)*

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Bhagwan Singh Rana, Appellant
v. The State of Haryana, Respondent.
Criminal Appeal No. 265 of 1971,
D/- 30-4-1976.

(A) Evidence Act (1872), Ss. 24 and 3 — Confessional statement — Inculpatory and exculpatory portions — Acceptance of one of the portions — Permissibility.

It is permissible to believe one part of a confessional statement, and to disbelieve another, and it is enough that the whole of the confession is tendered in evidence so that it may be open to the court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness. AIR 1969 SC 422, Rel. on. (Para 6)

Cases Referred: Chronological Paras

AIR 1969 SC 422 = (1969) 2 SCR	
1033 = 1969 Cri LJ 671	6
AIR 1968 SC 832 = (1968) 2 SCR	
641 = 1968 Cri LJ 1017	5
AIR 1952 SC 343 = 1952 SCR 1091	
= 1953 Cri LJ 129	6
AIR 1952 SC 354 = 1953 SCR 94 =	
1953 Cri LJ 154	6

Mr. M. K. Ramamurthy, Sr. Advocate, (Mr. J. Ramamurthi, Advocate with him), for Appellant; Mr. Harbabs Singh Marwah, and Mr. R. N. Sachthey, Advocates, for Respondent.

Judgment of the Court was delivered by

SHINGHAL, J.:— This appeal of Bhagwan Singh Rana is directed against the appellate judgment of the

*(Criminal Appeal No. 1284 of 1970, D/- 5-2-1971—(Punjab & Har)).

FT/FT/B707/76/GGM

High Court of Punjab and Haryana dated February 5, 1971, upholding the judgment of Additional Sessions Judge, Gurgaon, dated November 4, 1970, convicting him of an offence under Section 52 of the Post Office Act but reducing the sentence to rigorous imprisonment for one year.

2. The appellant was working as Sub-Post Master in Sohna Adda Post Office, in the leave vacancy of Raghu Ram (P. W. 6) on March 21, 1967. Navtej Singh (P. W. 5), who was a student of the Junior Technical School Gurgaon, delivered a parcel containing a lady's wrist watch (Ex. P. 1) addressed to R. L. Bhardwaj (P. W. 3), to the appellant, on March 21, 1967, at the Sub-Post Office. It was an unregistered parcel. The watch did not reach the addressee. R. L. Bhardwaj (P. W. 3) went to Gurgaon in May, 1967, and contacted Navtej Singh (P. W. 5) for obtaining the watch from him. Navtej Singh informed him that he had already sent the watch by post on March 21, 1967. Navtej Singh and R. L. Bhardwaj then went to Sohna Adda Sub-Post Office and made inquiries about the parcel. Raghu Ram (P. W. 6) who had, in the mean time, resumed his duties as Sub Postmaster, told them that he was on leave on March 21, 1967, and that it was appellant Bhagwan Singh Rana who was working for him on that day. He also informed them that he had seen a tin plate lying in the post office. Navtej Singh (P. W. 5) saw that tin plate and identified it to be the same in which he had packed the watch. R. L. Bhardwaj (P. W. 3) thereupon filed a complaint with the postal authorities, and the inquiry was entrusted to A. P. Bhatnagar (P. W. 1), Inspector of Post Offices. It is alleged that during the course of inquiry the appellant recorded a statement in his own handwriting on May 25, 1967, in the Post Office at Parliament Street, New Delhi, where he was working on that date making some admissions. That statement is on the record as Ex. PB. It is alleged further that the appellant undertook to produce the watch the next day and that he appeared before Inspector A. P. Bhatnagar (P. W. 1) on May 26, 1967, in his office at Gurgaon,

and produced watch (Ex. P. 1) and also wrote a further statement Ex. PC. The matter was however not reported to the police until September 15, 1969. It was then that the police registered a case against the appellant and charge-sheeted him for the commission of an offence under Section 52 of the Post Office Act. The case was tried by Additional Sessions Judge, Gurgaon, who convicted the appellant and sentenced him to rigorous imprisonment for two years. As has been stated, his conviction has been upheld by the High Court but the sentence has been reduced to one year.

3. It has been argued by Mr. Ramamurthi on behalf of the appellant that Exs. PB and PC which were produced in the trial Court as an extra judicial confessions of the appellant, had not been made voluntarily, and should not have formed the basis of the appellant's conviction as they were not true, were not corroborated, and were retracted by the appellant.

4. We have gone through both the documents Exs. PB and PC. It has not been controverted, and was in fact admitted, that they are in the handwriting of the appellant. Ex. PB was recorded by the appellant on May 25, 1967 in the presence of Joginder Singh (P. W. 11) Deputy Post master of the Parliament Street Post Office, and Inspector A. P. Bhatnagar (P. W. 1), both of whom have recorded that fact in their respective endorsements and have stated that the document was written by the appellant in his handwriting without any dictation and was given by him to Inspector A. P. Bhatnagar (P. W. 1) then and there. Inspector A. P. Bhatnagar has denied that there was any pressure, influence or inducement when the appellant wrote and gave Ex. PB to him, and nothing has been elicited in the cross-examination to show that the statement in Ex. PB was not voluntary. So far as Joginder Singh (P. W. 11) is concerned, all that was asked in the cross-examination was whether Ex. PB was written by the appellant in his own handwriting, without any dictation, and the witness stated that that was so. There was no further

cross-examination, and we are satisfied that there is no justification for the argument that Ex. PB was not a voluntary statement. As has been stated, Ex. PB was written by the appellant on May 25, 1967, and he stated therein that he would deliver the watch (Ex. P1) to the Inspector the next day. The appellant did so, and recorded the other statement Ex. PC on May 26, 1967. He made a mention of his earlier statement Ex. PB in his statement Ex. PC, and did not venture to state that the earlier statement was not voluntary. On the other hand, the appellant stuck to what had been stated in Ex. PB and delivered the watch also, in the presence of S. C. Jain (P. W. 4) Post Master Gurgaon Head Post Office. He was cross-examined on the point whether the document was dictated to the appellant and he denied the suggestion. Nothing was elicited in the cross-examination of S. C. Jain to show that Ex. PC was not a voluntary document. It is therefore futile to contend that Exs. PB and PC should have been rejected by the courts below as they were not recorded by the appellant voluntarily.

5. It is true that the appellant went back on what he had stated in his own handwriting Exs. PB and PC. The main contention of the appellant in Ex. PB was that the watch (Ex. P 1) was in his possession as it had been given to him by Tej Ram, who was the packer in the post office, by opening the unregistered postal parcel which had been delivered to the appellant by Navtej Singh (P. W. 5). Navtej Singh and R. L. Bhardwaj (P. W. 3) have identified the watch, and the appellant and Tej Ram never claimed the watch to be their own property. The production of the watch, which had been stolen from the postal parcel, is also a satisfactory evidence to corroborate the statements which had been made by the appellant in Exs. PB and PC, and there is no real justification for the contention that those retracted statements should have been rejected for want of corroboration. We have gone through the judgment in Haroom Haji Abdulla v. State of Maharashtra, (1968) 2 SCR 641 = (AIR 1968 SC 832)

cited by Mr. Ramamurthy, but that was a case which related to the confession of a co-accused and the extent to which it could be used against an accomplice, and cannot avail the appellant.

6. It has also been argued by Mr. Ramamurthy that the courts below erred in accepting those parts of the statements of the appellant in Exs. PB and PC which were inculpatory and in rejecting those parts which were exculpatory, and that, in doing so, the courts lost sight of the requirement of the law that such statements should either be accepted as a whole, or not at all. For this proposition our attention has been invited to Hanumant v. State of Madhya Pradesh, 1952 SCR 1091 = (AIR 1952 SC 343) and Palvinder Kaur v. State of Punjab. 1953 SCR 94 = (AIR 1952 SC 354). The law on the point has however been laid down by this Court in Nishi Kant Jha v. State of Bihar, (1969) 2 SCR 1033 = (AIR 1969 SC 422) in which the two cases cited by Mr. Ramamurthy have been considered. After referring to Taylor's Law of Evidence and Roscoe's Criminal Evidence this Court has held that it is permissible to believe one part of a confessional statement, and to disbelieve another, and that it is enough if the whole of the confession is tendered in evidence so that it may be open to the court to reject the exculpatory part and to take inculpatory part into consideration if there is other evidence to prove its correctness. An examination of Exs. PB and PC shows that the appellant admitted that he was working as Sub-Post Master at Sohna Adda Post Office on March 21, 1967 when a Sikh boy (Navtej Singh, P. W. 5) came to the post office and delivered a parcel under postal certificate. The appellant also admitted that the parcel was opened by Tej Ram in his presence, and that he (Tej Ram) took out a lady's wrist watch (Ex. P 1) from it and gave it to him. The appellant however stated that he had asked Tej Ram not to open the parcel but he opened it without his consent. The exculpatory part may therefore be not of much consequence for the rest of the statement goes to establish be-

yond any doubt that the postal parcel was delivered to the appellant by Navtej Singh (P. W. 5), it was opened by the post office packer Tej Ram in the presence of the appellant. Tej Ram took out the watch (Ex. P1) from the parcel and gave it to the appellant, who kept it with him. The appellant wrote out Ex. PC the next day in continuation of his statement Ex. PB and presented the watch (Ex. P 1) to Inspector A. P. Bhatnagar, as aforesaid. He clearly stated in Ex. PC that the watch was the same which Tej Ram had given to him by opening the parcel which was delivered at the post office on March 21, 1967. It may be that the appellant tried to show in Exs. PB and PC that the parcel was not opened by packer Tej Ram with his consent, but the fact nonetheless remains that the parcel was, according to the appellant's own admission, opened in his presence, in an unauthorised manner, the watch was removed from it and the appellant kept the watch with him for a period of more than two months without accounting for it. As has been stated, these admissions of the appellant have been corroborated by other satisfactory evidence on the record in material particulars. There is therefore no reason to doubt that the appellant committed the offence under Section 52 of the Post Office Act and has rightly been convicted and sentenced as aforesaid.

7. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 1800

(From: Allahabad)*

A. N. RAY C. J., M. H. BEG AND
JASWANT SINGH, JJ.

Balgopal Das, Appellant v. The
State of U. P. and others, Respondents.

Civil Appeal No. 222 of 1975,
D/- 8-4-1976.

(A) U. P. (Temporary) Control of
Rent and Eviction Act (3 of 1947), S. 3

*(Special Appeal No. 189 of 1972,
D/- 8-8-1973—(All)).

FT/FT/B371/76/KSB

(2) — Filing of revision directly before Commissioner within 30 days of order essential in absence of any rule or specific authority to present it before another authority — A wrong practice of presenting revision to Additional District Magistrate cannot modify terms of section. 1973 All LJ 402, Overruled.

Section 3 (2) provides that the party aggrieved must "apply to the Commissioner to revise the order." The natural inference is that the party must apply to the Commissioner directly and not through some other authority or official. It is true that S. 3 (2) does not prescribe the manner and place of presentation of applications. But, unless there is some rule made to confer authority, upon the District Magistrate or the Additional District Magistrate concerned or his office, to act as the agent of the Commissioner, or a clear and specific authorisation by the Commissioner is proved, the filing of a revision application before the Additional District Magistrate cannot be deemed to amount to making the application to the Commissioner. The alleged practice of receiving revision applications through the Additional District Magistrate cannot be held to have been even established. And, in any event, such a practice was not enough to confer authority to receive petitions on behalf of the Commissioner. 1973 All LJ 402, Overruled; 1973 All LJ 120 and Spec. App. No. 189 of 1973, D/- 8-8-1973 (All), Affirmed. (Paras 11 to 13)

Cases Referred: Chronological Paras

1973 All LJ 120	=	1973 All WR
(HC) 28		10, 11
1973 All LJ 402		9, 10, 11, 13
1970 All LJ 909	=	1970 All WR
(HC) 521		5
1965 All LJ 211		5

Mr. B. Sen, Sr. Advocate, (Mrs. Leila Seth and M/s. B. Mohan, Parveen Kumar and O. P. Khaitan, Advocates of M/s. Khaitan & Co. Advocates with him), for Appellant; Mr. T. S. Krishnamoorthy Iyer, Sr. Advocate, (Mr. P. K. Pillai, Advocate with him), for Respondent No. 4.

Judgment of the Court was delivered by

BEG, J.:— The appellant, here by special leave, is a tenant of premises in Dehradun in respect of which the landlord respondent No. 4 had sought permission, under Section 3 of the U. P. (Temporary) Control of Rent & Eviction Act III of 1947 (hereinafter referred to as 'the Act'), to sue for his eviction. The permission was granted by the Rent Control and Eviction Officer, Dehradun, as long ago as 11 August, 1969, and, thereafter, the suit for ejectment of the appellant was filed on 19th November, 1969.

2. Section 3, sub-sec. (1) of the Act had merely imposed a bar on suits in Civil Courts filed without the permission of the District Magistrate except on certain grounds which are given there. The plaintiff-respondent, one Mrs. Sheila Kalha, wife of a retired army officer, was given permission to file her suit on the ground that she required the accommodation for personal residence. She is said to have been living at considerable expense to her at New Delhi due to inability to live in her own house at Dehradun as it has been occupied by the appellant.

3. The tenant had applied on 19th August, 1969, for a certified copy of the order of the Rent Control Officer granting the landlord permission to sue and got its copy on 25th August, 1969. Thereafter, the tenant filed a revision application under Section 3 (2) of the Act, purporting to be made to the Commissioner, Meerut Division, but actually filed on 16th September, 1969, before an Additional District Magistrate of Dehradun who had forwarded it on to the Commissioner. The Revision Application was received in the Commissioner's office on 24th September, 1969. It was rejected by the Commissioner on the ground that it was filed beyond the time prescribed by Section 3 (2) of the Act which reads as follows:

"(2) where any application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission, the

party aggrieved by his order may within 30 days from the date on which the order is communicated to him apply to the Commissioner to revise the order."

4. The State Government also rejected the revision application of the appellant tenant, filed under Section 7F of the Act, against the Commissioner's order.

5. The appellant tenant then approached the Allahabad High Court with a petition under Article 226 of the Constitution. The petition was rejected by a learned Judge on 31st October, 1972, on two grounds: firstly, that there was no provision in the Act or in the rules framed thereunder for enabling the Additional District Magistrate to receive the tenant's application under Section 3 (2) of the Act; and, secondly, that the time spent on obtaining the certified copy of the order of the District Magistrate could not be excluded under Section 12 (2) of the Limitation Act of 1963. For the second proposition reliance was placed upon: *Shyam Sunder Bajpai v. Commr. Allahabad Division, Allahabad*, 1965 All LJ 211 and *Ram Lakhan v. Commr., Varanasi Division, Varanasi*, 1970 All LJ 909.

6. A Division Bench of the Allahabad High Court had rejected the tenant's Special Appeal summarily. This Court, however, granted special leave to appeal under Article 136 of the Constitution on 28th July, 1975. We need not express any opinion on the correctness of the second proposition here if we agree with the High Court's view on the first point because, in that case, the tenant's application would be time barred even if the time spent in obtaining the copy was excluded.

7. The only contention, put forward by Mr. B. Sen on behalf of the tenant-appellant, on the first point, is that there is a practice in Dehradun, acting on some instruction of the Commissioner, Meerut Division, to receive revision applications to the Commissioner through an Additional District Magistrate of Dehradun, who has, therefore, the Commissioner's authority to receive these applications. It was urged that the filing of the Revision Application be-

fore an Additional District Magistrate should be deemed, in these circumstances, to be sufficient compliance with the requirements of Section 3 (2) of the Act which provides, as is clear from a bare look at it, that the revision application lies before the Commissioner.

8. It is difficult to see how a practice could possibly modify the provisions of the Act. There is not even a rule on this subject made by the State Govt. under the provisions of Section 17 of the Act which authorises the Govt. to "make rules to give effect to the purposes of this Act." There are rules on other matters but not on such a matter.

9. Mr. B. Sen relied on a Division Bench decision of the Allahabad High Court in *F. C. Pasricha v. State of U. P.*, Special Appeal No. 744 of 1971, decided on 5-4-1973 = (1973 All LJ 402) where it was held:

"It appears that the Commissioner had authorised the District Magistrate to receive revisions meant for him. By so authorising, the Commissioner was only indicating the place and the manner of representation of the revisions. Since the Rent Control Act did not either by itself or rules framed under it lay down the precise procedure in regard to the presentation of the revision, the Commissioner who was the authority entitled to entertain and decide the revisions was within his rights to prescribe the procedure in respect of presentation of the revisions. The direction given by the Commissioner in 1946 with regard to the presentation of revision was valid and enforceable."

10. In *Pasricha's case* (1973 All LJ 402) (supra) the single Judge decision in *Balgopal Das v. State of U. P.*, 1973 All LJ 120 on the case now before us was noticed by the Division Bench and distinguished on the ground that there was no evidence here to prove that there was any such practice. Both *Pasricha's case* (supra) and the case now before us come from the Dehradun District. We think it is difficult to reconcile the Division Bench decision in *Pasricha's case*, decided on 5th April, 1973, with the summary rejection of the Special

Appeal No. 189 of 1973 on 8th August, 1973, which is under appeal before us, although we find that one of the learned Judges is common to both the Division Benches.

11. We prefer the reasoning of the learned Single Judge in *Balgopal Das v. State of U. P.*, 1973 All LJ 120 (supra) to the reasoning of the Division Bench in *Pasricha's case* (1973 All LJ 402) (supra). A wrong practice cannot possibly modify what naturally and logically follows from the language in Section 3 (2) of the Act. This provision says that the party aggrieved must "apply to the Commissioner to revise the order." The natural inference is that the party must apply to the Commissioner directly and not through some other authority or official.

12. It is true that Section 3 (2) does not prescribe the manner and place of presentation of applications. But, unless there is some rule made to confer authority, upon the District Magistrate or the Additional District Magistrate concerned or his office, to act as the agent of the Commissioner, or a clear and specific authorisation by the Commissioner is proved, we fail to see how filing a revision application before the Additional District Magistrate can be deemed to amount to making the application to the Commissioner.

13. In *Pasricha's case* 1973 All LJ 402 (supra), the Division Bench had gone to the extent of holding that some communication made by the Commissioner in 1946 to the District Magistrate of Dehradun, even a copy of which was not placed before the Court, could be shown by means of an affidavit of a party, to have been both established and to be enough to confer an authority on an Additional District Magistrate of Dehradun to receive applications on behalf of the Commissioner under the provisions of Section 3 (2) of the Act which were introduced after 1946 according to the statement of facts in *Pasricha's case* (supra) itself. Prima facie, an authorisation cannot relate to a power or right conferred by a provision which could not be present to the mind of the Commissioner at all at the time when he is supposed to have made

some communication to the District Magistrate as the provision for a revision in such a case did not even exist then. We, therefore, think that the reasoning of the Division Bench in Pasricha's case (supra) is unacceptable. The alleged practice cannot be held to have been even established. And, in any event, such a practice was not enough to confer authority to receive petitions on behalf of the Commissioner. For that purpose, proof of at least specific authorisation by the Commissioner, after the introduction of the new provision, was required.

14. The result is that we are unable to find any merit in the case of the appellant who has been able to hold up proceedings for his eviction long enough in respect of accommodation which, on the allegations made on behalf of the landlord (this term includes the "land-lady"), has been required to meet the landlord's dire personal needs since at least 1969. We hope that the trial of the suit in such a case will not be delayed now.

15. We dismiss this appeal with costs throughout.

Appeal dismissed.

AIR 1976 SUPREME COURT 1803

(From: Andhra Pradesh)*

Y. V. CHANDRACHUD, V. R.
KRISHNA IYER AND N. L.
UNTWALIA, JJ.

B. Prabhakara Rao, Appellant v.
Desari Panakala Rao and others,
Respondents.

Civil Appeal No. 1989 of 1975,
D/- 5-4-1976.

(A) A. P. State Transport Appellate Tribunal Rules (1971), R. 15—Provision is *intra vires* — It merely makes patent what otherwise is latent in the statutory provisions — (Motor Vehicles Act (1939), Ss. 47, 57 and 54).

Stage-carriage permits are granted for providing an efficient public transport system.

*(Writ Appeal No. 1038 of 1973, D/- 28-11-1975—(Andh. Pra.)).

DT/ET/B288/76/CWM

The adjudicatory content has dual elements—public interest in the best stage-carriage service and private title to better serve the public.

The procedure is flexible, free from the rigidity of court trials, and this flexibility flows from the duty of the tribunal, charged with the task of picking out him who has the best plus points for plying a good bus service, to discharge it properly. A people-conscious power cannot be pared down in a self-defeating manner.

An activist tribunal (RTA, and, in exceptional cases, even the STAT) may even collect useful information bearing on considerations set out in S. 47 and after public exposure of such information at the hearing and reasonable opportunity to meet it, if anyone is adversely affected, put it into the crucible of judgment.

The antithesis is not between the right of representation within the time limited by Section 57 (4) and beyond it but between representations by statutorily authorised entities under Sections 47 and 57 and receipt of relevant evidence of information from any source whatsoever at any stage whatsoever but subject to the wholesome rules of natural justice.

These five-fold guidelines squarely accommodate R. 15 within the framework of Sections 47, 57 and 54 of the Act and there is no spill-over breaching the banks of the provisions. The rule merely gives effect to what the sections intend and is not therefore *ultra vires*. AIR 1965 Mad 79 (FB), AIR 1964 Pat 154, Approved, AIR 1959 Assam 183, Distinguished. (Paras 12, 13)

(B) Interpretation of Statutes — Statute establishing administrative agencies — Rule of construction.

In the construction of statutes establishing administrative agencies and defining their powers, there is little scope for the deep-rooted shibboleth that into the statute must be read, by lawyer's instinct, the requirements of the trial of a civil suit or the hearing of an appeal by the ordinary courts of the land. This may result in defeating their obvious purpose. (Para 10)

Cases Referred: Chronological Paras

AIR 1965 Mad 79 = (1964) 2 Mad
LJ 511 (FB) 14, 17

AIR 1964 Pat 154 = 1964 BLJR 73
14, 15

AIR 1959 Assam 183 = ILR (1957) 9
Assam 206 17

AIR 1957 SC 232 = 1957 SCR 98
14

1911 AC 179 = 80 LJKB 796 15

Mr. M. N. Phadke, Sr. Advocate,
(Mr. B. Kantarao, Advocate with
him), for Appellant; Mr. V. S. Desai,
Sr. Advocate, (M/s. K. R. Chaudhuri,
S. L. Setia and Mrs. V. Khanna, Ad-
vocates with him), for Respondent
No 1.

Judgment of the Court was de-
livered by

KRISHNA IYER, J.— Counsel
for the appellant — a jolted trans-
port operator — has assertively
argued for an untenable position.
heedless of the true nature of 'trans-
port permit' jurisprudence. The sole
issue on which limited leave has
been granted to him by this Court
under Art. 136 lends itself to straight
forward resolution, once we grasp
the public character of the litigation
and public purpose of the jurisdic-
tion where permits regulating the
plying of stage carriages are award-
ed or refused. The conscience of
this branch of public law is justice
to the public, although, in the pro-
cess of adjudication private claims
to carry on transport business
through permits are comparatively
evaluated. Public interest is the
paramount consideration, while pri-
vate rights, fundamental though, ap-
parently constitute the quasi-lis for
decision. The touchstone of better
merit is solely the ability to serve
the public, and the hierarchy of
transport tribunals, bearing true
faith and allegiance to Section 47 of
the Motor Vehicles Act, 1948 (for
short, the Act) have the duty and,
therefore, the power to consider all
factors pertinent to the larger
scheme of efficient public transport.
To equate — and thereby hamstring
— this jurisdiction and processual
law with what governs a civil pro-
ceeding under the Civil Procedure
Code, is to miss the policing policy
of the law and maim the amplitude
of the power-duty complex. In other
words, the duplex scheme of the sta-

tute is the holding of a public en-
quiry to determine who will serve
public interest best but ordinarily
activated into that enquiry by pri-
vate applicants for permits. The pro
bono publico character of the hearing
cannot be scuttled in the name of
competitive individual rights and
narrow procedural trappings.

2. The minimal facts. The
appellant and the 1st respondent,
among others, applied for permits to
ply a stage carriage on a specified
route in the Krishna District, Andhra
Pradesh. Although there were two
permits for issuance, one was given
to R2 and that has become final. We
are now concerned only with the
other permit which had been grant-
ed by the Regional Transport Autho-
rity (acronymically, RTA) to the ap-
pellant but was switched over to the
1st respondent by the State Trans-
port Appellate Tribunal (STAT) on
taking into consideration a fresh
ground and supporting evidence to
the effect that the appellant was
guilty of a transport tax violation
and had compounded that offence
under Section 60 (3) of the Act. The
power in this behalf was stated to
be based on Rule 15 of the Andhra
Pradesh State Transport Appellate
Tribunal Rules, 1971 (hereinafter re-
ferred to as the Appellate rules),
which reads:

"15. Additional Evidence— (i)
The parties to the appeal or application
shall not be entitled to produce addi-
tional evidence whether oral or
documentary before the Tribunal
but,—

(a) if the authority from whose
order the appeal or application is
preferred has refused to admit evi-
dence which ought to have been ad-
mitted, or

(b) if the party seeking to ad-
duce additional evidence satisfies the
Tribunal that such evidence, notwith-
standing the exercise of due diligence
was not within his knowledge or
could not be produced by him at or
before the time when the order under
appeal was passed; or

(c) if the Tribunal requires any
documents to be produced or any
witnesses to be examined to enable
it to pass just orders; or

(d) for any other sufficient rea-
son, the Tribunal may allow such

evidence or documents to be produced or witnesses examined:

Provided that where such evidence is received the other party shall be entitled to produce rebutting evidence, if any.

(ii) If the Tribunal is of opinion that any witness should be examined in connection with any case before it, it may instead of examining him before itself, issue a commission to the concerned Regional Transport Authorities or the State Transport Authority as the case may be, or to an Advocate or such other suitable person as it may deem fit, in the circumstances of the case."

3. The vires of this rule was challenged before us and we will examine the contention. But, to continue the narrative, when the appellate authority deprived the appellant of his permit he attacked the order without avail, before the High Court at both tiers. Undaunted, he has carried the appeal to this Court where the controversy is confined to the validity of Rule 15, although we have heard arguments on a wider basis to appreciate the point made by counsel. The argument of ultra vires urged before us rests on the scope of Sections 57 (4) and 64 of the Motor Vehicles Act and the fitment of Rule 15 into the purpose and text of these provisions.

4. Having heard counsel on both sides, we are disinclined to accede to the submission of Shri Phadke for the appellant. Why? we will proceed to answer.

5. Rulings galore, of this Court and the High Courts, have focussed on Section 47 of the Act to emphasize that the quasi-judicial bodies entrusted with the work of issuing stage carriage permits must be conscious of the brooding presence of public interest, in the midst of the sparring contest of private applicants. A casual perusal of that provision brings home this juristic under-pinning of the jurisdiction. Against this background, we may notice the meaning of the clauses which broaden the nature of the enquiry and mark it off from a traditional civil litigation. Passengers' associations, police officers, local authorities and existing operators

who may have nothing directly to do with the rivalry for a permit have a place in the scheme and may make representations on a variety of matters. So also, in an appeal, the RTA itself may be heard. Thus, the considerations going into the judicial verdict are dominated by public interest; non-parties who have only to present points germane to public interest are allowed to represent their point of view. Why? Because the object of the regulatory statute is to promote smooth public transport and subject to the weighty factors bearing thereon set down in Section 47 (1) of the Act and, indeed, with a view to serve the public the better, applicants are chosen in recognition of their fundamental right under Art. 19 canalised by reasonable restrictions in public interest. To imprison such an enquiry into the familiar mould of a civil proceeding in ordinary courts is to be pathological, if one may say so. A freer, healthier, approach is the prescription. Of course, Shri Phadke is right in that any representation, ground or evidence presented by anyone prejudicing the right of an applicant has to be considered only subject to the canons of natural justice and in the discretion of quasi-judicial authority. Justice to the public and the parties can and must be harmonised. Such is the simplistic statement of the law.

6. A few more facts and some more law are necessary.

7. As stated earlier, the appellant got the permit from the RTA although both the contestants before us were equally qualified, having obtained equal marks on the basis of the Andhra Pradesh Motor Vehicles Rules (for short, the MV Rules). The appellate result went against the appellant because another applicant who had filed an appeal before the STAT produced, at that stage, a certificate from the concerned authority to prove that the present appellant had used a contract carriage as a stage-carriage on a trip to Tirupati and had compounded this offence by payment of a fee of Rs. 2,340/-. This circumstance was regarded by the STAT as a blot on the history-sheet of the appellant, although inadvertently omitted from the history

sheet prepared officially for the consideration of the RTA. It is admitted on all hands that this semi-punishment had not been mentioned in the representations of any party under Section 57 (3) of the MV Act. Therefore, an objection was raised before the STAT that this ground was new, although the episode which formed its basis existed prior to the disposal of the applications by the RTA. It was further urged that such new grounds could not be heard from an objector who had not included it in his representation made within the time limited by Section 57 (4) of the Act. However, the STAT overruled these objections and proceeded on the footing that this was material information relevant to Section 47 (1) and used it, after giving a fair opportunity to the affected appellant to meet it. Consequently, he upset the award of the permit to the appellant since this factor tilted the scales against the appellant. We cannot, in this Court, and especially on a limited leave, look into the evaluation.

8. These foundational facts are common ground, but the divergence arises on the exercise of the power under Rule 15 of the Appellate Rules. Shri Phadke contended that a representationist, under S. 57 (3) & (4), had to abide by the time-limit discipline of the provision and could not transgress it by making an additional representation at the appellate stage beyond the time limited by Section 57 (4). If Rule 15 permitted such a course, it violated the substantive provision of the Act. Since a stream cannot rise above its source and rules cannot go beyond the sections of the Act, this Court must hold the said rule void. Any way, if Section 57 (3) and (4) had a more spacious connotation than was attributed to it by Shri Phadke, Rule 15 could have full play and be accommodated within the parent provision in the Act regulating procedure. This was the counter-contention of Shri V. S. Desai for the contesting respondent.

9. Before proceeding further, it is useful to extract Section 57 (3) and (4) and test whether the rule-making power has exceeded the ambit of Section 57 or gone counter to

it in framing Rule 15 (earlier extracted):

"57. Procedure in applying for and granting permits.—

x x x x x

(3) On receipt of an application for stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than thirty days from such publication, on which, and the time and place at which, the application and any representations received, will be considered:

Provided that, if the grant of any permit in accordance with the application or with modifications would have the effect of increasing the number of vehicles operating in the region, or in any area or on any route within the region, under the class of permits to which the applications relate, beyond the limit fixed in that behalf under sub-section (3) of Section 47 or sub-s. (2) of Section 55, as the case may be, the Regional Transport Authority may summarily refuse the application without following the procedure laid down in this sub-section.

(4) No representation in connection with an application referred to in sub-section (3) shall be considered by the Regional Transport Authority unless it is made in writing before the appointed date and unless a copy thereof is furnished simultaneously to the applicant by the person making such representation."

We unhesitatingly agree with Shri Phadke that natural justice — that fine facet of judicial ethos — must broadly inform exercise of power by administrative tribunals. This obligates such bodies to give an affected party a fair opportunity to meet any evidence obnoxious to his case if it is to be pressed into service against him. In the present instance, it is not disputed, as the High Court has

noted, that the canons of natural justice have been conformed to. The surviving issue therefore is as to whether there is any soundness in the submission that Section 57 (3) & (4) read with Section 47 builds barricades against receiving any information by the STAT from any representative beyond the time fixed in the above sub-sections of S. 57.

10. Administrative law — a growing branch of Indian jurisprudence — has a mission. Where the trellis work of technical procedures and rules of evidence usually applicable to ordinary courts under the Code contains too many taboos regarding pleadings and too many prescriptions regarding trials, administrative bodies, manned by lay and legal men, charged with duties which are wider than decision of individual disputes between specific parties and operating quasi-judicially at the public-interest level, have to enjoy more liberal powers and less formal and more flexible processes if they are to fulfil the statutory behest efficaciously. To over-judicialize is to undermine. In the construction of statutes establishing administrative agencies and defining their powers, there is little scope for the deep-rooted shibboleth that into the statute must be read, by lawyer's instinct, the requirements of the trial of a civil suit or the hearing of an appeal by the ordinary courts of the land. This may result in defeating their obvious purpose. We will therefore briefly examine the legislative goal of the statute under construction, the general policy of the legislature in enacting the relevant sections and the definition of the sources from which information or evidence may be sought by the tribunals working within the framework of the Act. Mr. Justice Frankfurter has aptly stated that 'the answers to the problem of an art are in its exercise' and John Chipman had said that the process of statutory construction is a practical art (See: *Extrinsic Aid in the Construction of Statutes* — by V. S. Deshpande — *Journal of Indian Law Institute* — Vol. II, April-June 1969, pages 123, 126). Thus, the true test of the amplitude and correct interpretation of Section 57 (3) and (4) is

to be found in a study of its area and its exercise, as intended by its makers. The oft-quoted saying of Mr. Justice Holmes that 'the meaning of a sentence is to be felt rather than to be proved' also helps us to feel our way through the public law area sketched by Section 57 (3) and (4) understood in the background of Section 47 and the conspectus of other provisions. We have to shake off from our minds that the type of litigation contemplated by Section 57 is the thrust and parry in a civil suit or appeal. With these observations we may take a bird's eye view of the relevant provisions of the Act to give us a hang of the subject and help us interpret adequately.

11. Section 42 of the Act insists on a permit being taken by every transport operator. Section 44 lays down how the RTA is to be constituted. It has a mixed composition of lay and judicially-trained men, the reason being that the process of adjudication is not purely legal pugilis but a broader search, taking note of public considerations which may not be brought to its notice by contenders for permits. The nature of the enquiry is reflected in the very structure of the body. Section 46 speaks of applications for stage-carriage permits. When we reach Section 47, we have to take a close-up of that provision. Properly understood, Section 47 enjoins upon the RTA to have regard to the presiding idea of public interest generally and in its ramifications as set out in Section 47 (1) (a) to (f). In addition, the RTA shall also receive representations as mentioned therein and take them into the reckoning. It is not as if the sole source of decision-making materials consists of the representations made under Section 57 (3) within the time stipulated in Section 57 (4). The primary channel, it looks, is the information that the RTA may gather, bearing on matters touched upon in Section 47 (1) (a) to (f), supplemented by facts stated in representations referred to in Section 57 (3). Once we grasp this essential truth, the resolution of the conflict raised in this case is easy. The focus is not on who, as between A and B, has the title to the permit,

but on who, as between A and B, should be preferred to better serve the public interest.

12. We may, as a result of the above discussion, set down the following five propositions:

1. Stage-carriage permits are granted for providing an efficient public transport system.

2. The adjudicatory content has dual elements — public interest in the best stage-carriage service and private title to better serve the public.

3. The procedure is flexible, free from the rigidity of court trials, and this flexibility flows from the duty of the tribunal, charged with the task of picking out him who has the best plus points for plying a good bus service, to discharge it properly. A people-conscious power cannot be pared down in a self-defeating manner.

4. An activist tribunal (RTA, and, in exceptional cases, even the STAT) may even collect useful information bearing on considerations set out in Section 47 and, after public exposure of such information at the hearing and reasonable opportunity to meet it, if anyone is adversely affected, put it into the crucible of judgment.

5. The antithesis is not between the right of representation within the time limited by Section 57 (4) and beyond it but between representations by statutorily authorised entities under Sections 47 and 57 and receipt of relevant evidence or information from any source whatsoever at any stage whatsoever but subject to the wholesome rules of natural justice.

These five-fold guidelines squarely accommodate Rule 15 within the framework of Sections 47, 57 and 54 of the Act and there is no spill-over breaching the banks of the provisions. The rule merely gives effect to what the sections intend and is not therefore ultra vires.

13. Here the certificate of payment of compounding fees was filed by one of the appellants before the STAT and was received not as a representation under Section 57 (4) but as some information the STAT regarded had a bearing on matters falling under Section 47. It is im-

portant to note that Rule 15 does not entitle parties to the appeal or application to produce additional evidence but clothes the tribunal with discretionary power to allow such evidence. What is received is not qua representation under Section 57 (4) but qua evidence with public interest flavour. The rule is good and covers familiar ground to enable just orders being passed. A reference to Order XLI, Rule 27, C. P. C., and Section 540, Cri. P. C. proves this point. Justice to the public is the keynote of Sections 47, 57 and Rule 15. We are not lobbying for unconventional procedures of quasi-judicial tribunals but interpreting the relevant provisions according to well-established canons. We must listen to the signature tune of quasi-judicial justice to appreciate the note. We may also highlight the basic principle that subject to statutory regulations, each tribunal has its inherent power to devise its own procedure. Novelty, if it improves purposeful efficiency, is not anathema. But caution must be exercised in going against time-tried procedures lest processual law prove a charter for chaos. Likewise, it is necessary to mention that while a 'representator' under Section 47, read with Sec. 57, has a right to make representations and be heard, subject to the limitations written into those provisions, those who fall under it or outside it have no right to bring in evidence or urge grounds as and when they please or at all unless the tribunal, in its discretion, chooses to accept such extra information. The first is a right of the 'representator', the second is the power of the tribunal.

14. We are strengthened in our general approach and particular construction by a ruling of this Court in *New Prakash Transport Co. Ltd.*, 1957 SCR 98 = (AIR 1957 SC 232) and two rulings of the High Courts, one of a Full Bench of the Madras High Court (AIR 1965 Mad 79) and the other a Division Bench of the Patna High Court to which one of us (Untwalia J.) was a party (AIR 1964 Pat 154).

15. In *United Motor Works*, AIR 1964 Pat 154 the Patna Case, the Court observed:

"It was also pointed out by the Supreme Court in that case that the Motor Vehicles Act and the rules framed thereunder do not contemplate anything like a regular hearing in a Court of Justice and no elaborate procedure has been prescribed as to how the parties interested have to be heard either before the Regional Transport Authority or before the Appellate Transport Authority. The principle is well established that in the absence of any such prescribed procedure the appellate authority may adopt any procedure which it thinks best for hearing the appeal provided always that the rules of natural justice are observed. The matter has been clearly put by Lord Loreburn in the course of his speech in Board of Education v. Rice, (1911 AC 179) as follows:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve a matter of law as well as a matter of fact or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Ramaswami C. J., (as he then was) also laid down:

"It is..... manifest that the power of the appellate authority is co-extensive with the power of the

Regional Transport Authority in this respect, and there is no reason why the appellate authority should not take these matters into consideration in deciding the appeal under Sec. 64 of the Act."

It is trite that an appeal is a rehearing and ordinarily appellate power is as wide as original power. The facts of the Patna case bear a close parallel to our case.

16. Another point with which we are not concerned and also decided in the Patna judgment (one of the two appeals heard together) was challenged in the Supreme Court and reversed. That bears upon the inter-State routes which does not arise in the instant appeal before us.

17. In Cumbum Roadways, AIR 1965 Mad 79 (FB) Kailasam J. (as he then was), speaking for the Full Bench, stressed the same view. The headnote in the Report is sufficiently explicit and we quote:

"The representator, who makes the representation otherwise than under Section 57 (4) will not have a right to have his objection heard and considered, but there is no prohibition against the authority taking the information furnished by the objector and acting on it after giving an opportunity to the affected party, to prove that the information is false or that it should not be acted upon. The jurisdiction of the Regional Transport Authority or the Appellate Tribunal to act upon any information, whether it was brought to its notice by the objector or by the Transport Authority cannot be questioned. But it is within the discretion of the Regional Transport Authority or the Appellate Tribunal to accept the information taking into account the relevant circumstances under which the information was brought before it. If the authority decides to accept, it is bound to give a reasonable opportunity to the affected person to show cause as to why the information should not be acted upon. When the authority is acting on the information, but not as a representation by the objector, the person affected cannot object to the authority considering the information on the ground that it was brought to its notice by one of the objectors without including the information in

the representation made by the objector. The right of the representative as such is no doubt limited, for, he has no right to insist that any representation made otherwise than under Section 57 (4) should be considered in the manner prescribed under Section 57 (5). But that does not in any way debar the authority under Section 47 (1) of the Act from taking the information into account for deciding to whom the permit should be given in the interests of the public."

The decision of the Assam High Court (AIR 1959 Assam 183) brought to our notice by Shri Phadke does not really contradict the position we have delineated and turns on a different point.

18. Our conclusion therefore is that Rule 15 is intra vires and, further, that the said rule merely makes patent what is otherwise latent in the statutory provisions. The appeal, accordingly, fails and is dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1810

(From: ILR (1968) 2 Cal 575)

P. N. BHAGWATI, A. C. GUPTA
AND S. MURTAZA FAZL ALI,
JJ.

Smt. Safali Roy Chowdhary and others, Appellants v. A. K. Dutta, Respondent.

Civil Appeal No. 1599 of 1968,
D/- 6-5-1976.

(A) W. B. Premises Tenancy Act (12 of 1956), Sections 16 and 40 — Suit for ejectment against sub-tenant pending at commencement of Act — Right under Section 16 (3) held, available to such sub-tenant — Doctrine of lis pendens — Not attracted. ILR (1968) 2 Cal 575, Reversed. (T. P. Act (1882), Ss. 52 and 5).

The right conferred on the sub-tenant by the 1956 Act of being declared a tenant directly under the superior landlord is available to a sub-tenant against whom a suit for ejectment was pending when that Act came into force. (Para 6)

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A sub-tenant who avails of the provisions of Section 16 (3) which extinguishes the tenant's interest in the portion of the premises sublet and confers on the sub-tenant, the right to hold the tenancy directly under the superior landlord cannot be said to have alienated property pendente lite. When the legislature in exercise of its sovereign powers regulates the relations of landlord and tenant, altering or abridging their rights, what it does is not transfer of property attracting doctrine of lis pendens. ILR (1968) 2 Cal 575, Reversed. (Para 5)

The intention of the legislature, which is paramount, is clear to upgrade the sub-tenant and make him a tenant directly under the superior landlord. This is a new right given to the sub-tenant, and though the pending proceeding may continue to be regulated by the repealed statute in view of Section 40 there is nothing in that section to suggest that the sub-tenant against whom a suit was pending will be denied this additional right. (Para 6)

Cases Referred: Chronological Paras
(1907), 34 Ind App 102 = ILR 29 All 339 (PC) 5
(1857) 1 De. G. & J. 566 = 44 ER 842 5

M/s. D. N. Mukherjee and N. R. Choudhury, Advocates for Appellants; Mr. Sukumar Ghosh, Advocate for Respondent.

Judgment of the Court was delivered by

GUPTA, J.:— This appeal by special leave is directed against a judgment of the Calcutta High Court setting aside in revision the finding of the trial Court on the issue whether the relationship of landlord and tenant subsisted between the parties in a suit for ejectment. The issue which arises on the interaction of two statutes, the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 and the West Bengal Premises Tenancy Act, 1956, which repeals the earlier Act but keeps it alive for proceedings pending on the date of repeal, involves the question, — is the right conferred on the sub-tenant by the 1956 Act of being declared a tenant directly under the superior landlord

available to a sub-tenant against whom a suit for ejectment was pending when that Act came into force? The appeal turns on the answer to this question.

2. The material facts leading to the impugned order are these. The respondent was a tenant of premises No. 17/1E Gopal Nagar Road, Alipore, Calcutta, and his landlord was one Jagabandhu Saha, the owner of the house. Dilip Narayan Roy Chaudhury was a sub-tenant under the respondent in respect of the ground floor flat paying a monthly rent of Rs. 75/-. The respondent instituted a suit in the Munsiff's court at Alipore on March 21, 1956 when the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 was in force, seeking to evict Roy Chaudhury on the ground that he was a defaulter in payment of rent. This Act was a temporary statute due to expire on March 31, 1956, but on that date the West Bengal Premises Tenancy Act, 1956 was brought into operation repealing the temporary Act before it expired. The material part of Section 40 of the 1956 Act which repealed the 1950 Act is as follows:

"Repeal and savings.— (1) The West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (in this section referred to as the said Act), is hereby repealed.

(2) Notwithstanding the repeal of the said Act:—

(a) any proceeding pending on the 31st day of March, 1956, may be continued, or,

(b) x x x

as if the said Act had been in force and had not been repealed or had not expired;"

Section 16 of the 1956 Act confers on the sub-tenant the right to become a tenant directly under the landlord. Sub-section (2) of Section 16 provides inter alia that where before the commencement of this Act, the tenant, with or without the consent of the landlord, has sublet any premises either in whole or in part, the tenant and every sub-tenant must give notice to the landlord of such subletting within the prescribed period. Sub-section (3) of Section 16 provides that in any such case where the

landlord had not consented in writing or denies that he gave oral consent, the Rent Controller on an application made to him either by the landlord or the sub-tenant shall make an order declaring that the tenant's interest in so much of the premises as has been sublet shall cease and that the sub-tenant shall become a tenant directly under the landlord from the date of the order. The Rent Controller is also required to fix the rent payable by the sub-tenant to the landlord from the date of the order. Sub-tenant Roy Chaudhury served a notice under Section 16 (2) of the 1956 Act upon the superior landlord and applied under Section 16 (3) for being declared a tenant directly under him. On July 31, 1956 the Rent Controller recorded a finding on this application that Roy Chaudhury was entitled to the declaration asked for overruling the objections raised by the respondent. On February 23, 1957 the Rent Controller concluded the proceeding under Section 16 (3) by finally declaring that the sub-tenant was a tenant directly under the superior landlord with effect from that date, and fixing the rent payable by him. The appeal preferred by the respondent from this order was dismissed by the appellate authority.

3. In the meantime, on August 21, 1956 the respondent had made an application under Section 14 (4) of the 1950 Act in the suit for eviction which was pending. Section 14 (4) of the 1950 Act permitted the landlord to make an application in the suit for an order on the tenant to deposit month by month the rent at the rate at which it was last paid and also the arrears of rent, if any, and provided that on failure to deposit the arrears of rent or the rent for any month within the period prescribed for such deposits, the court would make an order striking out the tenant's defence against ejectment so that the tenant would be in the same position as if he had not defended the claim to ejectment. On this application the Munsiff on September 26, 1956 directed the appellant to deposit a certain sum as arrears of rent and also rent month by month at the rate of Rs. 75/-. After the declaration of tenancy under

S. 16 (3), Roy Chaudhury was permitted to amend this written statement in the suit by adding a paragraph questioning the relationship of landlord and tenant between the respondent and himself. It is unnecessary to refer to the various proceedings in the suit that followed in the course of which the High Court was moved more than once by either party. On January 24, 1956 Roy Chaudhury died and the present appellants were substituted in his place in the suit as his heirs and legal representatives. On November 1, 1965 the Munsif framed an additional issue, being issue No. 9, which was as follows:

"Has the alleged relationship of landlord and tenant between the parties been determined by final orders dated 31-7-56 and 23-2-57 passed by the R. C. (Rent Controller) Calcutta in Case No. 2433 of 1956?"

The Munsif took up for consideration the application under Section 14 (4) and the additional issue No. 9 together and by his order dated February 20, 1967 found that the Rent Controller had jurisdiction to pass the order under Section 16 (3) declaring the defendant to be a direct tenant under the superior landlord, and that the relationship of landlord and tenant between the parties ceased by virtue of the order made under Section 16 (3). The additional issue No. 9 was accordingly decided in favour of the defendant and the application under Section 14 (4) of the 1950 Act was dismissed. The plaintiff moved the High Court in revision against this order. The revision case was disposed of on February 16, 1968. The learned Judge maintained the order rejecting the application under Section 14 (4) but set aside the finding on issue No. 9 and held that "for the purposes of the present suit for ejectment there is a relationship of landlord and tenant". The propriety of this order is challenged by the tenant defendants.

4. In the course of his judgment the learned Judge recorded the following findings:

(i) "The validity or the binding nature of the order under Section 16 (3) of the 1956 Act cannot be challenged nor can it be found in this suit to be inoperative."

(ii) The rights arising out of a valid proceeding under Section 16 (3) cannot be overlooked in spite of the non obstante clause in Section 40 of the 1956 Act and the effect of the order under Section 16 (3) has to be considered in the suit.

(iii) As the proceeding under Section 16 (3) was started during the pendency of the suit, the principle underlying Section 52 of the Transfer of Property Act should apply to this case and "the decision made in the proceeding under Section 16 (3) would not control the decision in the ejectment suit."

5. It thus appears that the High Court was of the view that in spite of Section 40 providing that a pending proceeding would continue to be governed by the provisions of 1950 Act as if that Act had not been repealed or had not expired, the order made under Section 16 (3) of the 1956 Act must be given effect to. The High Court however held that the proceeding under Section 16 (3) having been initiated during the pendency of the suit, the principle of *lis pendens* should apply and accordingly the order under Section 16 (3) would not govern the suit. Before us, counsel for the respondent did not rely on Section 52 of the Transfer of Property Act, but sought to support the decree on the ground that in view of Section 40, the entire proceeding under Section 16 (3) was without jurisdiction. The doctrine of *lis pendens* can of course have no application to this case. Section 52 of the Transfer of Property Act forbids alienations *pendente lite* providing *inter alia* that the property forming the subject-matter of a pending suit cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. The doctrine of *lis pendens* means that no party to the litigation can alienate the property in dispute so as to affect the other party, and rests "upon this foundation, that it would plainly be impossible that any action or suit could be brought to a success-

ful termination if alienations pendente lite were permitted to prevail." (Observation of Turner L. J. in *Bellamy v. Sabine*, (1857) 1 De. G & J. 566 (584) quoted with approval by the Privy Council in *Faiyaz Hussain Khan v. Munshi Prag Narain*, (1907) 34 Ind App 102 (105)). But a sub-tenant who avails of the provisions of Section 16 (3) which extinguishes the tenant's interest in the portion of the premises sublet and confers on the sub-tenant the right to hold the tenancy directly under the superior landlord cannot be said to have alienated property pendente lite. S. 5 of the Transfer of Property Act defines transfer of property as an act by which a living person conveys property to another. When the legislature in exercise of its sovereign powers regulates the relations of landlord and tenant altering or abridging their rights, what it does is not transfer of property attracting the doctrine of *lis pendens*.

6. As stated already counsel for the respondent put his case on the provisions of Section 40 of the 1956 Act. According to him the suit must continue to be governed by the 1950 Act even after its repeal in view of S. 40, unaffected by the provisions of the 1956 Act. Section 40 of the 1956 Act keeps alive a proceeding pending on the date when the 1950 Act was repealed as if it is still in force and has not been repealed. This however does not mean that even if the 1956 Act created a new right in favour of the sub-tenant, he would be denied this right because a suit for ejectment was pending against him when the Act came into force. 'Tenant' as defined in Section 2 (b) of the 1956 Act includes a person continuing in possession after the termination of his tenancy until a decree or order for eviction has been made against him. A sub-tenant is also a tenant, and when the order u/s. 16 (3) was made no decree or order for eviction had been passed against him. That being so, we do not see why he should not be entitled to the benefit conferred by Section 16 (3). The intention of the legislature, which is paramount, is clear — to upgrade the sub-tenant and make him a tenant

directly under the superior landlord. This is a new right given to the sub-tenant, and though the pending proceeding may continue to be regulated by the repealed statute in view of Section 40, there is nothing in that section to suggest that the sub-tenant against whom a suit was pending will be denied this additional right. The High Court has held that the effect of the order under Section 16 (3) must be considered in the suit. Thus the suit may continue in spite of the repeal of the 1950 Act, but the right acquired by the sub-tenant under the 1956 Act has to be given effect to, and the suit decided accordingly. It must therefore be held that the relationship of landlord and tenant ceased between the parties on the date when the order under S. 16 (3) was made.

7. The appeal is allowed, the order of the High Court appealed from is set aside and that of the trial Court restored. The appellants will be entitled to their costs in this Court and in the High Court.

Appeal allowed.

AIR 1976 SUPREME COURT 1813

(From: AIR 1969 Andhra Pradesh 399)

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

Board of Revenue etc. etc., Appellants v. A. M. Ansari etc., Respondents.

Civil Appeals Nos. 67 to 122 and 238 of 1969, D/- 17-3-1976.

(A) Transfer of Property Act (1882), Section 105 — Lease and Licence — Distinction between pointed out — Agreement merely granting right to pluck, cut, carry away and appropriate forest produce — Held to be a licence and not a lease so as to attract Sch. I-A Art. 31 (c) Stamp Act — (Stamp Act (1899), Sch. I, Art. 35 (c) and Sch. I-A (A. P.) Article 31 (c)) — (Easements Act (1882), Section 52).

It is the creation of an interest in immovable property or a right to possess it that distinguishes a lease

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from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form. AIR 1959 SC 1262 and 1913 AC 771, Rel. on. (Para 10)

The agreements in the present case were for short periods of 9 to 10 months and they did not create any interest in the land. During the short periods of currency of agreement the respondents were merely granted the right to pluck, cut, carry away and appropriate the enumerated forest produce existing on the land.

Held that the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturals, the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31 (c) of the Stamp Act. AIR 1953 SC 108, Rel. on., AIR 1959 SC 735, Dist.

(Para 12)

(B) Andhra Pradesh General Sales Tax Act (6 of 1957), Sections 2 (e), 2 (bbb) and 5 — Government holding auction sales only annually of its forest produce and not at frequent intervals— Government is not carrying on business of sale of forest produce and is not liable to pay sales tax.

The consideration of profit motive cannot be regarded as an essential constituent of the term 'business' in view of the amendment introduced in the definition of the term 'dealer' in 1966, and one of the important ingredients of the term 'business' viz. frequency, is not satisfied in the instant cases. AIR 1958 Andh Pra 558 and AIR 1957 Assam 179 and 1971 Tax LR 1249 (Madh Pra), Ref. to (Paras 20 and 22)

(C) Stamp Act (1899), S. 2 (17), Sch. 1-A (Andh Pra) Art. 35 (c) — Mortgage bond — Essential conditions — Sale notice not indicating that any right over or in the security deposit was created in favour of State Government — As such security deposits are not liable to stamp duty under Art. 35 (c). (1892) ILR 15 Mad 134 (FB) and AIR 1947 All 190 (FB), Rel. on. (Paras 24, 26, 29)

Cases Referred: Chronological Paras

1971 Tax LR 1249 = (1971) 28 STC	
532 (Madh Pra)	21
(1970) 25 STC 57 (SC)	21
(1967) 20 STC 520 = (1968) 1 SCJ	21
281	21
AIR 1967 SC 1066 = (1967) 19 STC	20
1	20
AIR 1959 SC 735 = (1959) Supp (2)	14
SCR 339	14
AIR 1959 SC 1262 = (1960) 1 SCR	10
368	10
AIR 1958 Andh Pra 558 = (1958) 2	20
Andh WR 100	20
AIR 1957 Assam 179 = (1958) 9 STC	20
60	20
AIR 1955 Orissa 164 = (1955) 6 STC	21
674	21
AIR 1953 SC 108 = 1953 SCR	476
	13
(1952) 1 All ER 149 = (1952) 1 KB	10
290	10
(1952) 1 All ER 1199 = 1952 WN	10
196	10
AIR 1947 All 190 = 1946 All WR	28
(HC) 575 (FB)	28
1913 AC 771 = 83 LJPC	6
(1892) ILR 15 Mad 134 (FB)	27
(1875) 1 C. P. D 35 = 45 LJQB	11
153	11

Mr. P. Ram Reddy, Sr. Advocate, (Mr. B. Parthasarathi, Advocate, with him), for Appellants; Mr. K. J. John, Advocate, for M/s. J. B. Dadachanji & Co. for Respondent in C. As. Nos. 67, 78, 79, 100, 101 and 103 of 1969; Mr. G. Narayana Rao, Advocate, for Respondent in C. As. Nos. 69-73 of 1969; Mr. H. K. Puri, Advocate for Mr. R. V. Pillai, Advocate, for Respondents in C. As. Nos. 77, 83, 89, 90, 93, 95, 96, 102 and 120 of 1969.

Judgment of the Court was delivered by

JASWANT SINGH, J.:— This bunch of Civil Appeals Nos. 67-122

and 238 of 1969 by certificate granted under Article 133 (1) (b) of the Constitution by the High Court of Judicature of Andhra Pradesh at Hyderabad by its order dated June 28, 1968 against its common judgment and order dated August 21, 1967, passed in Writ Petitions Nos. 489, 491, 537 to 541, 635, 684, 685, 687, 688, 830 to 832, 561, 1219, 715 to 719, 812, 813, 1216, 677, 638, 639, 695, 853 to 856, 636, 867, 870, 1146, 1285, 1260, 1261, 1284, 1292, 1293, 1294, 1309, 1310, 1340, 1447, 1697 and 1265 of 1967 which raise interesting questions of law relating to the interpretation of some of the provisions of the Indian Stamp Act, 1899 and the Andhra Pradesh General Sales Tax Act, 1957 shall be disposed of by this judgment.

2. The facts giving rise to these appeals are: The Forest Department of the Government of Andhra Pradesh after giving a sale notice held, in accordance with the terms and conditions thereof, an auction in 1967 in respect of various items of forest produce viz. timber, fuel, bamboos, minor forest produce, beedi leaves, tanning barks, mohwa etc. Clause 23 of the notice inter alia required the contractors to pay within 10 days of the receipt of the confirmation orders of the competent authority: (a) the balance of the 1st instalment amount, as might be fixed by the Divisional Forest Officer; (b) $6\frac{1}{4}\%$ of the bid amount as security deposit; (c) sales tax on the bid amount at the rates current at the time of the sale. Clause 60 of the notice provided that the contractors would at all times comply with the provisions of the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959, and the Andhra Pradesh Court fees and Suits Valuation Act, 1956, and all the rules that might, from time to time, be in force thereunder.

3. The respondents herein being the highest bidders in respect of some items of the forest produce were called upon to pay in terms of the above noted conditions the stamp duty on the agreements to be executed by them as if they were leases of immovable property falling under Article 31 (c) of the Indian Stamp Act, 1899. They were also called

upon to pay sales tax on the bid amount in terms of clause (23) of the sale notice. They were further called upon to pay stamp duty on the deposits made by them by way of security as mortgages, falling within Article 35 (c) of the Stamp Act. Aggrieved by the said notices, the respondents filed the aforesaid petitions under Article 226 of the Constitution for issue of appropriate writs etc. declaring the aforesaid demand notices as illegal and void and restraining the appellants from enforcing or taking any proceeding for the levy and recovery of the amounts mentioned therein. The respondents contended before the High Court that as the right to pluck collect and take away beedi leaves and to cut and carry away bamboos, standing timber etc. was not a right or interest in immovable property so as to attract Article 31 (c) of the Stamp Act, there could be no question of payment by them of the stamp duty. The respondents also challenged the demand made from them for payment of sales tax on the bid amount on the ground that as the Government did not carry on any business of sale, the demand was illegal. They further challenged the demand of stamp duty under Article 35 (c) of the Stamp Act pleading that the security deposits were not mortgages so as to attract the provisions of the said Article of the Stamp Act.

4. The petitions were contested by the appellants herein who contended inter alia that pursuant to clause (6) of the terms and conditions of the sale notice, the respondents were bound to pay the stamp duties that were chargeable in view of the extension of the Indian Stamp Act to the whole of the State of Andhra Pradesh by the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959 with effect from April 1, 1959, and repeal of the Hyderabad Stamp Act, and the rules, notifications, instructions etc. made or issued thereunder; that the right acquired by the respondents was not merely a right to collect, appropriate and sell beedi leaves that had already grown but also the right to collect, use and sell beedi leaves that would subsequent-

ly grow on the standing trees and their branches taking nourishment from the land during the period of lease which showed that the respondents obtained under the agreements an interest in immovable property. The appellants further contended that the respondents were, according to the sale notice, liable to pay sales tax on the bid amount as also the stamp duty on security deposits which fell within the definition of mortgages as contemplated by the Stamp Act.

5. On a careful consideration of the respective stands of the parties, the High Court negatived the contentions of the appellants and allowed the petitions. Aggrieved by the judgment and order of the High Court, the appellants applied for certificate under Article 133 (1) (b) of the Constitution which, as already stated was granted to them. This is how the appeals are before us.

6. Three questions fall for consideration in these appeals. The first question that we are called upon to determine is whether the agreements which the respondents were called upon to execute in respect of the aforesaid rights relating to forest produce were in the nature of lease or licences.

7. It is necessary in this connection to notice at the outset the distinction between a lease and a licence by reference to the relevant Acts. Section 2 (16) of the Stamp Act defines the lease as meaning a lease of immovable property but this definition, it would be noted, is neither exhaustive nor self-explanatory. We are, therefore, driven to find out the true meaning of the term by turning to the Transfer of Property Act. Section 105 of the said Act defines 'lease' as follows:—

"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money."

8. 'Licence' is defined in Section 52 of the Easements Act, 1882 as under:—

"Where one person grants to another, or to a definite number of other persons, a right to do, or con-

tinue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

9. The expression 'immovable property' is not defined in the Stamp Act but is defined in Section 3 of the Transfer of Property Act, Section 2 (6) of the Registration Act and Section 3 (26) of the General Clauses Act. An idea as to the meaning of the expression can also be gleaned from Section 2 (7) of the Sales of Goods Act. According to learned counsel for the appellants, it is the definition of 'immovable property' as given in Section 3 (26) of the General Clauses Act that has to be applied in determining whether the agreements in question fall within the definition of 'lease' or not. It would be useful at this stage to set out in juxtaposition the definitions of 'immovable property' as contained in the aforesaid Acts, as also the definition of goods as given in the Sale of Goods Act:—

[For Table See page 1817]

10. A close study of the above definitions shows that it is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form. We are fortified in this view by the decision of this Court in *Associated Hotels of India Ltd. v. R. N. Kapoor*, AIR 1959 SC 1262 where Subba Rao, J. (with whom Das, J. agreed) observed:

"if a document gives only a right to use the property in a particular way or under certain terms

Section 3 (6) of
General-Clauses
Act.

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

Section 3 of Trans-
fer of Property
Act.

In this Act, unless there is something repugnant in the subject or context, "immovable property" does not include standing timber, growing crops or grass.

Section 2 (6) of
Registration
Act.

"Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

Section 2 (7) of
Sale of Goods
Act.

In this Act unless there is anything repugnant in the subject or context "goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington*, 1952-1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at page 155:

"The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal again in *Cobb v. Lane*, 1952-1 All ER 1199; considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At page 1201, Somervell L. J., stated:

".....the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning L. J. said much to the same effect at page 1202:

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

The following propositions may, therefore, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties — whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, '*prima facie*' he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease."

11. The crucial tests to be employed in cases of the present nature can be gathered from the observations made by Lord Shaw while delivering the judgment of the Board in *Kauri Timber Co. Ltd. v. Commr. of Taxes*, 1913 AC 771 (776). According to those observations, in order that an agreement can be said to partake of the character of lease,

it is necessary that the grantee should have obtained an interest in and possession of land. If the contract does not create an interest in land then to use the words of Lord Coleridge, C. J. in *Marshall v. Green*, (1875) 1 CPD 35 the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods.

12. For the purpose, therefore, of ascertaining the intention of the parties and finding out the character of the agreements in question, it is necessary to notice the salient features of the agreements. The first salient feature of the agreements is that they were for a short duration of nine to ten months. The second important feature of the agreements is that they did not create any estate or interest in land. The third salient feature of the agreements is that the respondents were not granted exclusive possession and control of the land but were merely granted the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the time of the contract or which might have come into existence during the short period of the currency of the agreements. The right to go on the land was only ancillary to the real purpose of the contract. Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturals, we were clearly of the view that the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31 (c) of the Stamp Act.

13. The conclusion arrived at by us gains strength from the judgment of this Court in *Firm Chhotabhai Jethabai Patel and Co. v. State of Madhya Pradesh*, 1953 SCR 476 = (AIR 1953 SC 108) where contracts and agreements entered into by persons with the previous proprietors of certain estates and mahals in the State under which they acquired the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and

bamboos were held in essence and effect to be licences.

14. There is, of course, a judgment of this Court in *Mahadeo v. State of Bombay*, 1959 SCJ 1021 = (AIR 1959 SC 735) where seemingly a somewhat different view was expressed but the facts of that case were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land, to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years.

15. For the foregoing reasons, the first question has to be decided in favour of the respondents.

16. The second question that falls for consideration is whether the respondents could be validly called upon to pay the sales tax. For the decision of this question, it is necessary to examine a few provisions of the Andhra Pradesh General Sales Tax Act, 1957. The charging section is Section 5 which in so far as it is relevant for the purpose of these appeals runs thus:—

"5. Levy of tax on Sales or Purchases of Goods:— (1) Every dealer (other than a casual trader and an agent of a non-resident dealer) whose total turnover for a year is not less than Rs. 25,000 and every agent of a non-resident dealer whatever be his turnover for the year, shall pay a tax for each year, at the rate of four paise on every rupee of his turnover;

"Every casual trader shall pay a tax at the rate of four paise on every rupee of his turnover:

Provided that a dealer in jagery shall pay a tax at the rate of two paise on every rupee upto the 31st March 1966 and at the rate of three paise on every rupee on and from the 1st April 1966, of his turnover irrespective of the quantum of turnover."

17. The term 'dealer' has been defined in Section 2 (e) of the Act as follows:—

"dealer" means any person who carries on the business of buying, selling, supplying or distributing

goods, directly or otherwise whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes (i) the Central Government, a State Government, local authority, a company, a Hindu undivided family or any society (including a co-operative society), club, firm or association which carries on such business....."

18. The term 'business' has been defined in Section 2 (bbb) of the Act as follows:—

"business" includes— (i) any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern."

19. 'Sale' is defined in Section 2 (n) thus:

'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration, and includes any transfer of materials for money consideration in the execution of a works contract provided that the contract for the transfer of such materials can be separated from the contract for the services and the work done, although the two contracts are embodied in a single document or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on, goods."

20. In order that the sales tax should be payable by the respondents in accordance with the obligation imposed on them by clause (23) of the sale notice, it is necessary that the Government of Andhra Pradesh should have been carrying on the business of selling the forest

produce. In *State of Gujarat v. Rairpur Manufacturing Co. Ltd.*, (1967) 19 STC 1 = (AIR 1967 SC 1066) this Court while examining the term 'business' in another context observed that whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. The Court further went on to observe that when a subsidiary product is turned out in the factory of the assessee regularly and continuously and it is being sold from time to time, an intention to carry on business in such product may be reasonably attributed to the assessee. As the consideration of profit motive cannot be regarded as an essential constituent of the term 'business' in view of the amendment introduced in the definition of the term 'dealer' in 1966, what we are left to consider is whether the other ingredients of the term 'business' viz. volume, frequency, continuity and regularity of transactions of sale and purchase are satisfied in the instant cases. The auctions of the forest produce by the Government of Andhra Pradesh are admittedly carried on only annually and not at frequent intervals. Thus the important element of frequency being lacking in the instant cases, it cannot be held that the said Government was carrying on the business of sale of forest produce. In *P. T. T. C. & S. Merchants' Union v. State of A. P.*, (1958) 2 Andh WR 100 = (1958) 9 STC 723 = (AIR 1958 Andh Pra 558) where a person who grew agricultural products and incidentally sold the same, it was held that no sale tax was payable as it could not be said that the person carried on business. A similar view was expressed in *Raja Bhairabendra v. Supdt. of Taxes*, (1958) 9 STC 60 = (AIR 1957 Assam 179) where standing sal trees grown spontaneously in his Zamindari were sold by the Zamindar by auction and the purchasers were permitted to fell the trees and sell them after sawing and other processes.

21. In *Orient Paper Mills Ltd. v. State of Madhya Pradesh*,

(1971) 28 STC 532 = (1971 Tax LR 1249) (Madh Pra) it was held that the State Government or the forest department could not, merely by selling the forest produce grown on their land, be regarded as carrying on any business of buying, selling, supplying or distributing goods and therefore in respect of mere sales of forest produce, neither the State Government nor the forest department was a dealer within the meaning of the definition in Section 2 (d) of the M. P. General Sales Tax Act, 1958. In Deputy Commr. of Agricultural Income-tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co., (1967) 20 STC 520 (SC) and Deputy Commr. of Agricultural Income-tax and Sales Tax, Quilon v. Midland Rubber and Produce Co. Ltd., (1970) 25 STC 57 (SC) where the only facts established were that the assessee converted the latex tapped from its rubber trees into sheets and effected a sale of those sheets to its customers and the conversion of latex into sheets was a process essential for the transport and marketing of the produce, it was held that the department had not been able to discharge the onus of proving that the assessee was carrying on business and was, therefore, a dealer within the meaning of Section 2 (b) of the Central Sales Tax Act, 1956. In Ramakrishna Deo v. Collector of Sales Tax, Orissa, (1955) 6 STC 674 = (AIR 1955 Orissa 164) where the Maharaja of Jeypore had sold the sal trees from his forest for preparing sleepers, it was held that he was not a dealer within the meaning of the Orissa Act because he was not carrying on the business of selling or supplying the goods for the reason that the element of purchase, one of the necessary ingredients of the business was absent.

22. In view of the foregoing discussion, we find ourselves unable to hold that the Government of Andhra Pradesh by holding auction of forest produce carried on business in the sale of that class of goods. As such, the respondents could not be made liable to pay the sales-tax.

23. There now remains for consideration only the last question as to whether the security deposits made by the respondents were in

the nature of mortgages so as to make the respondents liable to pay the stamp duty under Article 35 (c) of the Stamp Act. For the determination of this question, it is necessary to scrutinize the definition of 'mortgage deed' as contained in Section 2 (17) of the Stamp Act which runs thus:—

"2 (17). Mortgage-deed includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of, another, a right over or in respect of specified property."

24. A bare perusal of the above definition makes it clear that in order that an instrument should fall within the above definition, it is necessary that the instrument should satisfy the essential conditions by creating a right over or in respect of a specified property in favour of another person.

25. Bearing in mind the above mentioned essential requisites of a deed of mortgage let us examine clause (17) of the sale notice to which alone our attention has been invited. Clause (17) runs thus:—

"Earnest money deposit to be returned.— The earnest money deposits of all bidders except those of the successful bidders collected at the time of sale according to condition 5 above, will be returned to the depositors, on the conclusion of the sales provided that the officer conducting the sale, may if he considers it advisable retain the deposits of any bidders."

26. There is nothing in the above clause to indicate that any right over or in the security deposits was created in favour of the State Government.

27. In Reference under Stamp Act, Section 46, (1892) ILR 15 Mad 134 (FB) where a licence issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract and the licensee executed a muchalka stating that he agreed

to all the terms and conditions mentioned in the license, it was held that neither the licence nor the muchalka taken separately or together fulfilled the conditions of a mortgage as defined in the Stamp Act i.e. neither thereby actually created an interest in the deposit in favour of the Government.

28. In *Rishidev Sondhi v. Dhampur Sugar Mills*, AIR 1947 All 190 (FB), it was held that an instrument in which specific sums have been offered as security is not a mortgage deed within the meaning of Section 2 (17) as money is not 'specified property'.

29. In view of the above we have no manner of doubt that the respondents could not be called upon to pay the stamp duty under Article 35 (c) of the Stamp Act.

30. In the result the appeals fail and are hereby dismissed with costs limited to one set.

Appeals dismissed.

AIR 1976 SUPREME COURT 1821

(From: Punjab and Haryana)*

Y. V. CHANDRACHUD AND V. R. KRISHNA IYER, JJ.

Chanan Singh, Appellant v. Registrar, Co-op. Societies, Punjab and others, Respondents.

Civil Appeal No. 1137 of 1976, D/- 18-3-1976.

(A) Constitution of India, Article 226 — Reopening of disciplinary proceeding dropped by issuing fresh notice to show-cause against dismissal — Petition challenging it is premature.

Where the disciplinary proceedings against an employee dropped by an enquiry officer who was not competent to impose the punishment were revived by the competent officer by issuing a fresh show-cause notice against dismissal, a writ petition challenging the revival of proceedings is premature as no punitive action has as yet been taken and there is no present grievance which

*(C. W. No. 3995 of 1975, D/- 14-8-1975—(Punjab & Har)).

can be ventilated in Court.

(Paras 5, 6)

Mr. J. Ramamurthi, Advocate, for Appellant; M/s. Janendra Lal and B. R. Agarwala, Advocates of M/s. Gagrath & Co. Advocates, for Respondents.

Judgment of the Court was delivered by

KRISHNA IYER, J.:— This appeal, by special leave, lends itself to a quick burial in view of the brief facts set out below.

2. The appellant has been an employee of the second respondent. A notice was issued to him to show cause why disciplinary action should not be taken against him for certain items of misconduct imputed to him. The then secretary of the bank, Shri Daljit Singh, enquired into the allegations. Thereafter, on April 1, 1975 the secretary issued a notice to the appellant to show cause why his next increment should not be stopped by way of punishment. A reply was sent by the appellant by way of explanation and the secretary accepting the explanation dropped the proceedings by order dated April 9, 1975 (Annexure III). Thereafter, the Managing Director taking the view that Shri Daljit Singh, secretary, had no power to inflict punishment on the employees of the bank and that therefore the proceedings culminating in the exoneration of the appellant were invalid issued a fresh memorandum which concluded thus.

"After considering the said enquiry report along with other relevant documents, I am provisionally of the view to impose upon you a penalty of dismissal from bank services. Before doing so, you are asked to show cause within 21 days from the receipt of this memorandum why on account of findings of the said Enquiry Officer, into the charges, you should not be dismissed from the bank services. In case no reply is received within the prescribed period, it will be presumed that you have no reply in this behalf and the proposed punishment will be imposed."

The appellant was also suspended on the same date, viz., 7th July 1975.

3. Thereupon, a writ petition under Arts. 226/227 was moved by

the appellant challenging the revival of the proceedings against him as illegal and opposed to natural justice.

4. The first point raised in objection by the second respondent is that the writ petition is premature since no action has been taken finally against the appellant, the disciplinary proceedings are still pending and the explanation of the appellant is under consideration. It is only in the event of the appellant being punished that any grievance can arise for him to be agitated in the proper forum.

5. Other obstacles in the way of granting the appellant relief were also urged before the High Court and before us, but we are not inclined to investigate them for the short reason that the writ petition was in any case premature. No punitive action has yet been taken. It is difficult to state, apart from speculation, what the outcome of the proceedings will be. In case the appellant is punished, it is certainly open to him either to file an appeal as provided in the relevant rules or to take other action that he may be advised to resort to. It is not for us, at the moment, to consider whether a writ petition will lie or whether an industrial dispute should be raised or whether an appeal to the competent authority under the rules is the proper remedy, although these are issues which merit serious consideration.

6. We are satisfied that, enough unto the day being the evil thereof, we need not dwell on problems which do not arise in the light of the view we take that there is no present grievance of punitive action which can be ventilated in court. After all, even the question of jurisdiction to re-open what is claimed to be a closed enquiry will, and must, be considered by the Managing Director. On this score, we dismiss the appeal but, in the circumstances, without costs.

7. Before parting with this case, we would like to make it clear that counsel for the co-operative bank has not been able to show any power to suspend an employee pending an enquiry. If that be so, the suspension of the appellant is plain-

ly without the pale of law and he would be entitled to his salary during the period till final orders are passed. Since the matter has been pending long enough, we are assured by counsel for the respondent that final orders may be passed within one month from to-day.

Appeal dismissed.

AIR 1976 SUPREME COURT 1822

(From: Andhra Pradesh)*

Y. V. CHANDRACHUD AND A. C. GUPTA, JJ.

Mohammad Ibrahim, Appellant
v. B. Rama Rao, Respondent.

Criminal Appeal No. 194 of 1971,
D/- 28-11-1975.

(A) Criminal P. C. (1898), Section 479-A — Prosecution for giving false evidence — Essentials — Mere wrong statement is not enough for sanctioning prosecution.

Under Section 479-A, Cr. P. C. not only is it necessary that the court must form the opinion that the witness had intentionally given false evidence, but it is further necessary that the court must come to the conclusion that for the eradication of the evils of perjury and in the interests of justice it is expedient that the witness should be prosecuted for the offence which appears to have been committed by him. (Para 5)

Held, in the circumstances of the case there was a plausible explanation as to the circumstances in which the respondent, the person sought to be prosecuted under Section 193, I. P. C. made particular statements complained of. He also did not occupy any high place in the hierarchy of secretariat staff and the affidavit was also sworn on the command of his superior officer. The respondent had also retired. Therefore it was not expedient in the interests of justice to prosecute the respondent for having made false statements in his counter affidavit.

(Para 5)

(B) Constitution of India, Article 226 — Procedure — Affidavit in opposition by State Government —

*(Criminal Misc. Petn. No. 123 of 1970, D/- 7-7-1970—(Andh Pra)).

ET/FT/B671/76/MVJ

1976 Mohd. Ibrahim v. B. R. Rao (Chandrachud J.) [Prs. 1-4] S.C. 1823

Practice by higher officers of State to utilize lower ones to provide alibi for their own want of care, deprecated — Desirability of legal advisers of Government to display greater competence and attention in drafting affidavits pointed out: Writ Petns. Nos. 1480 and 1525 of 1968, D/- 5-3-1969 (AP). Ref. (Para 6)

Cases Referred: Chronological Paras (1969) Writ Petn. Nos. 1480 and 1525 of 1968, D/- 5-3-1969. (Andh Pra) 6

Mr. S. Markandeya, Advocate, for Appellant; Mr. P. Ram Reddy Sr. Advocate, (Mr. P. P. Rao, Advocate with him), for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellant had filed writ petition No. 205 of 1967 in the High Court of Andhra Pradesh for challenging the order of his reversion from the post of Assistant Engineer to that of a Supervisor. The respondent, who was then an Assistant Secretary to the Government of Andhra Pradesh in the Public Works Department, swore to a counter-affidavit on behalf of the five respondents in the writ petition. He stated in that affidavit, inter alia that grave charges of misbehaviour were made against the appellant by one Miss. G. L. Narayanamma, that the case in regard to those charges was pending in the court of the Eighth City Magistrate, that the appellant's services as an Assistant Engineer were found unsatisfactory since November, 1963 and that the order of reversion was passed because his service record was not satisfactory. The writ petition was dismissed by the High Court but the appellant carried the matter to this Court and on remand, the writ petition eventually succeeded and the order of reversion passed by the Andhra Pradesh Government was set aside by the High Court.

2. On January 28, 1970, the appellant filed an application in the High Court praying that orders may be passed under Section 479-A of the Code of Criminal Procedure 1898, directing that the respondent be prosecuted under Section 193 of the Penal Code on the ground that the

statements made by him in the counter affidavit were to his knowledge false. The High Court by its judgment dated July 7, 1970 dismissed the application and being aggrieved thereby, the appellant has filed this appeal by special leave.

3. Section 479-A of the Code provides, to the extent material, that when any civil court is of the opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of judicial proceeding and that for the eradication of the evils of perjury and in the interest of justice, it is expedient that the witness should be prosecuted for the offence which appears to have been committed by him, the court shall, at the time of delivery of the judgment disposing of the proceedings, record a finding to that effect and may, if it so thinks fit, make a complaint thereof in writing setting forth the evidence which is false. The statements made by the respondent in his counter affidavit in regard to the pendency of the complaint filed by Miss Narayanamma and the appellant's service record are, in their letter and in the literal sense, not true but that is not enough for sanctioning the prosecution. An essential pre-requisite of Section 479A is that the court must form the opinion that the witness had made the statement complained of "intentionally."

4. The High Court has recorded a finding that on the material before it, it was difficult to come to the conclusion that the respondent had made the particular statements intentionally. In this view, the High Court seems to us to be right. The respondent has filed an affidavit before us from which it is clear that Miss Narayanamma had, in fact, made a complaint against the appellant to his superior officers in regard to his conduct and behaviour towards her. It is this complaint which formed the subject-matter of the criminal case which was filed by the appellant against Miss Narayanamma for defamation under Section 500, I. P. C. Miss Narayanamma was fined in those proceedings but that is beside the point. The criminal case was pending in the Magistrate's court

when the counter affidavit of the respondent was drafted but the case was disposed of before the affidavit was sworn and tendered in the High Court. Those in charge of the legal affairs of the State ought to have shown greater care in scrutinising the affidavit once again before it was sworn but that cannot justify the charge that the respondent had made the untrue statement intentionally. It is not irrelevant, on the factual aspect, that he had no reason for doing so. The same holds good in regard to the other statement contained in the counter affidavit that the service record of the appellant was not satisfactory until a certain date.

5. Under Section 479-A, Cr. P. C. not only is it necessary that the court must form the opinion that the witness had intentionally given false evidence, but it is further necessary that the court must come to the conclusion that for the eradication of the evils of perjury and in the interests of justice it is expedient that the witness should be prosecuted for the offence which appears to have been committed by him. On this aspect of the matter, there is many a circumstance showing that it is not in the instant case expedient in the interests of justice that the respondent should be prosecuted for having made false statements in his counter affidavit. There is a plausible explanation as to the circumstances in which the respondent came to make the two particular statements now complained of. Secondly, the respondent did not occupy any high place in the hierarchy of the Secretariat staff and we are inclined to the view that he swore a statement which by his superior officer he was commanded to swear. Mr. Markandeya appearing for the appellant urged that the entire record of the case was before the respondent and if he were to peruse that record with any degree of care, he would not have made the particular averments in his counter-affidavit. The question before us is not whether the respondent was negligent in failing to peruse the record carefully but whether he had intentionally made the false statements complained of and whether the interests of

justice require that he must be prosecuted for having made the particular statements. Those whose duty primarily it was to study the record and to draft a counter affidavit on the basis of that record should have exercised the care demanded of them before the respondent was asked to swear the affidavit. Their failure to display care and caution cannot be visited upon the respondent who was but a small officer in a big department of the State Government.

6. We cannot, however, part with this case without drawing the attention of the State Government to what seems to be a highly unsatisfactory state of affairs. Counsel for the appellant drew our attention to an unreported judgment of the High Court of Andhra Pradesh in *G. Satyanarayana v. Govt. of Andhra Pradesh*, Writ Petns. Nos. 1480 and 1525 of 1968 Decided on 5-3-1969 (Andh Pra) in which the High Court, expressed its grave concern at innumerable instances in which irresponsible statements were made, without any regard to accuracy, in the affidavits filed on behalf of the State Government. The case before us is yet another instance of the malady. We hope that the higher officers of the State Government will cease hereafter to utilise the lower ones to provide an alibi for their own want of care and that the legal advisers of the Government will display greater competence and attention in drafting affidavits. The respondent has already retired from Government service and we do not think it expedient in the interests of justice to disturb his peace, such as may have survived the gnawing feeling of having made false statements on oath.

7. With these observations, we dismiss the appeal.

Order accordingly.

1976

Jose da Costa v. Bascora (Goswami J.) [Prs. 1-3] S.C. 1825

AIR 1976 SUPREME COURT 1825

(From: Gao, Daman & Diu Addl. J. C's Court)*

H. R. KHANNA AND P. K. GOSWAMI, JJ.

Jose da Costa and another, Appellants v. Bascora Sadashiva Sinai Narcornim and another, Respondents.

Civil Appeal No. 1521 of 1968, D/- 7-4-1976.

(A) Portuguese Civil Code, Articles 474, 505, 510, 528 and 529 — Suit for possession — Defendants setting up perpetual lease but failing to establish it — Alternative plea of prescription — If proved — Civ. App. No. 213 of 1966, D/- 20-1-1968 (Goa), Reversed.

Even under the Portuguese Law permissive possession is not sufficient to prescribe title of the owner of the land. (Para 26)

Held on the facts and circumstances of case that the defendants' ancestors and, after them, the defendants had been in possession of the land since 1875. Title of the plaintiffs was repudiated openly in the year 1920. The defendants were in possession by occupying the house standing on the land and the house was constructed by the defendants' ancestors. The plaintiffs had made a complaint about their conduct in denying their title to the land and in opposing their construction as early as in 1920. The passivity and inertness of the plaintiffs thereafter for over forty years till the institution of the suit in 1961 clearly established the plea of prescription set up by the defendants. The defendants must therefore be held to have acquired title to the said land by prescription. There being no proof whatsoever of permissive possession under the plaintiffs or their ancestors, there is no question of application of the rule laid down under Article 510, Civ. App. No. 213 of 1966, D/- 20-1-1968 (Goa), Reversed.

(Paras 28 to 32)

*(Civil Appeal No. 213 of 1966, D/- 20-1-1968—Goa, Daman & Diu Addl. J. C's Court.)

ET/FT/B366/75/KSB

1976 S. C./115 IX G—3

Cases Referred: Chronological Paras
AIR 1975 SC 1843 7

Mr. U. R. Lalit, Sr. Advocate, (Mr. K. Rajendra Chowdhary, Mrs. Veena Khanna and Mr. S. L. Setia, Advocates with him), for Appellants; Mr. V. M. Tarkunde, Sr. Advocate, (M/s. V. N. Ganpule and Mr. A. G. Ratnaparkhi, Advocates with him), for Respondents.

Judgment of the Court was delivered by

GOSWAMI, J.:— The appellants in this appeal by special leave, Jose da Costa and his wife, Isabela Braganca are the defendants and the respondents, Bascora Sadashiva Sinai Narcornim and his wife, Durgabai Narcornim, are the plaintiffs in the original suit.

2. The plaintiffs instituted a suit in the court of Judge of Quem-pem Comarca on February 27, 1961, in accordance with the Portuguese Law then in force in those territories for ejectment of the defendants from the suit property. It was alleged that on the death of Sadasiva, father of the plaintiff, Bascora, in partition proceedings with minors (inventario), this plot was assigned to Bascora's mother, Sitabai, towards her moiety in the estate. On Sitabai's death, the property devolved on the plaintiffs, Bascora and his six sisters. Before the partition of the property among the legal heirs of Sitabai, Bascora acquired the rights from some of his sisters and became the owner of the suit property with other heirs. Bascora's parents had inherited this property from their ancestors. The father of Bascora had permitted the ancestors of the defendants to build a house for their residence on a part of the property subject to the condition that they shall have to vacate the plot when called upon to do so. In the latter event, they shall be entitled to remove the super-structures of the building raised by them.

3. Even so, the plaint goes on to say that Caetana Esperanca Fernandes, the mother of the appellant, Jose da Costa, executed a deed on November 16, 1920, before the notary public of Comarca, which indicated that she and her family members were owners of the plot. On the basis of this deed, the defen-

dants asserted ownership of that part of the plot on which stands the house built by their ancestors and now in their occupation.

4. On the above allegations, the plaintiffs prayed for a declaration that the plaintiff, Bascora, and the other heirs of his mother, Sitabai, are, the only owners of the plot in dispute and that the house in the occupation of the defendants on a part of that plot was constructed in the circumstances and subject to the terms mentioned in the plaint. They further prayed that the defendants be directed to vacate the plot after removing the materials of their house.

5. The defendants denied the allegations and pleaded that it was Visnum Bascora Sinai Narcornim, an ancestor of the plaintiffs, who had given the suit property on perpetual lease to Pascoal da Costa, an ancestor of the defendants in the year 1875 at an annual rent of Rs. 2/4/-. It was stated further that no such rent has been paid for over forty years before the suit nor has any rent ever been claimed by the family of the plaintiffs for such a long time. It was Pascoal da Costa who possessed the plot as his own and originally built one house on it, but subsequently his descendants constructed more houses so that at present there are three houses and one stable on the plot in dispute. On Pascoal da Costa's death, in inventaria proceedings, this property on November 16, 1920, was "consolidated in full ownership in the patrimony of the descendants of the said Pascoal da Costa."

6. The defendants further aver in their written statement that the suit property has been in their "open, peaceful and continuous" possession including that of their predecessors-in-interest, as owners for a period of more than 50 years and that they have acquired title by prescription.

7. The trial Court decreed the suit on April 30, 1966, directing the defendants to remove their superstructures on the land or in the alternative to receive from the plaintiffs Rs. 1084/- which was found to be the value of the material of the house in question as per estimate of

the experts appointed for the purpose. On appeal the learned Additional Judicial Commissioner dismissed the same on January 20, 1968, and affirmed the decree of the trial Court. The defendants came to this Court by special leave against the judgment of the Additional Judicial Commissioner and this Court by its order dated August 1, 1975, which has since been reported in AIR 1975 S. C. 1843, remanded the appeal to the Judicial Commissioner for a finding on the plea of prescription raised by the defendants by observing as follows:—

"The plea of prescription goes to the root of the matter. It was raised by the defendants in their pleadings and the matter was put in issue. It was again taken up in the grounds of appeal filed in the Court of the Judicial Commissioner, but was left undecided. For the purpose of doing complete justice in the case, we think it necessary to have the advantage of the finding of the court below on this issue. Accordingly, we remit this case to the Court of the Judicial Commissioner, Goa, Daman and Diu with the direction that it should after rehearing the parties record a specific finding on the issue as to whether the defendants had acquired full title to the suit property by prescription under the law in force at the relevant time. The Judicial Commissioner shall submit his report with reasons therefor to this Court within four months from the date on which the records are received in his court. In the meantime the appeal shall remain pending in this Court."

8. We have actually taken the facts of this case from the above decision.

9. The Judicial Commissioner has since submitted his report dated December 5, 1975, and the appeal has come up before us for final hearing.

10. After examining the entire evidence, oral and documentary, the Judicial Commissioner has come to the conclusion that the defendants have failed to prove their acquisition of full title to the suit property by prescription under the law in force at the relevant time.

11. During the hearing we did not have before us any printed Portuguese Civil Code or any standard legal treatise to which we would have ordinarily liked to refer. Counsel for the appellants, however, produced certain extracts from various articles to which counsel for the respondents has not taken any exception. There is also reference to certain articles from the Portuguese Civil Code in the earlier judgment of this Court as also in the Report submitted by the Judicial Commissioner. Both the parties accept those articles as correct, although the original books are not before us.

12. In view of the earlier decision of this Court and after hearing the parties we feel that we will be justified to decide this appeal only on the question relating to the plea of prescription.

13. Since the original perpetual lease was not produced in court and a certified copy of the original translation of the perpetual lease issued on November 23, 1920, was alone produced, we have no reason to disagree with the conclusion of the Judicial Commissioner that the defendants failed to establish their plea of perpetual lease of the land.

14. Before we may proceed further it will be appropriate to note that even the plaintiffs themselves laid a nucleus for the plea of adverse possession to be easily taken up by the defendants. Para 5 of the plaint may, therefore, be quoted:—

"5. Notwithstanding this, the mother and mother-in-law of the defendants Caetana Esperanca Fernandes with the ambition of alleging to the said plot of the plaintiffs rights that do not assist her, participated as an executing party in a deed drawn up on 16-11-1920, by the former notary public of this Comarca, Salinho da Silva, wherein a plot having the denomination of "Deul acodil tucda" or "Mordi" was partitioned, one-third of which was assigned to the said Caetana, and with basis in that partition the defendants allege to be the owners of the ground whereon the said house raised by their ascendants is situate." Indeed this repudiation of title of the plaintiffs by the defendants gave

rise to the cause of action. We cannot accept the submission of Mr. Tarkunde on behalf of the respondents that the word "allege" in the above paragraph in the present tense makes any difference in the matter of the plea.

15. Not only in the plaint, but also in the evidence, the plaintiff Bascora gave further reinforcement to the plea of adverse possession when he stated thus:

".....in 1920 the deponent (that is the plaintiff), desiring to build the house existing in the plot of land, there were disputes raised by defendant's mother and by one Santana Costa and then the deponent (that is the plaintiff) notified them through the Administration Office of Sanguem to vacate the plot land. He does not know what subsequent course his petition had....."

16. Mr. Tarkunde submits that there might have been some dispute which, however, was settled and the plaintiffs built the house on the suit land and the defendants also continued on the land under the earlier permissive arrangement. Mr. Tarkunde draws our attention to the following passage in the evidence of defendant No. 1:—

"In 1920 more or less, the plaintiff built a house in the plot in question and began to stay there. The same house was built very near the house where the deponent (that is the defendant No. 1) stays and which already existed at the time of that building. The deponent was about 14 or 15 years old. The grandfather of the deponent Pascoal da Costa and his uncle Francisco Piedade Costa and even the deponent's mother opposed the said building raised by the plaintiff. The question was amicably solved at the house of Narcornins Bencares to which the plaintiff belongs, to the effect that the plaintiff should build the house and reside in it as well as the said persons who had their houses in it should continue to reside therein. The deponent came to know of these facts regarding the dispute and its solution after hearing his said uncle Francisco Piedade da Costa."

17. Apart from the fact that the above is hearsay evidence we

are clearly of the view that the statement is not sufficient to annihilate the theory of repudiation of the title of the plaintiffs to the property. It stands to reason that the defendants had been in continuous possession of the entire plot of land described in para 1 of the plaint which is a larger area including the portion where the house of the defendants stands. In the year 1920 the plaintiffs sought to make their construction on the vacant portion of the land close to the defendant's house which led to opposition and obstruction from the defendants. At that time apparently the defendants later agreed to the construction by the plaintiffs and that seems to be the reference to the "amicable" solution in the above extract.

18. So far as the land on which the defendants had their house, there was no proof nor any evidence of any change on the part of the defendants to their open hostility to the plaintiffs' title to the same. The plaintiffs did not give any evidence of any such amicable solution. On the other hand, it is admitted that they had reported to the Administrator without even caring to know the result of such action against the defendants. The further fact that along with the plaint the plaintiffs annexed a certified copy of the partition deed of November 16, 1920, — which copy was obtained as early as on December 22, 1920 — goes to show that they were fully cognizant of the public assertion by the defendants of their own title to the land on which their house stands repudiating that of the plaintiffs. Mr. Tarkunde submits that there is no evidence that this document had been actually obtained by the plaintiffs, but production of the document without any explanation from the side of the plaintiffs speaks a volume about their knowledge of the repudiation of title.

19. Mr. Tarkunde also invited our attention to the statement of defendant No. 1 to the effect:

"that the plaintiff for reasons of enmity does not receive this rent nor he ever asked for its payment to the deponent (that is defendant No. 1) and other members of his family."

This statement cannot be torn from the context of the alternative plea set up by the defendants. This statement is fairly consistent with the alternative plea of perpetual lease of the land set up by the defendants. According to the defendants the land had been in their occupation on perpetual lease from Visnum Narcornim, the plaintiffs paternal uncle and one that would have been acknowledged by the plaintiffs the defendants would perhaps be willing to pay even to the plaintiffs the annual rent. But it is the clear case of the plaintiffs that the story of perpetual lease was false and fraudulent and besides that Visnum Narcornim had no interest in the land and was not competent or authorised to lease out the same. We, therefore, cannot accept the exaggerated importance to the above statement of the defendant No. 1 in his cross-examination.

20. The Judicial Commissioner, however, rightly observed that "an overt act of possession to the knowledge of the plaintiffs and their ascendants must be shown to have taken place." From the above discussion, we have no hesitation in arriving at the conclusion that the defendants have been able to establish the same and the Judicial Commissioner is not right in taking a contrary view.

21. According to Article 474 of the Portuguese Civil Code, "possession is defined as holding or fruition of any thing or right. Para 1. The acts done by licence or permission do not constitute possession...".

22. According to Article 505, "things and rights are acquired by virtue of possession, just as obligations are extinguished by reason of not demanding their fulfilment. The law lays down conditions and the period of time that are necessary for one as well as for the other thing. This is called prescription.

Proviso. The acquisition of things and rights is known as positive prescription; the discharge of the obligations by reason of not demanding their fulfilment is known as negative prescription."

23-24. Article 528 reads thus: "In the absence of registration of possession or title of acquisition,

prescription with respect to immovable property or rights to immovable will operate by virtue of possession for 15 years."

25. Article 529 of the Code is as follows:—

"When, however, the possession of immovable property or rights to immovable property referred to in the foregoing article has lasted for a period of 30 years, prescription will operate; and no mala fide or absence of title can be averred, except the provisions of Article 510."

26. Thus even under the Portuguese Law what appears to be clear is that permissive possession is not sufficient to prescribe title of the owner of the land.

27. The Judicial Commissioner was not right in holding that possession of the defendants was permissive under the plaintiffs. There is no evidence whatsoever for such a conclusion. On the other hand the evidence is against recognition by the defendants of any title in the plaintiffs as such. The Judicial Commissioner mistook the defendants' admission of the alleged perpetual lease under *Visum Narcornim* as permissive occupation under the plaintiffs even after holding that the defendants failed to establish perpetual lease.

28. We are, therefore, left with the long, continuous and peaceful possession by the defendants of the land with the residential house thereon since the time of their ancestors after a clear repudiation of the title of the plaintiffs to the land in 1920. The fact that the defendants set up title in *Visum Narcornim* describing him as plaintiffs' ancestor, does not affect the position in view of the plaintiffs' avowed denial that *Visum Narcornim* had anything to do with the land. *Visum Narcornim* is survived by his own descendants and we are not dealing with a case where *Visum Narcornim's* heirs as such have sought eviction of the defendants from the land. The plaintiffs do not accept *Visum Narcornim's* title to the land as their title. The Judicial Commissioner fell into an error because of not keeping the distinction between *Visum Narcornim's* title to the land

and the plaintiffs' title to the same. The origin of ownership of the suit land being dipped in the misty past what emerges from the evidence, in the absence of proof of lease or permission by the plaintiffs' own ancestors, is that the defendants have been in long and open possession of the land over which they have constructed their house for a period long enough for that possession to ripen into ownership. The defendants in our opinion should be held to have acquired title to the said land by prescription.

29. There being no proof whatsoever of permissive possession under the plaintiffs or their ancestors, there is no question of application of the rule laid down under Article 510, relied upon by Mr. Tar-kunde.

Article 510 reads thus:

"One who possesses a thing in another's name cannot acquire it by prescription except if the title of possession has been inverted, either due to an act of a third party, or by objection raised by the possessor to the right of the other in whose name he was possessing it and not refuted by the latter; but in such event the prescription shall run from the date of inversion of the title. Sole para: The title is said to be inverted when it is substituted by another title capable of transferring the possession or ownership (*dominio*)."

30-31. According to the Judicial Commissioner the above Article is applicable and since the defendants could not prove that there had been at some time "inversion of title" their possession was merely "*detencao*" (namely, a precarious possession) and such physical *detencao* without "*animus*" cannot be invoked for the purpose of claiming any effect that possession in one's own name or as of right connotes. It is difficult to see how Art. 510 can be attracted to the instant case. The defendants had at no time possessed the land on which their house stands in the name of the plaintiffs. They were never accepting the position of permissive possession under the plaintiffs and had asserted perpetual lease under *Visum Narcornim*, who, even according to the plaintiffs, was an un-

authorised person. Article 510 would not be attracted to this case when the defendants alternatively were possessing in the name of Visnum Narconim or his descendants. Article 510 is, therefore, clearly out of the way. We are, therefore, not even required to consider whether there was any "inversion of title" in this case or not.

32. It is clear that the defendants' ancestors and, after them, the defendants have been in possession of the land since 1875. Title of the plaintiffs was repudiated openly in the year 1920. The defendants are in possession by occupying the house standing on the land and the house was constructed by the defendants' ancestors. The plaintiffs had made a complaint about their conduct in denying their title to the land and in opposing their construction as early as in 1920. The passivity and inertness of the plaintiffs thereafter for over forty years till the institution of the suit in 1961 clearly establishes the plea of prescription set up by the defendants.

33. It is significant that even the plaintiffs, being out of possession of the land in suit for a long number of years and having constructed their house on a portion of the land only in the year 1920, sought to establish the title to the property "by virtue of the prescription that operated in their favour" (see paragraph 3 of the plaint).

34. Mr. Tarkunde has made a further submission, which appears to have received approval of the Judicial Commissioner, that the defendants' witnesses while describing the land in suit acknowledged it as "the plaintiff's land." It may not be overlooked that the plaintiffs also have their own house on a part of the land. We, therefore, cannot agree that the defendants' witnesses by identifying the land in suit in that manner defeated the claim of the defendants with regard to the adverse possession.

35. We may observe that Mr. Lalit, the learned counsel for the appellants, fairly conceded that he was confining his claim in this case only to the land on which the defendants have their house.

36. The appeal is, therefore, partly allowed. The plaintiffs' suit for title to the land in occupation of the defendants and for their eviction so far as that portion of the land with their house on it is concerned is dismissed. The plaintiffs' suit for declaration in respect of the remaining portion of the land, however, is decreed. As there is no prayer for eviction of any person other than the defendants, that claim is rejected. We express no opinion with regard to the claim of persons who may be in occupation of the land other than the defendants who are not impleaded in the suit and against whom no relief has been claimed. The judgment and decree of the Additional Judicial Commissioner to the extent indicated in this judgment are set aside. There will be, however, no order as to costs.

Appeal partly allowed.

AIR 1976 SUPREME COURT 1830

(From: Andhra Pradesh)*

H. R. KHANNA AND P. K. GOSWAMI, JJ.

Udavilli Nagarathnam and another, Appellants v. Reddi Satyanarayana Murthi and others, Respondents.

Civil Appeal No. 1048 of 1968, D/- 1-4-1976.

(A) A. P. (Andhra Area) Tenancy Act (18 of 1956), Ss. 10, 11, 13— Possession of property transferred under deed — Defendant to pay produce and obtain receipt — Whether tenancy created by deed — Eviction of defendant — Procedure. (T. P. Act (1882) Sections 105 and 79).

One S on 4-8-1958, executed a deed in favour of the defendant a grandson giving him possession of the properties in which he had life interest stipulating at the same time that the defendant should deliver forty bags of paddy and obtain receipt from the plaintiff every year during his lifetime. After the death of S plaintiff basing his claim to the property on a deed issued no-

*(Appeal No. 64 of 1962, D/- 26-4-1967—Andh Pra).

ET/FT/B353/76/MVJ

tice to the defendant to hand over possession. On refusal, he filed a suit. The defendant claimed that he was entitled to the protection under the Andhra Act.

Held, that the Civil litigation between the parties having established their respective rights based on the documents and the plaintiff being the landlord and defendant being cultivating tenant, eviction must be sought for in accordance with the provisions of the Andhra Act. The High Court was right in refusing eviction through the process of the Civil Court. (Para 28)

The deed in favour of the defendant fulfilled the ingredients of a lease under Section 105, T. P. Act. Assuming that the principles of Section 76 (a) and (e) of the T. P. Act were applicable to the case, it could not be held that granting of lease to the defendant in the entire circumstances of the case was not a prudent act of management of the properties. In view of the relationship of the parties, that was a natural arrangement for cultivation of the land. (Paras 13, 17)

When a person with full knowledge of the law, ignorance of which is no excuse, enters upon a lawful transaction or executes a valid document, the rights flowing from the law cannot be denied to those who are entitled to their benefit on the supposed theory of estoppel or a plea of contracting out by implication. The provisions of the Andhra Act would therefore be attracted to the tenancy created by the deed in favour of the defendant. (Para 20)

Under Section 10 (1) of the Andhra Act the lease created by the deed dated 4-8-1958 would continue upto August 4, 1964 and even for further periods by later amendments of the Act. Taking the original section 10 (1) itself, the landlord S died in May 1960 and there is no question of the lease ceasing on his death in view of the clear provisions under Section 10 (1). As assignee by gift the plaintiff is a landlord on the death of S. Under Section 11, the ownership thus being changed on the death of the landlord, the tenancy, which subsists by operation of law, will continue on the same terms

and conditions for the unexpired portion of the lease under the scheme of the Act as amended. The expression "currency of the lease" in Section 11 will include the statutory extension of the lease under the provisions of the Andhra Act. In the circumstances termination of tenancy could only be under the Andhra Act and not through the process of Civil suit. (Para 27)

Cases Referred: Chronological Paras

AIR 1966 SC 1721 = (1966) 3 SCR 676 18, 20

Mr. M. Natesan, Sr. Advocate, (M/s. K. Jayaram and R. Chandrasekar, Advocates with him), for Appellants; Mr. B. V. Subrahmanyam, Sr. Advocate, (M/s. I. Balaiah and G. Narasimhulu, Advocates with him), for Respondent No. 1, Respondents 2-4 Ex parte.

Judgment of the Court was delivered by

GOSWAMI, J.:— This is an appeal on certificate from the judgment of the Andhra Pradesh High Court.

2. The two plaintiffs in the original suit are the appellants. They brought a suit in the court of the Subordinate Judge, Rajahmundry, for evicting defendants 1 to 3 from the properties in Schedules A, B and C, for delivery of possession of A and C Schedule properties to the first plaintiff and of the B Schedule properties either to the first plaintiff or to the second plaintiff. The suit properties were owned and possessed by Meenavalli Subbarayudu of Vedurupaka (hereinafter to be described as Subbarayudu). Subbarayudu was the husband of the second plaintiff and father of the first plaintiff. He had no male issue. He had only two daughters, plaintiff No. 1 and defendant No. 4, who was the older of the two. Subbarayudu made various dispositions of his property by executing several documents during his lifetime in favour of his daughters. So did his wife, the second plaintiff. While making such dispositions he was careful enough to make provision for himself and for his wife during their lifetime. The fourth defendant was married in 1923 and defendant No. 1 is her son. The first plaintiff was married in 1935. After

the marriage of the first plaintiff the mother executed a deed of gift (Ex. B-6) on February 13, 1935 in her favour in respect of certain land. On the same day her father also executed in her favour a deed of gift (Ex. B-7) in respect of some other land. On 7-6-1935, Subbarayudu executed another deed of gift in favour of his first daughter, defendant No. 4, giving her also some land (Ex. B-8). All the three documents were registered on the same day, namely, on June 11, 1935. After about nine years the mother executed a settlement deed (Ex. B-5) dated June 7, 1944, in respect of her joint 1/3 share in certain property in favour of her two daughters to be shared by them equally reserving life interest for herself. Then followed a settlement deed (Ex. A-4) of January 8, 1950, executed by Subbarayudu in favour of the first plaintiff giving her ten acres of pasture land as mentioned in C Schedule. Subbarayudu further executed a registered deed dated January 23, 1950 (Ex. A-8), described as will, whereby he gave to his daughters all the properties barring a few mentioned therein and stating that after his own lifetime and after the lifetime of his wife all his movable and immovable properties would be taken in equal shares by his two daughters. On April 14, 1955, he executed a settlement deed (Ex. A-1) whereunder he gave A and B Schedule properties to the first plaintiff, his second daughter. By this document the A Schedule property was to be enjoyed by the first plaintiff after his lifetime and B Schedule property after the lifetime of her parents. Three years later on August 4, 1958, Subbarayudu executed four more documents including a deed of revocation. Ex. B-10 is the document by which the earlier document Ex. A-1 was revoked stating that the earlier one had been brought about by fraud and misrepresentation. Ex. B-11 was executed purporting to settle his property on both the daughters to be enjoyed in equal shares after the lifetime of their parents. Ex. B-12 was executed in favour of his wife and the elder daughter giving them a certain extent of the land in Mellore village

besides the house sites and houses in Vedurupaka. It was mentioned in Ex. B-12 that after his lifetime his wife would be in possession without powers of alienation and that thereafter the elder daughter would be entitled to possession and enjoyment of the property as an absolute owner. Ex. B-13 was executed in favour of the first defendant, namely, grandson of Subbarayudu through his first daughter, giving him possession of the properties in which he had life interest stipulating at the same time that he (the first defendant) should deliver forty bags of paddy and obtain receipt from him every year during his lifetime.

3. The plaintiffs' case is that Subbarayudu had leased out A and B Schedule properties mentioned in Ex. A-1 on August 16, 1958, to the third defendant, the son of the second defendant and that both these defendants were in possession of the properties as tenants from that time. Subbarayudu died on May 5, 1960. After his death plaintiffs 1 and 2 basing their claim on Ex. A-1 respectively gave notices to the third defendant on June 14, 1960 and on July 11, 1960, to deliver back the lands in their possession. The third defendant replied that he was only working as a farm servant under the first defendant and the latter was the lessee under a deed dated August 4, 1958 and that the settlement deed in favour of the plaintiffs had been revoked by late Subbarayudu. The first plaintiff also had trouble with the first defendant when the latter drove away his watchman and lodged a complaint with the police claiming that he was in possession of the lands. The first plaintiff thereupon sent a notice on August 20, 1960, to the first defendant who, on the other hand, asserted his rights in the lands under a deed of settlement (Ex. B-13) dated August 4, 1958. That led to the institution of the present suit by the plaintiffs out of which this appeal has arisen.

4. The first daughter of Subbarayudu was impleaded as defendant No. 4 in the plaint.

5. The first and the fourth defendants filed separate written statements. Defendants Nos. 2 and

3 filed a memo adopting the written statement filed by the first defendant. All of them repudiated the plaintiffs' claim for possession of the lands.

6. Several issues were raised, but we are concerned in this appeal only with Issue No. 5 and the additional Issue No. 1 which are as follows:—

"Issue No. 5. Whether defendant No. 1 is entitled to any protection under the Andhra Tenancy Act?

Additional Issue No. 1

"Whether the deed D/- 4-8-1958 executed by late Meenavalli Subbarayudu in favour of the 1st defendant is a settlement deed or a lease?"

7. It may be mentioned that issues were raised regarding the validity of Ex. A-1, Ex. B-10, Ex. B-11 and Ex. B-13. The trial Court held that Ex. A-1 on which the plaintiffs based their suit was a valid document. The trial Court further held that the deed of revocation (Ex. B-10) and deed of settlement (Ex. B-11) were invalid. The High Court affirmed these findings of the trial Court and that controversy is closed.

8. With regard to Ex. B-13, the trial Court held it to be a true document and that it was a settlement deed and not a lease and that the first defendant was not entitled to any protection under the Andhra Pradesh (Andhra Area) Tenancy Act, 1956 (briefly the Andhra Act) and that defendants 2 and 3 were not tenants in possession of the land at the time of institution of the suit. In the view it took the trial Court decreed the suit for possession of A and C Schedule properties in favour of the first plaintiff and directing that the future profits, which would be payable by the first defendant, were to be determined in separate proceedings. The suit was also decreed in favour of the second plaintiff for possession of the B Schedule properties with similar orders regarding future profits.

9. On appeal by the defendants the High Court after hearing the parties, remanded the matter for a finding under Order 41, Rule 25. Civil Procedure Code by framing the following issue:

"Whether the plaintiffs accepted the gift of A and B Schedule properties by late Subbarayudu before its revocation on 4-8-1958 by late Subbarayudu?"

The subordinate Judge returned a finding that the gift had been accepted prior to the execution of the deed of revocation (Ex. B-10). The High Court thereafter heard the appeal and partly allowed the same.

10. The High Court, in disagreement with the trial Court, came to the conclusion that the document Ex. B-13 satisfied all the conditions of the definition of lease under Section 105 of the Transfer of Property Act and could not be treated as a settlement. The High Court further observed:

"The term of lease is conterminous with the life of the lessor with the result that as soon as the life of Subbarayudu ended, the term of lease automatically expired. On the death of Subbarayudu the property would pass to the persons specified in Ex. A-1. That must be the normal incidents of the transaction under the ordinary law. At the time the transaction of lease was entered into the Andhra Tenancy Act had already come into force. Subbarayudu was the landlord and the 1st defendant was the cultivating tenant within the meaning of those terms in the Andhra Tenancy Act. On the death of Subbarayudu his heirs, assignees and successors would likewise be landlords and they are entitled to evict the cultivating tenants."

11. Repelling the contention of the plaintiffs that the first defendant was not the tenant of Subbarayudu at all, but only a trespasser, the High Court held, on the oral and documentary evidence as well as on the admissions of defendants 2 and 3 with regard to the possession of defendant No. 1 as a lessee, that the defendant No. 1 was a cultivating tenant under the plaintiffs on the death of Subbarayudu. The High Court having come to that conclusion further held that the plaintiffs could evict the defendants only under the provisions of the Andhra Act by making an appropriate application to the Tehsildar and not in the present suit in the civil court.

The High Court, therefore, granted all the reliefs prayed for by the plaintiffs except that of eviction from A and B Schedule properties which was directed to be obtained by due recourse to the provisions of the Andhra Act. The High Court accordingly partly allowed the appeal refusing the prayer for eviction from A and B Schedule properties but at the same time declaring that the plaintiffs were entitled to the suit properties in terms of Ex. A. 1. The C Schedule property was not the subject-matter of appeal before the High Court and the decree in relation to that property was unaffected.

12. Mr. Natesan, the learned counsel appearing on behalf of the appellants, submits that the High Court is wrong in holding that Ex. B-13 is a lease and not a settlement.

13. We have perused the document (Ex. B-13). It is true that it is described in the very opening words of the document as "settlement deed". But that recital is not decisive of the real intent of the document. Under Section 105 of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The necessary ingredients mentioned under Section 105 of the Transfer of Property Act are found in the document (Ex. B-13). It is clear from the recitals that possession of the land was handed over by Subbarayudu to the first defendant for enjoying the same during the lifetime of Subbarayudu in consideration of "forty three weighed bags of paddy worth Rs. 800/-..... every year commencing from 15-1-1959." The document does not disclose a disposition of the property by a grandfather to a grandson out of love and affection but is a business-like instrument. To illustrate, the document refers to paddy to be delivered to Subbarayudu "without subjecting me to any expenses what-

soever and obtaining proper receipts from me." It goes on to say that "payment not borne by receipt need not be given credit to you." We are satisfied that the document (Ex. B-13) fulfils the ingredients of a lease under Section 105 of the Transfer of Property Act. The submission of Mr. Natesan, therefore, cannot be accepted.

14. Mr. Natesan next contends that Subbarayudu reserving only "life interest" in the Schedule A and B properties after he had gifted the same to the plaintiffs by Ex. A-1 on April 14, 1956, could not in law imperil their rights to possession of the same after his death by leasing out the same properties in 1958 in the manner done in view of the provisions of the Andhra Act which had already come into force in 1956. At any rate, says Mr. Natesan, it was not an act of prudent management of the properties in which he had only a life interest and the principles applicable to a mortgagee in possession under Section 76 (a) and (e) of the Transfer of Property Act would be applicable in the present case and the lease will not be binding on the plaintiffs.

15. In Ex. A-1 itself, which is the sheet-anchor of plaintiffs claim, there was reference, inter alia, to two things relevant for consideration on this aspect of the matter. Firstly, it is stated there:

"I and my wife, Bapanamma who is your mother shall during our lifetime, be in enjoyment of the A Schedule mentioned property and B Schedule mentioned property respectively without powers of disposition by way of gift, sale, etc. but only enjoying the produce got there by paying all Government taxes." Secondly, further:

"After my lifetime you take possession of the A Schedule mentioned property and after your mother's lifetime the B Schedule mentioned property."

16. In the first extract just set out, Subbarayudu made it clear that during his life he would enjoy the produce of the land "got there by paying all Government taxes". Subbarayudu was already an old man in 1955 and was apparently unable

personally to look after cultivation of the land. His wife and younger daughter were also, perhaps, considered by him no better for the purpose. Besides, it appears that he was keen to have at least some paddy to come to him from the land during his lifetime as a source of income and perhaps thought that his grandson, the first defendant, would faithfully carry out the conditions without creating difficulties. This position does not appear to have been disapproved even by the plaintiffs during the lifetime of Subbarayudu.

17. Assuming, but not deciding, that the principles under Section 76 (a) and (e) of the Transfer of Property Act may even be applicable in this case, we are unable to hold that granting of the lease to defendant No. 1 in the entire circumstances of the case was not a prudent act of management of the properties. In view of the relationship of the parties, that was a natural arrangement for cultivation of the land.

18. Mr. Natesan drew our attention to several decisions of this Court dealing with Section 76 of the Transfer of Property Act and in particular to the decision in *Prabhu v. Ramdev*, (1966) 3 SCR 676 = (AIR 1966 SC 1721) wherein this Court held that—

"even in regard to tenants inducted into the land by a mortgagee cases may arise where the said tenants may acquire rights of special character by virtue of statutory provisions which may, in the meanwhile, come into operation. A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period, it was observed, was a different matter altogether."

19. Counsel submits that the present case is clearly distinguishable from the above case since prior to the execution of Ex. B-13 in 1958, the Andhra Act had already come into force and it was not a case where certain special rights were created "in the meanwhile."

20. When a person with full knowledge of the law, ignorance of which is no excuse, enters upon a lawful transaction or executes a valid document, the rights flowing from the law cannot be denied to those who are entitled to their benefit on the supposed theory of estoppel or a plea of contracting out by implication. Prabhu's case (AIR 1966 SC 1721) (supra) is not an authority for such a proposition which counsel seeks to spell out. The provisions of the Andhra Act will, therefore, be attracted to the tenancy created by Ex. B-13.

21. It is further contended by Mr. Natesan that the plaintiffs are not landlords within the meaning of Section 2 (f) of the Andhra Act. He also submits that defendant No. 1 is not a cultivating tenant under the plaintiffs.

22. By Section 2 (f) of the Andhra Act, "landlord" means, the owner of a holding or part thereof who is entitled to evict the cultivating tenant from such holding or part, and includes the heirs, assignees, legal representatives of such owner, or person deriving rights through him."

23. By section 2 (c) of the said Act, "'cultivating tenant' means a person who cultivates by his own labour or by that of any other member of his family or by hired labour under his supervision and control, any land belonging to another under a tenancy agreement, express or implied, but does not include a mere intermediary."

24. The High Court has found that defendant No. 1 was a cultivating tenant of the landlord under Subbarayudu relying on Ex. B-13 and also on admissions by the defendants 2 and 3 who conceded possession of the land by defendant No. 1 as a lessee under Subbarayudu and their own possession as farm servants under the first defendant. We have no reason to take a contrary view.

25. In view of our conclusion that Ex. B-13 is an instrument of lease, there is no difficulty in holding that Subbarayudu was the quondam landlord of the first defendant within the meaning of Section 2 (f)

of the Andhra Act. Once that is established, Section 10 of the Andhra Act takes care of the tenancy that has been created under Ex. B-13.

26. Section 10 of the Andhra Act at the relevant time reads as under:—

"10 (1) "The minimum period of every lease entered into between a landlord and his cultivating tenant on or after the commencement of this Act, shall be six years. Every such lease shall be in writing and shall specify the holding, its extent and the rent payable therefor, with such other particulars, as may be prescribed. The stamp and registration charges for every such lease shall be borne by the landlord and the cultivating tenant in equal shares.

(2) Notwithstanding anything contained in sub-section (1) all tenancies subsisting on the date of promulgation of the Andhra Cultivating Tenants' Protection Ordinance, 1956 (Andhra Ordinance 1 of 1956), and protected by that Ordinance, and all subsequent tenancy agreements entered into up to the commencement of this Act, shall continue for a period of five years from the 1st June 1956 or until the expiry of the lease in the normal course, whichever is later, on the same terms and conditions as before, but subject to the determination of fair rent in case of dispute.

(3) After such termination, the landlord may resume the land from the cultivating tenant without any notice, and if the tenant does not surrender possession, the landlord may by an application before the Tahsildar obtain an order for delivery of possession in the prescribed manner."

27. Thus under Section 10 (1) when Ex. B-13 was executed on August 4, 1958, the lease created would by statute continue upto August 4, 1964 and even for further periods by later amendments of the Act. Taking the original Section 10 (1) itself, the landlord Subbarayudu died in May 1960 and there is no question of the lease ceasing on his death in view of the clear provision under Section 10 (1). As assignees by gift the plaintiffs are landlords

on the death of Subbarayudu. Under Section 11, the ownership thus being changed on the death of the landlord, the tenancy, which subsists by operation of law, will continue on the same terms and conditions for the unexpired portion of the lease under the scheme of the Act as amended. The expression "currency of the lease" in Section 11 will include the statutory extension of the lease under the provisions of the Andhra Act. Termination of tenancy under the Andhra Act is provided for under Section 13. Under Section 16, there is a special forum for adjudication of disputes under the Act including eviction of cultivating tenants. Under Section 17 the provisions of the Andhra Act override anything inconsistent therewith contained in any pre-existing law, custom, usage, agreement or decree or order of a Court.

28. It is, therefore, clear that the civil litigation between the parties having established their respective rights based on the two documents, Ex. A-1 and Ex. B-13, and the plaintiffs being landlords and defendant No. 1 being a cultivating tenant, eviction will have to be sought for in accordance with the provisions of the Andhra Act. The High Court is right in refusing eviction through the process of the civil court.

29. In the result we are unable to interfere with the judgment and decree of the High Court. The appeal is dismissed. There will be, however, no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1836

(From: AIR 1971 Delhi 49)

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

Yogiraj Charity Trust, Appellant v. Commissioner of Income-tax, New Delhi, Respondent.

Civil Appeals Nos. 937 to 966 of 1971, D/- 30-3-1976.

(A) Income-tax Act (1922), S. 4

(3) (i) — Some objects charitable and some non-charitable — Claim for exemption — Test.

ET/FT/B348/76/CWM

In order to claim the benefit of the exemption under Sec. 4 (3) (i) of the Act the property must be held under trust or other legal obligation wholly for religious or charitable purposes. The only relaxation which may arise in some cases is that all the primary objects of the trust must be of a religious and charitable nature and the existence of any ancillary or secondary object which is not of a religious or charitable nature but which is intended to subserve the religious and charitable objects may not prevent the grant of an exemption. (Paras 17, 18)

The test is that if one of the objects of the trust deed is not of a religious or charitable nature and the trust deed confers full discretion on the trustees to spend the trust funds for an object other than of a religious or charitable nature, the exemption under Section 4 (3) (i) of the Act is not available to the assessee. AIR 1971 Delhi 49. Affirmed, AIR 1967 SC 1554, Applied. Case law discussed. (Para 26)

Cases Referred: Chronological Paras
 AIR 1976 SC 10 = (1976) 1 SCR 461 19
 AIR 1969 Andh Pra 4 = 66 ITR 195 21
 AIR 1967 SC 1554 = 65 ITR 611 16
 AIR 1966 Raj 154 = 73 ITR 402 26
 AIR 1965 SC 1281 = 55 ITR 722 18
 AIR 1965 SC 59 = (1964) 8 SCR 36 20
 (1963) 48 ITR 181 (Cal) 21
 AIR 1954 All 291 = 25 ITR 472 21
 AIR 1944 PC 88 = 12 ITR 482 19
 AIR 1930 PC 226 = 57 Ind App 260 16

Mr. Bishambhar Lal, M/s. D. N. Banerjee, Pramod Dayal and M. Iyengar, Advocates, for Appellants; Mr. Hardayal Hardy (in Civil Appeal No. 937 of 1971), (Mr. S. P. Nayar, Advocate with him) (in Civil Appeals Nos. 938-966 of 1971), for Respondent.

Judgment of the Court was delivered by

RAY, C. J.— These appeals by special leave are from the judgment dated 26 May, 1970 of the High Court of Delhi.

2. The question referred to the High Court under Section 66 (1)

of the Income-tax Act, 1922 referred to as the Act was as follows:—

"Whether on the facts and in the circumstances of the case the income of the trust which was spent on the religious and charitable purposes within the taxable territories was exempt under Section 4 (3) (i) of the Indian Income Tax Act, 1922."

3. The main judgment was delivered in Income Tax Reference No. 40 of 1965.

4. The High Court answered the question in the negative.

5. The trust in Income Tax Reference No. 40 of 1965 was taken as typical of all the cases. The deed of trust dated 12 April, 1948 was made by Ramkrishna Dalmia. The trust was called "Jaipur Charitable Trust". In Jaipur Charitable Trust Rs. 10,000 was given on trust on the terms and conditions set out in the deed.

6. The objects of the trust in clause 5 (a) are, inter alia, as follows:

(i) To open, found, construct, establish, take over, equip, promote, conduct, maintain, support, subsidise, grant aids and make donations to schools, colleges, Pathshalas, boarding houses, reading clubs, libraries, art, music or literary societies and other institutions, educational or otherwise, associations, printing presses, journals, newspapers, periodicals, and other publications for imparting or developing religious, commercial, industrial, legal, medical, engineering scientific or other knowledge or training.

(ii) To give stipends, scholarships, travelling expenses, allowances and monetary aids to students and scholars in India and abroad, engaged in any of the pursuits referred to in sub-clause (i).

(iii) To found, construct, maintain, support, assist or grant aids or subscriptions to temples, prayer or congregational halls or other buildings for cultural, social or religious discourses.

(iv) To open, found, conduct, maintain, or contribute to the opening and maintaining of such institutions where work at living wages can be provided to poor and deserving people and also be conducive to

the development of industries and benefit of the poor.

(v) To open, found, establish, equip, finance, assist, maintain or contribute to religious, commercial technical, industrial, or commercial concerns, institutions, associations or bodies imparting any type of training or providing employment to persons.

(vi) To give donations, subscriptions or contributions to any other Charitable Trust in Jaipur State or outside.

7. There are other objects to help widows, orphans, lunatics, indigent persons and to give relief to the poor and distressed, to build, equip, take over, conduct, maintain and grant aids to dispensaries, maternity homes, hospitals, lunatic asylums; to construct, erect and maintain bridges, bathing ghats, to give relief by subscription or otherwise during famines, flood, earthquake, pestilence; to help or maintain institutions for the cultural, social or economic advancement of any country or countries.

8. For the purpose of carrying out the trust the trustees are empowered in clause 5 (b), inter alia, (a) to purchase or otherwise acquire any property, rights, leases, concession; (b) to purchase or acquire, start, establish, equip or close any business undertaking or industry; (c) purchase, acquire or undertake the whole or any part of property and liabilities of any person, firm or company.

9. The property of the Trust is vested in the trustees. Clause (9) of the Trust Deed provides that the Trustees shall carry out the aforesaid objects from out of the net income of the Trust left after meeting the expenses of management and all charges and outgoings so far as such income shall permit, and shall not utilize the income or any portion thereof for any other objects or purpose.

10. Section 4 (3) (i) of the Act is as follows:—

"Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them;

(i) Subject to the provisions of clause (c) of sub-section (1) of Sec-

tion 16, any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, in so far as such income is applied or accumulated for application to such religious or charitable purposes as relate to anything done within the taxable territories, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application there-to:

Provided that such income shall be included in the total income.

(a) xx xx xx

(b) in the case of income derived from business, carried on behalf of a religious or charitable institution, unless the income is applied wholly for the purpose of the institution and either—

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution, or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution.

(iii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes."

11. Charitable purpose under Section 4 (3) of the Act includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) of Section 4 (3) applies and shall operate to exempt from the provisions of the Act that part of the income from property held under a trust or other legal obligation for private religious purposes which does not enure for the benefit of the public.

12. The terms of the Trust Deeds in all the cases are similar. The pattern of financial dealings of the various Trusts is also the same.

13. The appellant contends that the Trust is entitled to claim exemption under Section 4 (3) (i) of the Act because the trust is for religious and charitable purposes only. As to clauses which confer power on trustees to establish any business, undertaking or industry it is said by

the appellant that the income derived from such commercial concern is to be spent wholly for the religious and charitable purposes and therefore exemption is permissible. The appellant contends that the dominant purpose of the founder of the trust as expressed in the forefront of the Deed is religious or charitable and even if money be spent on non-charitable purposes it should not be held that the trust is meant for non-charitable purpose. The appellant also relies on clause 30 of the trust deed where it is said that the deed should not become invalid for the reason that some object might be considered unlawful.

14. The Revenue denies the claim for exemption on the ground that some objects are non-charitable and the trustees are given an unfettered discretion with regard to the utilisation of the income. Some of the objects of the Trust according to the Revenue give absolute discretion to the Trustees to apply the funds of the Trust for purposes which cannot be regarded charitable in the eye of law. The Revenue contends that if out of several objects of the Trust some are found to be non-charitable, the whole trust will fail. The Revenue also contends that it is not a genuine charitable trust but its creation and existence are a camouflage and are meant only as a device for the benefit of the settlor and the industrial and commercial concerns controlled by him.

15. Clauses 11 and 16 of the deed give an uncontrolled discretion to the trustees to spend the whole of the trust fund on any of the non-charitable objects of the trust. The non-charitable objects authorise the opening and maintaining of commercial institutions where work at living wages can be provided to the poor and also to contribute to commercial, technical, industrial or commercial concerns, institutions, associations or bodies imparting any type of training or providing employment to persons. The Revenue contends that these clauses are clearly non-charitable. Each clause is independent and distinct. According to the Revenue it is neither ancillary nor secondary to the primary dominant

purpose of the trust nor can it be said that these clauses subserve the main object of the trust. Engagement in commercial institutions giving employment on wages cannot be said to be charitable object. Some of the objects of the trust are non-charitable. The trustees have been authorised to utilize the income of the trust for any purpose mentioned in the Trust Deed.

16. The question is whether exemption can be granted where some objects are charitable and some non-charitable. Where there are several objects of a trust, some of which are charitable and some non-charitable, and the trustees in their discretion are to apply the income to any of the objects, the whole trust fails and no part of the income is exempt from tax. Where the objects are distributive, each and every one of the objects must be charitable in order that the trust might be upheld as a valid charity. If no definite part of the property or of its income is allocated to charitable purposes and it would be open to the trustees to apply the whole income to any of the non-charitable objects no exemption can be claimed. (See *East India Industries (Madras) Pvt. Ltd. v. Commr. of Income-tax*, (1967) 65 ITR 611 = (AIR 1967 SC 1554) and *Mohammad Ibrahim Riza v. C. I. T.* 57 Ind App 260 = (AIR 1930 PC 226)).

17. In order to claim the benefit of the exemption under Section 4 (3) (i) of the Act the property must be held under trust or other legal obligation wholly for religious or charitable purposes. The only relaxation which may arise in some cases is that all the primary objects of the trust must be of a religious and charitable nature and the existence of any ancillary or secondary object which is not of a religious or charitable nature but which is intended to subserve the religious and charitable objects may not prevent the grant of an exemption. This is because such an ancillary or secondary object even though not of a religious or charitable nature is intended to effectuate the main and primary objects of the trust.

18. If the primary or dominant purpose of a trust is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust from being a valid charity. A clear distinction must be drawn between the object of a trust and the powers conferred upon the trustees as incidental to the carrying out of the object. If the only object of a trust is the construction and maintenance of a swimming bath which is a purpose of general public utility, the fact that the trustees are given the power to supply or sell refreshments to persons who resort to the bath would not make the trust any the less charitable. Mere application of income to charity on the other hand will not avail to secure exemption if under the terms of the will or deed the income is applicable in the first instance to non-charitable objects and only the residue will go to charity. (See Commr. of Income Tax v. Andhra Chamber of Commerce, (1965) 55 ITR 722 = (AIR 1965 SC 1281)).

19. The appellant contended that if any income from the Trust is utilized and applied wholly in carrying out the primary purposes of the Trust, the Trust is entitled to claim exemption under proviso (b) to Section 4 (3) (i) of the Act. The appellant relied on the recent decision of this Court in *Sole Trustee Loka Shikshana Trust v. Commr. of Income Tax, Mysore*, (1976) 1 SCR 461 = (AIR 1976 SC 10). The Loka Shikshana Trust was engaged in the business of printing and publication of newspaper and journals and the further fact that the activity yielded profit and there were no restrictions on the trust earning profits in the course of its business went to show that the purpose of the trust did not satisfy the requirement that it was one not involving the carrying on of any activity for profit. This Court relied on the decision in *All India Spinners' Association v. Commr. of Income Tax*, (1944) 12 ITR 482 = (AIR 1944 PC 88) namely, that the charitable purposes exclude objects of private gain.

20. The appellant contended that there was no bar on the trust

to carry on business under the Act provided the profits of business were utilized only for charitable purpose. The appellant relied on the decision of this Court in *C. I. T. v. P. Krishna Warriar*, (1964) 8 SCR 36 = (AIR 1965 SC 59). In Krishna Warriar's case the trustees were directed to apply 60 per cent of the income of the business vested in the trustees to charitable purposes and 40 per cent for the benefit of the family. The question was whether 60 per cent of the income was liable to tax under proviso (b) to Section 4 (3) (i) of the Act on the ground that the entire income was not applied for charitable purposes. The question that arose in that case dealt with the meaning of the expression "part" as used in Section 4 (3) (i) of the Act that "in the case of profit so held in part only for such purposes the income applied or finally set apart for application thereto shall not be included in the total income of the person receiving." Krishna Warriar's case does not deal with the effect of a deed which has charitable as well as non-charitable objects and the trustees have been given the power to apply the whole of the trust fund for non-charitable objects excluding charitable objects.

21. The decisions in *C. I. T. v. Bengal Home Industries Association*, (1963) 48 ITR 181 (Cal); *Hyderabad Stock Exchange Ltd. v. C. I. T.* 66 ITR 195 = (AIR 1969 Andh Pra 4); *C. I. T. v. Radhaswami Satsang Sabha*, 25 ITR 472 = (AIR 1954 All 291) on which the appellant relied are all applications of the ruling in *All India Spinners' Association* case that what has to be found out is whether the object clause has any non-charitable object. In the *Bengal Home Industries* case, the object was to promote and develop home industries, arts and crafts. The income of the Association was to be applied solely towards the promotion of and carrying out of its objects. No portion of the income could be paid or transferred directly or indirectly by way of dividends to the members. In the case of winding up the surplus could not be distributed to the members but were to be transferred to the institution.

22. In the Hyderabad Stock Exchange case, the aims and objects were not only to further the interests of brokers and dealers but also to assist, regulate and control the trade in securities, to maintain high standards of commercial honour and integrity, to discharge and suppress malpractices, to settle disputes and decide all questions of usage, custom or courtesy in the conduct of trade or business. The objects were found beneficial to a section of the public and of general public utility. The profits were not to be distributed to the members but were to be utilized for the promotion of the objects of the Exchange. Therefore, the object was charitable and the income was applied wholly for charitable purposes.

23. In Radhaswami Satsang Sabha case, several industrial and commercial concerns were started for the benefit of the Satsanghis. Those were not run for individual profits nor were the profits distributed among the members. The concerns were started in furtherance of its objects of religious and charitable nature.

24. In the present case, the Income Tax Authorities found that the various industrial and commercial concerns were not started by Ram Krishna Dalmia in furtherance of the objects of the trusts. The concerns were started for the purpose of earning profits which were to be distributed to the share holders who had invested share money in those concerns.

25. This Court in East India Industries (Madras) Private Limited v. C. I. T., (1967) 65 ITR 611 found that one of the objects of the trust was not for charitable or religious purposes. The object was to manufacture, buy, sell and distribute pharmaceutical, medicinal, chemical and other preparations. The other objects were charitable in nature. The Trust Deed in East India Industries (Madras) Pvt. Limited case conferred power on the trustees to apply the whole or any part of the trust property or fund for all or any other purposes of the trust. This Court found that there was no special trust and no particular item of property

had been burdened with the performance of any specific object of the trust. It was open to the trustees to utilize the income for any one of the objects of the trust to the exclusion of all other objects. It would not be a violation of the trust if the trustees devoted the entire income to the carrying on of a business of manufacture, sale and distribution of pharmaceutical, medicinal and other preparations. This Court held that the trust property could not be said to be wholly for religious or charitable purposes within the meaning of Section 4 (3) (i) of the Act. The present appeals are all of the type of East India Industries (Madras) Private Limited case and fall within the ruling in that case.

26. The test is that if one of the objects of the trust deed is not of a religious or charitable nature and the trust deed confers full discretion on the trustees to spend the trust funds for an object other than of a religious or charitable nature, the exemption under Section 4 (3) (i) of the Act is not available to the assessee. (See Lakshmi Narain Nath Trust v. Commr. of Income Tax, (1969) 73 ITR 402 = (AIR 1966 Raj 154)).

27. For these reasons the appeals are dismissed. In view of the fact that the High Court directed that the parties will bear their own costs, the same order is made as to costs.

Appeals dismissed.

AIR 1976 SUPREME COURT 1841

(From: 1973 Lab IC 806 (Punjab and Haryana))

A. N. RAY C. J., R. S. SARKARIA,
P. N. SHINGHAL AND JASWANT
SINGH. JJ.

State of Haryana, Appellant v.
Inder Prakash Anand and others,
Respondents.

Civil Appeal No. 2454 of 1972,
D/- 7-5-1976.

(A) Constitution of India, Article 311 — Compulsory retirement simpliciter — Nature of.

ET/FT/B665/76/KSB.

Compulsory retirement simpliciter does not amount to dismissal or removal or reduction in rank under Article 311 or under the Service Rules. It is in fact compulsory retirement in accordance with the terms and conditions of service. AIR 1975 SC 1487, Rel. on. (Para 10)

(B) Constitution of India, Article 235 — Control of High Court over District Courts and Subordinate Courts — Nature and extent of — Compulsory retirement — Recommendation of High Court binding on State Government.

Control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including dismissal, removal, reduction in rank and the initial posting and of the initial promotion to District Judges. There is nothing in Article 235 to restrict the control of the High Court in respect of Judges other than District Judges in any manner. Article 311 has taken away the power of dismissal or removal or reduction in rank from the High Court and the Governor has been given that special power referred to in Article 311 (3). If State Government is to have the power of deciding whether a Judicial Officer should be retained in service after attaining the age of 55 years up to the age of 58 years that will seriously affect the independence of the judiciary and take away the control vested in the High Court. It is unsound to contend that the Governor and not the High Court has the power to retire a Judicial Officer compulsorily under Section 14 of the Punjab General Clauses Act. The suggestion that the High Court recommends and the State Government is to implement the recommendation in the matter of compulsory retirement is to destroy the control of the High Court. (Paras 11, 12)

Administrative, judicial and disciplinary control over members of the Judicial Service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. The vesting of complete control over the Subordinate Judiciary in the High Court leads to

this that the decision of the High Court in matters within its jurisdiction will bind the State.

(Paras 16, 18)

Held that an order of the State Government compulsorily retiring a Senior Subordinate Judge under Rule 5.32 (c), Punjab Civil Service Rules against the recommendation of the High Court was rightly quashed by the High Court. 1973 Lab IC 806 (Punj and Har), Affirmed.

(Para 19)

Cases Referred: Chronological Paras

AIR 1975 SC 613 = (1975) 3 SCR	
365 = 1975 Lab IC 375	11, 17
AIR 1975 SC 1487 = (1975) 4 SCC	
86 = 1975 Lab IC 1046	9
AIR 1974 SC 2192 = (1975) 1 SCR	
814 = 1974 Lab IC 1380	12
AIR 1973 SC 698 = (1973) 1 SCC	
361 = 1973 Lab IC 427	9
AIR 1967 SC 903 = (1967) 1 SCR	
454	17
AIR 1966 SC 447 = (1966) 1 SCR	
771	11, 15
AIR 1960 SC 1305 = (1961) 1 SCR	
88	8
AIR 1954 SC 369 = (1955) 1 SCR	
26	8

Mr. L. N. Sinha, Solicitor General of India, (Mr. Naunit Lal, Advocate, for Mr. R. N. Sachthey, Advocate with him), for Appellant; Mr. Amar Swarup Sr. Advocate, (Mr. Harbans Singh Marwah, Advocate with him), (for No. 2) and Mr. Ashok Grover, Advocate, (for No. 1), for Respondents.

The Judgment of the Court was delivered by

RAY, C. J.:— This appeal is by certificate from the judgment dated 18 November, 1971 of the Punjab and Haryana High Court.

2. The respondent joined the Punjab Civil Service, (Executive Branch) in November, 1954. He was selected for the Judicial Branch of the Punjab Civil Service on or about 1 May, 1965. On 15 November, 1968 he was promoted as officiating Additional District and Sessions Judge.

3. The respondent was due to attain the age of 55 years on 24 February, 1971. His case was referred to the High Court for their recommendation whether the respondent should retire at the age of 55

years or he should be retained in service till the age of 58 years which is the prescribed age of superannuation under the Punjab Civil Service Rules.

4. The High Court was of opinion that the work of the respondent as Additional District and Sessions Judge was not satisfactory. The High Court was not inclined to recommend the respondent's continuance in Superior Judicial Service up to the age of 58 years. The High Court recommended that the respondent should be reverted to his substantive post of Senior Subordinate Judge/Chief Judicial Magistrate and that he might be allowed to continue in service till the age of 58 years.

5. The State Government agreed with the recommendation for reverting the respondent from the post of Additional District and Sessions Judge to the Senior Subordinate Judge/Chief Judicial Magistrate. With regard to the retention of the respondent in service up to the age of 58 years the State again asked the High Court to consider whether in view of the respondent's work as Additional District and Sessions Judge, Hissar having been found to be unsatisfactory, the respondent should be retained at all in service beyond the age of 55 years. The State Government suggested that it was in public interest to retire the respondent at the age of 55 years. The High Court did not agree with the suggestion. By letter dated 16 August, 1971 the High Court reiterated that the respondent might continue in service up to the age of 58 years. The State Government did not agree with the recommendation of the High Court and decided to retire the respondent under Rule 5.32 (c) of the Punjab Civil Service Rules. A notice was issued to the respondent on 20 August, 1971 giving him notice of three months on the expiry of which he would retire from service.

6. The respondent filed a writ petition in the High Court impeaching the notice dated 20 August 1971. The matter was heard by a Bench of three learned Judges. The order retiring the respondent from

service was quashed by the majority opinion.

7. The question is whether the State Government could compulsorily retire a Senior Subordinate Judge cum Chief Judicial Magistrate under Rule 5.32 (c) of the Punjab Civil Service Rules against the recommendation of the High Court.

8. This Court in *Shyam Lal v. State of Uttar Pradesh*, (1955) 1 SCR 26 = (AIR 1954 SC 369) held that compulsory retirement does not involve stigma or any implication of mis-behaviour or incapacity. In *Dalip Singh v. State of Punjab*, (1961) 1 SCR 88 = (AIR 1960 SC 1305) this Court said that in order to find out whether an order of compulsory retirement is or is not by way of punishment, is to find out whether a charge of imputation against the officer is made the basis of the exercise of power and second whether the officer is deprived of any benefit already earned.

9. In the recent decision in *Tara Singh v. State of Rajasthan*, (1975) 4 SCC 86 = (AIR 1975 SC 1487) this Court held that compulsory retirement is not a punishment because the officer does not lose the terminal benefits already earned by him. In *B. Venkateswararao Naidu v. Union of India*, (1973) 1 SCC 361 = (AIR 1973 SC 698) this Court held that compulsory retirement does not involve civil consequences.

10. It, therefore, follows that compulsory retirement simpliciter does not amount to dismissal or removal or reduction in rank under Article 311 or under the Service Rules. It is in fact compulsory retirement in accordance with the terms and conditions of service.

11. The decisions of this Court in *State of West Bengal v. Nripendra Nath Bagchi*, (1966) 1 SCR 771 = (AIR 1966 SC 447) and *High Court of Punjab and Haryana etc. v. State of Haryana* (Sub nom *Narendra Singh Rao*), (1975) 3 SCR 365 = (AIR 1975 SC 613) are that Article 235 vests in the High Court control over District Courts and courts subordinate thereto. The Governor appoints and dismisses and removes Judicial Officers. Control

which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including dismissal, removal, reduction in rank and the initial posting and of the initial promotion to District Judges. There is nothing in Article 235 to restrict the control of the High Court in respect of Judges other than District Judges in any manner. Article 311 has taken away the power of dismissal or removal or reduction in rank from the High Court and the Governor has been given that special power referred to in Article 311 (3).

12. This Court in *Shamsher Singh v. State of Punjab*, (1975) 1 SCR 814 = (AIR 1974 SC 2192) held that when a case is not of removal or dismissal or reduction in rank any order in respect of exercise of control over the Judicial Officers is by the High Court and no other authority. There cannot be dual control. If State Government is to have the power of deciding whether a Judicial Officer should be retained in service after attaining the age of 55 years up to the age of 58 years that will seriously affect the independence of the judiciary and take away the control vested in the High Court. Compulsory retirement is neither suspension nor dismissal nor removal nor reduction in rank. It is unsound to contend that the Governor and not the High Court has the power to retire a Judicial Officer compulsorily under Section 14 of the Punjab General Clauses Act. The suggestion that the High Court recommends and the State Government is to implement the recommendation in the matter of compulsory retirement is to destroy the control of the High Court.

13. The Punjab Civil Service Rules in Rule 3.26 (a) deals with compulsory retirement at the age of 58. Rule 5.32 (c) deals with retirement at the age of 55.

14. Two relevant rules in the Punjab Civil Service Rules in the present case are these. Rule 3.26 (a) states that the date of compulsory retirement of a Government servant other than a Class IV Government servant is the date on which he attains the age of 58. Rule 5.32 (c)

states that a retiring pension is granted to a Government servant who is retired by the appointing authority on or after he attains the age of 55 years by giving him not less than three months' notice.

15. This Court in *Bagchi's case* (AIR 1966 SC 447) (supra) said that control vested in the High Court is over the conduct and discipline of the members of the Judicial Service. Orders passed in disciplinary jurisdiction by the High Court are subject to an appeal as provided in the conditions of service. The High Court further deals with members of the Judicial Service in accordance with the rules and conditions of service. This Court in *Bagchi's case* (supra) said that the word "deal" points to disciplinary and not merely administrative jurisdiction. The order terminating the appointment of a member of the service otherwise than upon his reaching the age fixed for superannuation will be passed by the State Government on the recommendation of the High Court. This is because the High Court is not the authority for appointing removing, reducing the rank or terminating the service.

16. It is true that the fixation of the age of superannuation is the right of the State Government. The curtailment of that period under rule governing the conditions of service is a matter pertaining to disciplinary control as well as administrative control. Disciplinary control means not merely jurisdiction to award punishment for misconduct. It also embraces the power to determine whether the record of a member of the service is satisfactory or not so as to entitle him to continue in service for the full term till he attains the age of superannuation. Administrative, judicial and disciplinary control over members of the Judicial Service is vested solely in the High Court. Premature retirement is made in the exercise of administrative and disciplinary jurisdiction. It is administrative because it is decided in public interest to retire him pre-maturely. It is disciplinary because the decision was taken that he does not deserve to continue in

service up to the normal age of superannuation and that it is in the public interest to do so.

17. This Court held in *State of Assam v. Ranga Mahommed*, (1967) 1 SCR 454 = (AIR 1967 SC 903) that the Governor under Article 233 is concerned with the appointment promotion and posting to the cadre of District Judges but not with the transfer of District Judges already appointed or promoted and posted to the cadre. This Court has held in the *Punjab and Haryana* case (AIR 1975 SC 613) (supra) that the confirmation of District Judges is to be done by the High Court because it falls within the control vested in the High Court. The High Court is acquainted with the capacity of work of the members of the Service. In the *Punjab and Haryana* case (supra) this Court pointed out that if after the appointment of District Judge till he is confirmed the State is allowed to control the District Judge there will be dual control. This is not the meaning of "control" in our Constitution.

18. The control vested in the High Court is that if the High Court is of opinion that a particular Judicial Officer is not fit to be retained in service the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the appointment. In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate. It is in public interest that the State will accept the recommendation of the High Court. The vesting of complete control over the Subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State. "The Government will act on the recommendation of the High Court. That is the broad basis of Article 235." See *Shamsher Singh's case* 1975-1 SCR 814 at page 841 = (AIR 1974 SC 2192 at page 2207) (supra).

19. In the present case, the order of the State retiring the respondent from service after the expiry of three months from the date of the order 20 August, 1971 has been rightly quashed by the High Court. The High Court did not make any recommendation to that effect.

20. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1845

(From: (1975) 2 Andh Pra LJ

229)

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

State of Andhra Pradesh, Appellant v. Bathu Prakasa Rao etc. etc., Respondents.

Criminal Appeals Nos. 100-146 of 1976. D/- 7-5-1976.

(A) Constitution of India, Article 136 — Interference with findings of fact in appeal by special leave.

Ordinarily, the Supreme Court does not interfere with findings of fact. But, where (as in this case) the errors of logic as well as law, appear to be gross and to have occasioned a miscarriage of justice, the Supreme Court is constrained to interfere. (Para 1)

(B) Southern States (Regulation of Export of Rice) Order (1964), Cl. 2 (b) — "Rice" as defined "includes broken rice and paddy." (1975) 2 Andh Pra LJ 229, Reversed.

As the definition of rice is a comprehensive one, it includes "broken rice as part of rice". But, to hold that this meant that "broken rice" must include whole rice is to accept that a part includes the whole. If the whole includes a part, it necessarily means that the part cannot possibly be equated with the whole. (1975) 2 Andh Pra LJ 229, Reversed. (Para 19)

(C) Southern States (Regulation of Export of Rice) Order (1964), Cl. 3 — Person who transports rice from Andhra Pradesh to Kerala has to prove that he has a permit for the

rice he is exporting — Transport of "broken rice" under a permit — On seizure and confiscation proceedings under Section 6-A, Essential Commodities Act it was found to be admixture of whole rice with broken rice — On facts order releasing portion of seized rice which contained 12 per cent broken rice was not interfered with — (1975) 2 APLJ 229, Reversed — (Evidence Act (1872), Section 106) — (Essential Commodities Act (1955), Section 6-A).

The commonsense test that at least 50% must be broken in order to constitute what could pass off as marketable 'broken rice' adopted by the District and Sessions' Judge was neither incorrect nor unreasonable. The High Court was quite unjustified in interfering with this test on what seems like metaphysical reasoning to justify its view that, where the quantities of the whole grains and broken grains in a consignment cannot accurately be determined the consignment should be deemed to be no longer one of rice which requires a permit. The High Court has quite erroneously held that such mixtures do not fall within the mischief provided for by the Regulation Order of 1964. (1975) 2 Andh Pra LJ 229, Reversed. (Paras 24, 26, 34, 39, 40)

Mr. Niren De, Attorney General for India (In CrI. A. Nos. 100, 101 and 112 of 1976); Mr. P. Ram Reddy, Sr. Advocate (in CrI. A. Nos. 102-111 and 113-145 of 1976), (Mr. P. P. Rao, Advocate and R. K. Deshpande, Advocates with them), for Appellant (in all the Appeals); Mr. Sachin Chaudhary, Sr. Advocate (In Criminal A. 100 of 1976), Mr. S. V. Gupte, Sr. Advocate (In CrI. A. No. 101 of 1976); (Mr. T. Raman and Mr. B. Parthasarathi, Advocates with them), for Respondents (in CrI. Appeal Nos. 101-105, 107-118, 120-139 and 141-146 of 1976).

The Judgment of the Court was delivered by

BEG, J.:— These appeals, by special leave, raise an apparently simple question which appears to be essentially one of fact. But, as the real question to be answered was not correctly posed before itself by the High Court of Andhra Pradesh, it misdirected itself as to what was

to be really decided by it and also how it should be decided according to rules of ordinary logic as well as law. Ordinarily, this Court does not interfere with findings of fact. But, where the errors of logic as well as law, discussed below appear to us to be gross and to have occasioned a miscarriage of justice, we are constrained to interfere.

2. The crucial question to be decided may be put as follows: What did the respondents understand when they obtained permits for the despatch of "broken rice (raw, boiled)" shown in their export permits?

3. If the respondents understood what their permits meant they could not, under the guise of these permits, transport any other kind of rice. It was their duty to abide by the terms of their permits, and to show, when proceeded against, that they did so.

4. Each permit shows: quantity permitted to be sent; the duration of the validity of the permit; the name of the consignor; the name of the station from which rice was to be despatched; the means of despatch (shown as "by rail only"); the name and address of the consignee (shown as "self"); the State to which the consignment was to be booked (shown as Kerala State); purpose of the consignment (shown as trade account). The permit was described as an "export permit." The details mentioned above were given in a schedule, the permit was addressed "to the Miller", and its operative part said:

"In exercise of the powers conferred under clause 3 of the Southern States (Regulation of Export of Rice), Order, 1964 read with G. O. Ms. No. 2495 F & A Dt. 17-10-1964 the Collector hereby permits the transport of rice products mentioned in the Schedule subject to the conditions specified below".

The specified conditions, in addition to those mentioned in the details given above were:

"1. This permit is not transferable.

2. It is liable for cancellation at any time by the issuing authority for the reasons to be recorded in writing.

3. It is valid only for the period mentioned in the permit and the consignment must be booked from the despatching station before the expiry of such period.

4. Any permit that is taken out but not utilised should be returned immediately to issuing authority.

5. The staff should be got checked by the Assistant Grain Purchasing Officer assisted by the Food Inspector concerned while loading into the wagon and a certificate should be got recorded on the permit itself that the stuff loaded is broken rice and not whole rice and the quantity loaded.

6. In respect of self permits the permit holder should furnish to the Collector, West Godavari, Eluru (A. P.) and the District Supply Officer, Tadepalligudem and the Collector of the importing District within one month from the date of issue of the permit the particulars of the Station to which the consignment is booked names and addresses of the buyers."

5. The allegation against the respondents was that they had broken the conditions of their permits inasmuch as their consignments, which had been seized, whilst being transported in railway wagons from Andhra Pradesh to Kerala, consisted of rice instead of "broken rice." After the issue of show cause notices and the replies filed by the respondents, a number of writ petitions was filed on a number of grounds in the High Court of Andhra Pradesh questioning the validity of confiscation proceedings under Section 6A of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'). These writ petitions were dismissed on 25th October, 1971.

6. After the dismissal of the writ petitions mentioned above, the Revenue Officer passed orders, on 18th November, 1971, confiscating only what was estimated as the quantity of "whole rice", according to the standards applied in drawing up an analysis report from samples which the Revenue Officer accepted as correct. The respondents then appealed to the District and Sessions

Judge who, on 16th February, 1972, set aside the orders of the Revenue Officer and directed him to decide again the question involved in the cases in accordance with law, after giving full opportunity to the respondents to object to the analysis which was to be carried out afresh in their presence. The District Judge did not consider the report of the Assistant Marketing Officer of Chitpur, after an analysis carried out in the presence of the District Revenue Officer, to be a sufficient compliance with the requirement to give due opportunity to the respondents to show what the consignments contained.

7. It may be mentioned here that the reports upon which proceedings were commenced in respect of a very large quantity of rice had been filed by the Inspector of Police of the Vigilance Section of the Civil Supplies Department. It was clearly mentioned in these reports that the rice which was seized by the police in the course of its transit in a number of wagons of a goods train proceeding from Andhra Pradesh to Calicut in Kerala State was not "broken rice." The respondents are regular Millers whose business it is to know the varieties and the nomenclature of various types and qualities of rice. They could not, therefore, be ignorant of what was the case against them. Moreover, when the cases were actually remanded to the Revenue Officer with specific directions to give the respondents fuller opportunity to show cause and meet the cases against them, there could be no possible excuse for the respondents not to put in evidence of their side of the case if they had a case to put up in defence.

8. The Revision Applications by the State against the orders of District and Sessions Judge were dismissed by the High Court on 29th March, 1973. During the pendency of the revision applications in the High Court, notices of auction of boiled rice were issued under the orders of the High Court. The rice was sold as ordinary "boiled rice." It is alleged on behalf of the State, that the price for which the boiled rice, seized from the Railway wa-

gons, was sold on 5th October, 1972, was about Rs. 30 laks. This price, it was submitted, could only be fetched by "whole rice."

9. We are, however, more concerned with what took place after the High Court had upheld the order of the District and Sessions Judge remanding the case for full hearing and adduction of evidence by both sides.

10. In his final order of 4th December, 1973, after the remand, the District Revenue Officer gave the whole history of the case and pointed out the opportunities the respondents had been given for substantiating their case if they had one worth consideration.

11. The District Judge had remanded the case principally because the first report of the analyst, issued by the Assistant Director of Marketing, Chitpur, had been made without an analysis carried out in the presence of the respondents although it was made in the presence of the District Revenue Officer. The District Judge had held that the Asstt. Director of Marketing should have himself given evidence before his report could be treated as evidence.

12. After the case had been remanded, there was a fresh analysis with fresh samples taken under the orders of the High Court. And, this second analysis took place in the presence of the respondents. The Assistant Director of Marketing, who made the analysis, was produced in evidence. The respondent had full opportunity of cross-examining him and also of giving their own versions. But, they contended themselves with some cross-examination of the Assistant Director of Marketing in the course of which it was not suggested to the Assistant Director that the test of "broken rice" was itself incorrect. On the other hand, in answer to one of the questions in cross-examination, the Assistant Director of Marketing replied:

"I agree that any grain which is less than $\frac{3}{4}$ th of the whole grain is a broken. According to Serial Grading Rules, 1966, rice includes broken, but it is classified separately."

This meant that the respondents knew, and, therefore, suggested that the test applied by the Asstt. Director Marketing, that any grain less than $\frac{3}{4}$ of the whole length was to be deemed as "broken", was correct. The cross-examination was directed towards showing that, accepting this test, known to both sides, the consignment was of "broken rice."

13. It is true that the Assistant Director, in his evidence, admitted that he had not actually measured a whole grain. He said that he had adopted the method of differentiation by looking at the grains with the naked eye and by picking them up with his hand using his own fingers. He also admitted that, in ten out of the 50 samples he had analysed, the percentage of broken in the analysis conducted in 1973 was less than that of 1971 from 2 to 10% but in others it was greater. The Revenue Officer, after a careful consideration of all the facts of the case and the whole background, including the test laid down in the Hand-book on Grading Foodgrains and Oilseeds, had reached the conclusion that the whole of the quantity seized was liable to be confiscated because no sample taken from the bags contained a minimum percentage of 60% of "broken" grains satisfying the test adopted, that is to say, grain less than 75% of its normal length would be deemed to be broken. The Revenue Officer treated the opinion of the Assistant Director as that of an expert which ought to be accepted.

14. The District and Sessions' Judge, in appeals from the orders of the Revenue Officer, reconsidered the whole case at considerable length and allowed the appeals partially by holding that percentage which could be fairly classified as broken had to be deducted after an addition to it of 2% as allowable "foreign matter." The Sessions Judge's interpretation of the remand order, as affirmed in revision by the High Court, was that the Revenue Officer could only determine the quantities of "broken" rice and whole rice to decide what proportion was and not whether the whole of the seized

rice was liable to confiscation as not covered by the permits. It appears that there had been an order by the Revenue Officer releasing 12% of the total rice as equivalent of "broken rice" which had not been set aside and had become final.

15. On the question whether the respondents could be said to have a mens rea the learned Sessions Judge observed:

"I am not prepared to accept the contention that they are under a mistaken impression that whole rice, when boiled could become boiled brokens. I do not also admit that they are not having any mens rea. I am of the opinion that they had certainly managed with the officers, and attempted to transport whole rice (boiled) under the guise of brokens (boiled). Therefore, it cannot be said that they have no mens rea in this case when they attempted to transport whole rice as brokens. It is a fact that huge quantities of rice are involved and the money involved is also huge. But the crime that these appellants attempted to perpetrate can also be considered as huge (Grave) in consonance with the quantity of rice they attempted to transport. Therefore, I am of the opinion, that these appellants do not deserve sympathy and it does not require any more alteration of the lower Court's orders, than the one I have already indicated above."

Hence, with the abovementioned notification of the orders of the Revenue Officer by adding 2% for "foreign matter" to the amount released as equivalent of "broken rice", the respondents' appeals were dismissed by the Sessions Judge on 20th November, 1974.

16. Both sides filed revision applications. The High Court had before it two sets of Revision Applications. One of these was by the State of Andhra Pradesh against that part of the order of the learned Sessions Judge by which he held that the Revenue Officer had no jurisdiction, after the remand order, to order confiscation of the whole quantity of rice. The State claimed the price of the whole of the seized consignment. The other set of revision applications before the High Court

was of the respondent millers against the affirmations of the orders of the Revenue Officer. The respondents submitted that no part of the consignment was liable to be confiscated as it was not proved that it was not broken rice. They, therefore urged that they should get the price of the whole quantity sold.

17. The High Court also went into the history of the case. It held that the object of the remand order "was to take samples of the stocks for the purpose of analysis in the presence of the rice millers and after the analysis and report of the Assistant Director Marketing, Chituru, to give an opportunity to the rice millers to cross-examine him with regard to it". It held:

"There is nothing in the remand order from which it can be said that the learned Sessions Judge intended the entire matter to be reopened including that of the released stocks with regard to which, according to the learned Sessions Judge, the matter had become final because of the view taken by him in the appeals preferred by the State that the State has no right of appeal as provided under Section 6-A of the Essential Commodities Act."

18. The High Court upheld the contention that the State Government had no right of appeal to the Sessions Judge. It held that only a person aggrieved by an order of confiscation and not just anybody aggrieved by an order under Section 6-A had a right of appeal. It is, however, not necessary for us to go into this question as it has not been argued by either side.

19. The High Court held that there could be a contravention of the Southern States (Regulation of Export of Rice) Order, 1964, by the rice millers if they attempted to transport essential goods requiring permit under the Regulation Order of 1964 from the State of Andhra Pradesh to Kerala. It, however, proceeded to hold that, as it was not proved that what was being transported was "broken rice", there was no contravention. It reached this conclusion by a somewhat strange reasoning that, since the percentages of whole rice in the samples analys-

ed were not known, it could not be held that the consignment was of a kind of rice for which any permit was required. We are constrained to observe that we are not able to follow the reasoning of the High Court, that as the definition of rice in clause 2 (B), in the Regulation Order of 1964, says that rice "includes broken rice and paddy", it necessarily follows that the converse must be true so that "broken rice must include rice." It would have been quite correct if the High Court had said that "broken rice" is also "rice". As the definition of rice is a comprehensive one, it includes "broken rice as part of rice." But, to hold that this meant that "broken rice" must include whole rice is to accept that a part includes the whole. If the whole includes a part, it necessarily means that the part cannot possibly be equated with the whole. The natural, and, indeed, the only reasonably open logic would be: if the whole includes a part, nothing which is merely a part of the whole could be equated with the whole. We think that the High Court misdirected itself seriously by accepting an obviously fallacious reasoning on this question.

20. The High Court said:

"By merely establishing that the goods are not broken rice, no offence or contravention is committed. It must further be established that the goods are rice in which case only there will be contravention of the control orders as the rice millers were not exporting the goods under permits issued for export of rice. Having regard to the uncertainty as to what the balance material other than the broken rice contained in the samples, it is not possible to say with any assurance that the rice millers have contravened the control orders by attempting to export rice."

It went on to add:

"It may be said that having regard to the circumstances of the case it is reasonable to assume that the rice millers have deliberately put some rice in the goods they were transporting. Otherwise, normally, the price of whole rice being more, they would not have allowed it to go into the broken rice, and, unless there were some substantive quantities of

whole rice in the goods which the rice millers were transporting, the Inspector of Police, Vigilance Cell Civil Supplies Nellore, would not have thought of seizing the goods. It is common knowledge and judicial notice can be taken that rice or broken rice is very much costlier in Kerala State than in the Andhra Pradesh State. It is quite possible that broken rice in Kerala State was then even costlier than whole rice in Andhra Pradesh State and it may be in such circumstances the rice millers while exporting the goods allowed more whole rice to go into the broken rice so that the entire thing could be sold as broken rice and even by that to get a better price than in Andhra Pradesh for the quantity of whole rice allowed into the broken rice. But at the same time, in the absence of any guidelines by fixing standards for rice and broken rice it is difficult to say that the rice millers have done so with the necessary animus that in so doing they would be going outside the permits issued to them and they would be contravening the control orders. When there were no standards fixed with regard to whole rice and broken rice and when there is an admixture of both whole rice and broken rice, it is difficult to say when a particular admixture can be said to be broken rice or whole rice. On an uncertain ground or on vagueness, I do not think any person can be made liable for an action which will be penal in nature."

21. A ground given by the High Court to justify the millers' case, that the rice was broken rice, was:

"In the present case, there is also the fact that both the Assistant Grain Purchasing Officer and the food inspector inspected the goods when they were loaded into the wagons and certified that the goods loaded to be broken rice. Across the Bar, Shri Babul Reddy has stated that no action was taken by the Government against those officers on the ground that colluding with the rice millers they falsely certified that goods loaded to be broken rice. He has also submitted that not only that no action was taken against them, but they were also promoted to higher

posts subsequently perhaps, in usual course. Of course, there is no material before the Court with regard to it. But suffice it to say that the fact remains that those two officers certified the materials to be broken rice."

22. A surprising conclusion of the High Court, which conflicts with the earlier conclusion that there was an attempted transport of rice which would contravene the Regulation order, was stated as follows by the High Court:

"The rice millers were having the permits for exporting BROKEN RICE and they were not having any permits for exporting RICE. Even assuming that the goods which the rice millers were transporting were not broken rice, it is not enough, to prove the contravention, to show that the goods they were transporting were not broken rice. It must be proved that the goods which the rice millers were exporting were rice for which they have no permits. If the goods which the rice millers were transporting could neither be said to be broken rice nor rice, there would be no contravention in either of which case no permits will be necessary under the control orders. The consequences of the contravention of the control orders being penal in nature, the rice millers cannot be penalised by confiscating the goods on uncertain grounds or vagueness. I have no doubt that the Government have failed to establish that the rice millers in attempting to export the goods in question outside the State have contravened the two control orders."

23. We can only make the passage from the High Court's judgment, set out above in the last paragraph, intelligible to ourselves by believing that what the High Court meant was that the control order does not make it necessary to have a permit for the transport of goods containing a mixture of broken rice and rice by requiring a permit for such a mixture. If this be the meaning, as it probably is, we think that it constitutes a complete oversight or misreading of the Regulation Order 1964, clause 3 of which says:

"3. Regulation of export of rice from specified areas.— No person shall export or abet the export of rice from any place within a specified area to a place outside that area except under and in accordance with permit issued by the State Government or an officer authorised by that Government in this behalf."

24. It follows that the person who transports has to prove that he has a permit for the rice he is transporting.

25. Learned Attorney General has, very rightly, pointed out that the whole case of the respondent Millers from the outset, when they sent a reply to the show cause notice, was that they were transporting what was wholly "broken rice." In other words, their case was that they knew that they were holding the permit. They never said that they did not know what their permit meant or had misunderstood it. They did not plead that they had been cheated by somebody, who sent something on their behalf which was not authorised by them.

26. We think that Section 106 of the Evidence Act was clearly applicable to such a case. It says: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The illustrations to this section are also helpful:

"(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

26A. So far as the actual intentions of the respondent Millers are concerned, the High Court recorded a finding, set out above, that it appeared that they had deliberately mixed whole rice with broken rice, because, unlike the situation in Andhra Pradesh, broken rice sells at a higher price in Kerala than it does in Andhra Pradesh. If this had been the correct state of affairs, it would have been reasonable for the Millers to transport broken rice to Kerala, where it fetches a higher

price, and keep whole rice which sells at a higher price in Andhra Pradesh, for sale in their own State.

27. Apart from this obvious flaw in the reasoning of the High Court, it is difficult to understand how the High Court could act on such an assumption about relative prices. It thought it could take judicial notice of such a state of prevailing prices of rice in the two States. It was certainly not a fact commonly or generally known to people that broken rice fetches a much higher price in Kerala than even whole rice. Such an assertion has to be proved to be correct. It was unreasonable to assume that, even if that was so, the millers of Andhra Pradesh would be so anxious to cheat the purchasers in Kerala as to deliberately mix some whole rice with broken rice instead of selling the whole rice in Andhra Pradesh and broken rice in Kerala. The more natural inference, from patent facts, was obviously that there was some advantage in mixing some "broken rice" with "whole rice" for which the millers had no permit.

28. Thus, the learned Judges of the High Court have themselves expressed a view indicating that the Millers were quite conscious of the distinction which existed, in accordance with the accepted practice, between what could be deemed to be "whole rice" and what could be described as "broken rice." If they were labouring under some mistake of fact and had no intention to commit an offence, which the character and circumstances of their acts suggested, the burden of proving this was certainly upon them.

29. Again, what was covered by the permit would be deemed to be known to the Millers who were carrying on the business of exporting rice of various kinds, grades, and descriptions. It is their business to see that they carry on their trade in accordance with the terms of the permits they actually obtained. It is true that it appears, as the High Court observes, that the Millers had, apparently, been given the green signal by the officers who were expected to inspect the consignments and certify that it was "broken rice." It is difficult to know what evidence

the High Court was relying upon, apart from the conditions attached to the permits and the presumption that their duties were carried out by their officers concerned, to hold what they had inspected and certified correctly. The respondents, who had objected to the first analysis report, on the ground, *inter alia*, that the analyst did not enter the witness box could be met with a similar objection to the alleged inspection reports of some officers.

30. The only evidence produced in the case was that of the Assistant Director of Marketing who performed the analysis in the presence of the Millers after the remand order.

31. If the respondents were relying upon some inspection carried out by the officers in compliance with the conditions of the permit, they ought to have produced that evidence so that the officers concerned could have been subjected to cross-examination. An opportunity had been given to the Millers to produce evidence in rebuttal. They produced none. On the other hand, the cross-examination of the Assistant Director showed that the Millers were accepting the tests laid down in the Hand-Book on Grading of Foodgrains and oilseeds as applicable to the descriptions of rice and broken rice. These terms, as used in the Hand-book, must have been well understood by the Millers. The Foreword to the Hand-Book says that it contains instructions based on practice followed in this country for many years by the Directorate of Marketing and Inspection. The Hand-Book is an official publication. It could be looked into to find out the accepted practice and tests employed by the Assistant Director. As already observed, the Assistant Director was cross-examined on matters contained in the Hand-Book. It was not suggested to him that the Hand-Book did not contain correct information.

32. At page 8 of this Hand-book, we find: "Broken Rice. In addition to the classes mentioned above broken rice forms a class by itself as it is a by-product of rice milling. It has been classified into two groups, viz., fine brokens and com-

mon broken. Fine broken cover the broken of long slender and scented varieties of rice and common broken cover the rest." At page 6, we find: "Broken.— Broken shall include pieces of rice kernels which are less than $\frac{3}{4}$ th of the whole kernel. Pieces smaller than $\frac{1}{4}$ th of the kernel are to be treated as fragments." The cross-examination of the Assistant Director showed that the Counsel for the Millers were fully acquainted with the contents of the Hand-book and were accepting it as the basis for finding out whether the tests laid down in the Hand-book had been observed.

33. The Hand-book contains several schedules. Schedule 7 gives maximum limits of tolerance for various grades of "mill rice", a term apparently used for whole rice. The maximum tolerance of broken in whole rice of first grade is given as 3% whereas the maximum tolerance of the broken in the whole rice grade is 20%. Schedule VIII is for "Parboiled Milled Super fine Rice." In Schedule X, for "Parboiled, milled common rice", is shewn to vary from 10% in Gr. I to 40% in Gr. IV. Schedule 14 gives the grade designations and definitions of different qualities of "common broken rice." It shows that, in order to constitute "broken rice", the percentage of broken, the maximum limit of tolerance is from not less than 80 to not less than 60% in grades 1 to 3.

34. The District Judge had reached the conclusion that, quite apart from these technically prescribed tests for the purposes of grading, by the Directorate of Marketing and Inspection, the common-sense test was that at least 50% must be broken in order to constitute what could pass as a marketable consignment of "broken rice". He had also made the necessary allowances for foreign matter. We do not think that the test adopted by the District & Sessions Judge was either incorrect or unreasonable. Indeed, we think that the High Court was quite unjustified in interfering with this test on what seems to us like metaphysical reasoning to justify its view that, where the quantities of the whole grains and broken grains in a consignment cannot be

accurately determined, the consignment should be deemed to be no longer one of rice which requires a permit. The learned Attorney General has rightly pointed out to us that at no earlier stage was it the case of the Millers that mere mixture of some broken rice with some whole rice is enough to constitute the whole consignment into one of broken rice or of substance which was not "rice" at all. In our opinion, the High Court has quite erroneously held that such mixtures do not fall within the mischief provided for by the Regulation Order of 1964.

35. An argument advanced by Mr. Sachin Chaudhari, on behalf of the Millers, is that no rice in the course of Milling can really remain whole or unbroken in the sense that the whole length of it will be preserved. He contended that, in that sense, every grain must be broken to some extent. If that be the correct position, we think that the test laid down in the Hand-book on Grading of Foodgrains and Oilseeds, issued by the Directorate of Marketing and Inspection, compiled by the Ministry of Agriculture of the Govt. of India, is based on sound knowledge of what actually happens to grains of rice in the course of milling.

36. Still another argument was that it is impossible to determine with the naked eye whether a grain of rice was above or below $\frac{3}{4}$ th its normal length. We think that this would not be a difficult task at all for an expert in the line as an Asstt. Director of Marketing could be deemed to be. Indeed, even with his naked eye, any person can make out, by looking at the 2 ends of a grain, how much of a grain of rice appears to be broken. As we know, a grain of rice is thicker in the middle and tapers at each end. It is not like a cylinder with a uniform diameter throughout. From its shape and size, it is possible, even for an ordinary careful observer, to assess the length of a broken grain as compared with its expected length had it been whole.

37. Mr. S. V. Gupte appearing for some respondents, has invited our attention to the differences,

in the analyses conducted in 1971 and in 1973, between percentages of "broken rice" in samples from the same stocks. The explanation of these differences, according to the learned Attorney General, is indicated in the order of the High Court, dated 29th March 1973, by which Revision petitions against remand orders were dismissed. The High Court observed:

"During the pendency of these proceedings in this Court admittedly fresh samples had been taken in the presence of the parties and the rest of the grain was directed to be disposed of. These fresh samples are now available for analysis, it is contended by the learned public prosecutor that on account of lapse of time there is the possibility of even whole rice getting broken and a larger percentage of broken rice being forged in analysing now to be done. It should be possible for the Analyst to know how long rice stay preserved as whole rice and what is the lapse of time that results in breaking up of even the whole rice and what percentage should be allowed in that connection and come to the conclusion in making an analysis of the new samples taken."

38. The High Court had said that "there should be no difficulty in getting the fresh samples taken analysed also and the analyst giving his opinion with regard to both the samples."

39. There is not only a difference between the results of the analysis of 1971, as compared with the analysis of 1973, for which samples were taken afresh from the same bags of rice, but we find that the report of 1973 itself shows, that, out of 50 samples taken from different bags of rice, there is a variation ranging from 12.5%, in the case of two samples from wagon No. SE 53657 to 40% in the case of the sample from wagon No. SE 57670. The analysis of another sample from the same wagon SE 57670 gives a percentage of 36.2 of "broken rice." Two samples from the same wagon WR 70715 show 22.5% and 37.5% of broken rice, thus making a difference of 15% between two samples from the same wagon. In seven

samples, the percentages of broken rice were above 35%. In 16 samples, the broken rice found ranged between 30% and 35%. Of course, these different percentages may lead to the inference that some broken rice had been deliberately introduced unevenly between rice found in different bags. But, once the principle is accepted that it is only the rice not covered by the permits which, under the orders of the Court, was to be confiscated, these variations do introduce an element of difficulty in determining precisely what that amount was. Sec. 6A of the Act, however, says that the Revenue Officer (who exercised the powers of the Collector), "if satisfied that there has been a contravention of the order", that is to say, the Control Order, "may order the confiscation of the essential commodities seized." It is arguable that the power is there to confiscate whatever essential commodity may have been seized for the purposes of proceeding against the person who has contravened the Control Order, yet, it cannot be denied that this power is discretionary.

40. Therefore, we do not propose to interfere with the order of the learned Sessions Judge, to the effect that, as the Revenue Officer's order releasing the seized rice to the extent of about 12% had become final, it should not be interfered with except to the extent that the learned Sessions Judge added 2% more for foreign matter, thereby releasing slightly more in favour of the respondents.

41. For the reasons given above, we allow these appeals and set aside the judgment and orders of the High Court and restore those of the learned Sessions Judge in the cases before us.

Appeals allowed.

AIR 1976 SUPREME COURT 1855

(From: Punjab and Haryana)*

**A. C. GUPTA AND S. MURTAZA
FAZL ALI, JJ.**

1. State of M. P. (In CrI. A. No. 47 of 1972) 2. State of Punjab (In CrI. A. No. 48 of 1972), Appellants v. Ajit Singh and others, Respondents.

Criminal Appeals Nos. 47 and 48 of 1972, D/- 5-5-1976.

(A) Criminal P. C. (1898), S. 401 — Appropriate Government is the Government of the State in which the prisoner has been convicted and sentenced by the Court of that State — Conviction by Court in M. P. State — Transfer of prisoner to State of Punjab under Transfer of Prisoners Act — Request by Punjab Govt. to M. P. Govt. for remission of sentence declined — High Court quashing the order of M. P. Government and directing Punjab Government to consider the case of prisoner for release — Held that there was no error of law in the order of M. P. Government. **AIR 1976 SC 1552**, Followed. Cr. Writ No. 10 of 1971, D/- 8-9-1971 (Punj and Har), Reversed. (Paras 2 and 3)

Cases Referred: Chronological Paras
AIR 1976 SC 1552 1, 2
AIR 1969 Madh Pra 252 = 1969
Jab LJ 530 2

Mr. Ram Panjwani, Deputy Advocate General, M. P., (Mr. H. S. Parihar, Advocate for Mr. I. N. Shroff, Advocate with him), for Appellants (In CrI. A. No. 47 of 1972); M/s. O. P. Sharma, M. S. Dhillon and S. K. Mehta, Advocates, for Respondents Nos. 2-4 (In CrI. A. No. 47 of 1972) and for Appellants (In CrI. A. No. 48 of 1972).

Judgment of the Court was delivered by

FAZL ALI, J.— These two appeals are directly covered by our decision in State of Madhya Pradesh v. Ratan Singh. Criminal Appeal No. 246 of 1971 = (reported in AIR 1976 SC 1552) just pronounced. The respondent Ajit Singh was sentenced under Section 302, I. P. C. by the Sessions Judge, Bhind in the State of Madhya Pradesh by his

*(Criminal Writ No. 10 of 1971, D/- 8-9-1971—(Punj & Har.)).

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order dated January 28, 1960. An appeal against his conviction was dismissed by the High Court and the respondent was lodged in the Central Jail at Gwalior. Sometime thereafter under Section 3 of the Transfer of Prisoners Act, 1950 the Government of Madhya Pradesh transferred the prisoner Ajit Singh at his instance to the Punjab Government where he was lodged in the District Jail at Gurdaspur. Sometime in the year 1968 the prisoner having served for more than 20 years, the Punjab Government made a request to the State of Madhya Pradesh for release of the prisoner and remitting the remaining part of the sentence. The Madhya Pradesh Government, however, declined to pass an order under Section 401 (1) of the Code of Criminal Procedure. Thereafter the respondent filed a writ petition in the High Court of Punjab and Haryana praying for quashing the order of the Madhya Pradesh. The High Court allowing the writ petition quashed the order of the Madhya Pradesh Government and directed the Government of Punjab to consider the case of the respondent for his release. Against the order of the High Court, both the Madhya Pradesh Government and the Punjab Government have filed these appeals by special leave. These appeals have been heard together. Appeal No. 47 is the appeal preferred by the State of Madhya Pradesh, whereas Appeal No. 48 has been preferred by the State of Punjab. Both these appeals arise out of the order of the High Court dated September 8, 1971.

2. We have already held in Criminal Appeal No. 246 of 1971 = (reported in AIR 1976 SC 1552) that the appropriate Government within the meaning of Section 401 of the Code of Criminal Procedure would be the Government of the State in which the prisoner had been convicted and sentenced by the Court of that State. We have also held that the decision of the Madhya Pradesh High Court in Sitaram Barelal v. State of Madhya Pradesh, AIR 1969 Madh Pra 252 has absolutely no bearing on the question of the remission to be granted under Section 401 of the Code of Criminal Procedure. It is therefore clear

that the Punjab Government was fully justified in making a request to the Madhya Pradesh Government which was the appropriate Government for the purpose of exercising its discretion under Section 401 of the Code of Criminal Procedure and as the Government of Madhya Pradesh refused to exercise its discretion there was no error of law committed by the State Government and the High Court was, therefore, not justified in quashing the order of the Madhya Pradesh Government and directing the Punjab Government to consider the case of the respondent for his release.

3. We, therefore, allow these appeals and set aside the order of the High Court. As the respondent has already been released and at the time of granting the special leave we had directed that the release of the respondent would not be disturbed in any event, while quashing the order of the High Court we would not disturb the order of release of the respondent passed by the Punjab Government as a result of the order of the High Court.

Appeals allowed.

AIR 1976 SUPREME COURT 1856

(From: ILR (1969) Delhi 1214)

A. N. RAY C. J., R. S. SARKARIA,
P. N. SHINGHAL AND JASWANT
SINGH, JJ.

Union of India, Appellant v. Prem Kumar Jain and others, Respondents.

Civil Appeals Nos. 2289-2299 of 1969, D/- 28-4-1976.

(A) Constitution of India, Arts. 309, 372-A and 312 — "State" Meaning — Word includes Union Territories — Formation of joint Cadre for Indian Administrative service for Union Territories as published in Notification No. G. S. R. 42 to 49, published in Gazette of India, Extraordinary dated 13-1-1968 is intra vires the Constitution as also All India Services Act, ILR (1969) Delhi 1214, Reversed — (1) Indian Administrative Service (Recruitment) Rules, 1954, R. 4 (5) — (2) Indian Administrative Service (Cadre) Rules, 1954 R. 3(1) — (3) All India Services Act

FT/FT/B705/76/GGM

(1951), Section 3 (1) — (4) General Clauses Act (1897), Section 3 (58)).

Rule 4 (5) of the Indian Administrative Service (Recruitment) Rules is intra vires the Constitution as also the All India Services Act, the joint Cadre for Indian Administrative Service for Union Territories formed being common to the Union and the State. (Para 8)

As and from November, 1, 1956 when the Constitution (Seventh Amendment) Act, 1956, came into force, the President had the power to adopt the laws for the purpose of bringing the provisions of any law in force in India into accord with the provisions of the Constitution. It was under that power that the President issued the Adaptation of Laws (No. 1) Order, 1956, which substituted a new clause (58) in Section 3 of the General Clauses Act providing, inter alia, that the expression "State" shall, as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, mean "a State specified in the First Schedule to the Constitution and shall include a Union Territory." It cannot be said with any justification that there was anything repugnant in the subject or context to make that definition inapplicable. By virtue of Art. 372A (1) of the Constitution, it was that definition of the expression "State" which had effect from the 1st day of November, 1956, and the Constitution expressly provided that it could "not be questioned in any court of law." Consequently Union Territories are "States" for purposes of "Article 312 (1) of the Constitution and the preamble to the Act of 1951." The definition of "State" in the Cadre Rules is not ultra vires the All India Services Act, 1951 and the Constitution, and the Union Territories Cadre of the Service is common to the Union and the States within the meaning of Article 312 (1) of the Constitution, and the Central Government could make the Indian Administrative Service (Cadre) Rules, 1954 in consultation with the State Governments. ILR (1969) Delhi 1214, Reversed. (Para 8)

Cases Referred: Chronological Paras
AIR 1970 SC 1126 = (1970) 3 SCR

Mr. V. R. Raman Addl. Sol. General, (M/s. B. P. Rao and S. P. Nayar, Advocates with him), for Appellant; Mr. R. B. Datar, Advocate, for Respondents.

The Judgment of the Court was delivered by

SHINGHAL, J.— These appeals by certificate are directed against the judgment of the Delhi High Court dated September 25, 1969, allowing Civil Writ Petn. No. 405 of 1968 and connected Petitions Nos. 478 to 487 of 1968. The High Court has quashed the orders of the Central Government notified in GSR 42 to 49, published in Gazette of India, Extraordinary, dated January 13, 1968, as well as the scheme for the formation of a joint cadre of the Indian Administrative Service, hereinafter referred to as the service, for the Union Territories, and has held that the formation of the Delhi-Himachal Cadre of the service was also ultra vires the Constitution. As we shall show, the decision has turned on a short point of law, and it will be enough to refer to those facts which bear on it.

2. A new cadre of the service was constituted for the Union Territories of Delhi and Himachal Pradesh, and recruitment to that cadre was made directly, without complying with the requirement of Rule 4 (1) of the Indian Administrative Service (Recruitment) Rules, 1954, hereinafter referred to as the Recruitment Rules, which prescribed the normal method of recruitment to the service. The Rules were amended on December 21, 1967, by providing for a Joint Cadre in relation to the Union Territories and the North East Frontier Agency, and the Central Government formulated the aforesaid scheme to extend the Delhi-Himachal Pradesh Cadre to all Union Territories by absorbing the officers of that cadre and by appointing to it officers of the Indian Frontier Administrative Service and all other Union Territories at its initial constitution. The Joint Cadre for all the Union Territories was brought into existence from January 1, 1968, by GSR 42 under Rule 3(1) of the Indian Administrative Service (Cadre) Rules, 1954, hereinafter referred to as the Cadre Rules, pub-

lished (along with certain consequential changes in the other rules of the service) in Gazette of India, Extraordinary, dated January 13, 1968. The petitioners in the High Court challenged the creation of the new Joint Cadre for all the Union Territories, and the appointment of some of the respondents thereto. It was urged in the High Court that the constitution of the new Joint Cadre was illegal as it was contrary to the provisions of Article 312 of the Constitution and the All India Services Act, 1951, as it was not common to the Union and the State inasmuch as a Union Territory was not a State, and the recruitment of the respondents concerned to the Joint Cadre was contrary to the provisions of section 3 of the All India Services Act, 1951, and the Cadre Rules.

3. The High Court examined the question whether the Union Territories were States, and reached the conclusion that this was not so. It therefore held that rule 4 (5) of the Recruitment Rules was ultra vires the Constitution and the All India Services Act, for the Cadre in question could not be said to be common to the Union and the States. The High Court also observed that as the Central Government was itself the State Government for purposes of a Union Territory, the Central Government could not consult itself within the meaning of Section 3 of the All India Services Act and the Recruitment and the Cadre Rules. It therefore quashed the orders and the scheme mentioned above.

4. It appears, however, that it was not brought to the notice of the High Court that, in so far as the service was concerned, it was not necessary for Parliament to make a law providing for its creation as a service common to the Union and the States, under clause (1) of Article 312 of the Constitution, because clause (2) of that article expressly provided as follows,—

"312. (2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article."

The Service did not therefore have to be created under the provisions of clause (1) of Article 312 of the Constitution, or Section 2A of the All India Services Act. Section 3 (1) of that Act however made provision for the making of rules for the regulation of recruitment and conditions of service of persons appointed to an All India Service "after consultation with the Governments of the States concerned." It was under that provision that the Cadre Rules were made by the Central Govt. and the question which engaged the attention of the High Court was whether the Union Territories could be said to be States for purposes of such consultation. In that connection the High Court examined the question whether the Union Territories could be said to be States merely because Rule 2 (c) of the Cadre Rules defined a "State" to mean a State specified in the First Schedule to the Constitution and including a Union Territory, and answered it in the negative.

5. The expression "State" has not been defined in the Constitution, but it has been defined as follows in Section 3 (58) of the General Clauses Act (Act X of 1897),—

"State—

(a) as respects any period before the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean a Part A State, a Part B State or a Part C State; and

(b) as respects any period after such commencement, shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory."

This was however not the original definition, for it was substituted by the Adaptation of Laws (No. 1) Order, 1956. Before that Order, the expression "State" meant "a Part A State, a Part B State or a Part C State." That definition was, in its turn, brought in by adaptation under Article 372 of the Constitution by the Adaptation of Laws Order, 1950, for the purpose of bringing the provisions of any law in force in the territory of India in accord with the provisions of the Constitution. The original definition has thus been

adapted twice to suit the requirements of the Constitution.

6. Clause (1) of Article 367, which deals with "interpretation" of the Constitution, provides as follows,—

"367 (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372 apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India." A cross-reference to Article 372 (2) shows that while the purpose of the adaptation was to bring the provisions of any law in force in the country "into accord with" the provisions of the Constitution, clause (3) thereof expressly stated, *inter alia*, as follows,—

"(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution;"

The power of adaptation or modification was therefore spent after the expiry of three years, and the High Court has taken the view that as it were only the adaptations made in the General Clauses Act under Article 372 (2) which applied to the interpretation of the Constitution in view of Article 367 (1), the adaptations made later, by Article 372A, were not so applicable.

7. A comparison of the provisions of Articles 372 and 372A shows, however, that while the purpose of both the articles was to bring the provisions of any law in force in India "into accord" with the provisions of the Constitution, Article 372 was a general provision enabling the making of adaptations and modifications in such laws by an order of the President, whereas Article 372A was a special provision which was made specifically for purposes of the Constitution (Seventh Amendment) Act, 1956, inasmuch as clause (1) thereof provided as follows,—

"372A (1) For the purposes of bringing the provisions of any law

in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law." (Emphasis added)

It is obvious therefore that as the power of the President to make any adaptation or modification of any law under clause (2) of Article 372 was spent after three years, Parliament felt the necessity of giving such a power to the President once again for the purpose of bringing the provisions of any law in force immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of the Constitution as amended by that Act. That was therefore a necessary power as it was meant to make the amended Constitution workable. For instance, Section 3 (58) of the General Clauses Act, 1897, as it stood before the coming into force of the Seventh Amendment Act, defined a "State" to mean "a Part A State, a Part B State or a Part C State." As has been stated, that definition had itself been substituted by the Adaptation of Laws Order, 1950, to make it workable, and it served the purpose, for the country had those three types of States at that time. But an important change was made by the Constitution (Seventh Amendment) Act, 1956, which abolished the distinction of Part A, Part B and Part C States and provided, inter alia, that the territory of the country shall comprise the territories of the States and the Union Territories specified in the First Schedule. The definition of the expression "State" as it stood before November 1, 1956,

became unsuitable and misleading on the coming into force of the Constitution (Seventh Amendment) Act, 1956, from November 1, 1956, and it will, for obvious reasons, be futile to contend that it should have continued to be applicable for all time to come and remained "the final definition of "State"" merely because the period of three years provided by clause (3) (a) of Article 372 of the Constitution expired and was not extended by an amendment of that clause, or because Article 367 (1) was not amended by the Seventh Amendment Act "to say that adaptations made in the General Clauses Act otherwise than those made under Article 372 (2) would be applicable to the interpretation of the Constitution." The High Court also erred in thinking that such "abstention seems to be deliberate." On the other hand, it is quite clear from the fact that Parliament inserted Article 372A by the Constitution (Seventh Amendment) Act, 1956, that it was aware that the power of adaptation under Article 372 (2) had come to an end, and was alive to the necessity of giving a similar power of adapting the laws once again to the President for the purposes of bringing the provisions of any law in force in the country immediately before the commencement of that Act "into accord" with the provisions of the Constitution. It is therefore futile to contend that the definition of the expression "State" which was applicable upto November 1, 1956, remained the final definition for all time to come. That view is incorrect, for it overlooks or ignores the anxiety of the Parliament to remove any such misapprehension by inserting Article 372A. It was a special provision, and it was meant to serve the purpose of making the Seventh Amendment Act workable. As has been held by this Court in *Management of Advance Insurance Co. Ltd. v. Shri Gurudasmal*, (1970) 3 SCR 881 = (AIR 1970 SC 1126), Article 372A gave a fresh power to the President which was equal and analogous to the power under Article 372(2).

8. It follows therefore that, as and from November 1, 1956, when

the Constitution (Seventh Amendment) Act, 1956, came into force, the President had the power to adapt the laws for the purpose of bringing the provisions of any law in force in India into accord with the provisions of the Constitution. It was under that power that the President issued the Adaptation of Laws (No. 1) Order, 1956, which, as has been shown, substituted a new clause (58) in Section 3 of the General Clauses Act providing, inter alia, that the expression "State" shall, as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, mean "a State specified in the First Schedule to the Constitution and shall include a Union Territory." It cannot be said with any justification that there was anything repugnant in the subject or context to make that definition inapplicable. By virtue of Article 372A (1) of the Constitution, it was that definition of the expression "State" which had effect from the 1st day of November, 1956, and the Constitution expressly provided that it could "not be questioned in any court of law." The High Court therefore went wrong in taking a contrary view and in holding that "Union Territories are not 'States' for purposes of Article 312 (1) of the Constitution and the preamble to the Act of 1951." That was why the High Court erred in holding that the definition of "State" in the Cadre Rules was ultra vires the All India Services Act, 1951 and the Constitution, and that the Union Territories Cadre of the Service was "not common to the Union and the States" within the meaning of Article 312 (1) of the Constitution, and that the Central Government could not make the Indian Administrative Service (Cadre) Rules, 1954 in consultation with the State Governments as there were no such governments in the Union Territories.

9. The High Court has held further that Section 3 of the All India Services Act, 1951 and Rule 5 of the Cadre Rules have been contravened by the "direct appointment of respondents 2 to 37 to the Union Territories Cadre and by their being not recruited first to the IAS". But

no such ground appears to have been taken in the writ petition. Moreover, the validity of Rule 4 (5) of the Recruitment Rules, which contained a non obstante clause providing for recruitment to the Joint Cadre of the Union Territories on its initial constitution by such method as the Central Government may, after consultation with the Union Public Service Commission prescribe, was not examined by the High Court.

10. For the reasons mentioned above, the appeals are allowed, the impugned judgment of the High Court dated September 25, 1969 is set aside and the writ petitions are dismissed. There will however be no orders as to the costs.

Appeals allowed.

AIR 1976 SUPREME COURT 1860

(From: ILR (1974) Cut 623)

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

Sridhar Suar and another, Appellants v. Shri Jagan Nath Temple and others, Respondents.

Civil Appeal No. 491 of 1975, D/- 21-4-1976.

(A) T. P. Act (1882), S. 105 —
— "Sanand" executed by Shebait —
Lease or licence — Determination.

Where the 'Sanand' executed by the shebait in favour of the plaintiff's great grandfather merely permitted the grantee to open a 'Saraghara' which meant a room for storing articles for the sole purpose of preparing Bhog for the deities and the Sanand did not confer the right of exclusive possession of the suit property on the grantee and it was also proved that the employees of the Shebait used to clear the refuse etc. which got accumulated before the suit 'Saraghara', the 'Sanand' could not be held to be any more than a licence and could not clothe the grantee with the status of a lessee. ILR (1974) Cut 623, Affirmed; Case law discussed. (Para 19)

(B) Hindu Law — Religious endowments — Permanent alienation of temple debutter property by shebait

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— Permissible only in a case of a need or for the benefit of the estate.

(Paras 14, 15)

(C) Hindu Law — Religious endowments — Mohunt — Powers of— Permanent lease for fixed rent — Validity.

Apart from unavoidable necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty in the mohunt. (1869) 13 Moo Ind App 270 (PC); AIR 1917 PC 33, Rel. on.

(Para 18)

Cases Referred: Chronological Paras

AIR 1976 SC 1813	10
AIR 1974 SC 396 = (1974) 2 SCR 530	9
AIR 1965 SC 610 = (1964) 6 SCR 642	12
AIR 1959 SC 1262 = (1960) 1 SCR 368	8
(1952) 1 All ER 149 = (1952) 1 KB 290	8
(1952) 1 All ER 1199 = (1952) 1 TLR 1037	8
AIR 1917 PC 33 = 44 Ind App 147	16, 17
1913 AC 771 = 83 LJPC 6	10
(1869) 13 Moo Ind App 270 = 2 Sar 528 (PC)	18
(1856) 6 Moo Ind App 393 = 18 WR 81 (PC)	14

Mr. Gobind Das, Sr. Advocate, (Mr. B. Parthasarathi, Advocate with him), for Appellants; Mr. Santosh Chatterjee and G. S. Chatterjee, Advocates, for Respondents.

Judgment of the Court was delivered by

JASWANT SINGH, J.:— This appeal by special leave which is directed against the judgment and decree dated June 24, 1974, of the High Court of Orissa at Cuttack reversing the judgment and decree dated September 23, 1970, of the first appellate court which in turn reversed the judgment and decree dated April 10, 1970, of the trial Court relates to the controversy regarding the appellants' right to store and sell dry 'Mahaprasad' in the suit premises consisting of two pucca rooms standing on plot No. 167 in 'Bihar Bedha' (outer compound) of the Hoary Holy public temple of Lord

Jagannath Ji in Puri (hereinafter referred to as 'the Temple'), which to use the language of the illuminating and instructive preamble of Shri Jagannath Temple Act, 1954 (Orissa Act No. 11 of 1955) (hereinafter referred to as 'the Act') has ever since its inception been an institution of unique national importance, in which millions of Hindu devotees from regions far and wide have reposed their faith and belief and have regarded it as the epitome of their tradition and culture.

2. The facts giving rise to this appeal are: On August 7, 1969, one Gopal Suar, since deceased, who was the father and predecessor-in-interest of the present appellants describing himself as sevak of the Temple brought a suit in the Court of the Munsiff, Puri, being suit No. 160 of 1969, for permanent injunction restraining the respondents herein from interfering with his right of storing and selling dry 'Mahaprasad' in the suit premises.

3. The case of the original plaintiff was that by means of 'Sanand' (Exhibit I) Raja Sri Dibya-singha Deb, the then Superintendent of the Temple, granted to his great grandfather, Gangadhar Suar, a permanent lease of the site on which the two suit rooms stood on an annual rent of Rs. 7/-; that it was provided in the 'Sanand' that the grantee or lessee would be entitled to enjoy the site from generation to generation and in case a permanent structure was constructed thereon, the rent would be enhanced to Rs. 14/- per year; that as a result of the death of his great grandfather, Gangadhar Suar, of his grandfather, Bela Suar, and of his father, Chakhi Suar, he had become the sole owner of the property; that a few days after the commencement of the lease, two permanent pucca rooms for storing and selling 'Mahaprasad' were constructed by his great grandfather, Gangadhar Suar, who according to the stipulation contained in the aforesaid 'Sanand' became liable to pay an annual rent of Rupees 14/-; that since the commencement of the lease, his ancestors had from generation to generation been using the suit property as a store room and as a shop for selling dry 'Maha-

prasad' in their capacity as tenants of the Raja of Puri who was the Superintendent of the Temple and the said right of his had been acknowledged and duly recorded in the record of rights; that ever since the taking over of the management of the Temple by the Government, he had been paying annual rent as per terms of the lease to the respondents who had accepted him as a tenant; that he had been occupying and enjoying the suit property as before without any let or hinderance either by the respondents or by their predecessor-in-interest; that on August 1, 1969, his son intimated to him that respondent No. 2 had, by means of notice dated July 31, 1969, called upon him to close the shop on pain of daily fine of Rs. 100/-, as in the opinion of the respondent, he had been using the land in inner Bedha of the Temple for storage and sale of 'Mahaprasad' which adversely affected the discipline and dignity of the Temple; that on being so informed, he personally approached respondent No. 2 and represented to him that he was the permanent lessee of the suit property and had acquired indefeasible right of storing and selling 'Mahaprasad' thereon and the respondents could not interfere with that right but his representation fell flat and respondent No. 2 threatened to close his shop forcibly, to impose penalty on him, and to dismiss him from the 'seva'; that after sometime, respondent No. 2 served him with another notice imposing an accumulated penalty of Rs. 4,600/- at the rate of Rs. 100/- per diem and that there being no provision in the Act empowering the respondents to do any of the aforesaid things, their action was arbitrary, illegal and without jurisdiction.

4. The suit was vigorously contested by the respondents. While denying the grant of the open site to the plaintiff's ancestor, Gangadhar Suar, as alleged, as also the construction of two pucca rooms by the latter and the storage and sale thereon of 'Mahaprasad' by the plaintiffs' ancestors, the respondents averred inter alia that the Raja of Puri being merely a Superintendent or a Manager of the Temple, it was be-

yond his competence to transfer a portion of the Temple permanently in favour of any individual and the 'Sanand' set up by the plaintiff was as such ineffectual, invalid and inoperative and did not confer any right, title or interest on him or his ancestors and was not binding on the respondents; that according to the established custom and usage of the Temple, 'Mahaprasad' could not be stored and sold in a 'Saraghara' but was to be sold in Anand Bazar — the place specifically set apart for the purpose, and that since the plaintiff had been committing a breach of discipline and violating the orders of the respondents by storing and selling 'Mahaprasad' in the 'Saraghara' standing on plot No. 167 (which had been recorded in the record of rights as 'khas dakhali' land of the respondents and was never intended for storage and sale of 'Mahaprasad') and was thus acting in a manner derogatory to the dignity of the Temple, the respondents in whom the governance and administration of the Temple and its endowments vested under Section 5 of the Act were competent to take action under Sections 21(A) and 30(A) of the Act.

5. After framing the necessary issues and recording the evidence adduced by the parties, the trial Court dismissed the suit holding that as Sections 15 and 30(A) of the Act cast statutory obligation on the respondents to ensure maintenance of order and discipline and proper hygienic conditions in the Temple and proper standard of cleanliness and purity of the offerings made therein, they could not be restrained by a permanent injunction from stopping the plaintiff to sell 'Mahaprasad' at a place other than the one specified for the purpose. On appeal, however, the Sub-Judge (Additional District Magistrate) Puri, decreed the suit. Aggrieved by this decision, the respondents preferred an appeal to the High Court which accepted the same and dismissed the suit.

6. Counsel for the appellants has urged before us that the suit property did not form part of the Temple; that the transactions evidenced by 'Sanands' (Exhibits I & II)

issued by the Raja of Puri as Superintendent of the Temple in exercise of his right of superintendence and management of the Temple amounted to a permanent lease of the suit property and not merely to a licence, and that the appellants had an indefeasible right of storing and selling Mahaprasad in the suit Saraghara. We shall deal with these contentions seriatim.

7. Regarding the first contention raised on behalf of the appellants, we may observe that according to S. 2 (d) of Act No. XIV of 1952 called the Puri Shri Jagannath Temple (Administration) Act, 1952, 'Temple' means "the Temple of Lord Jagannath of Puri, other temples within its premises, all their appurtenant and subordinate shrines, other sacred places and tanks and any additions which may be made thereto after the commencement of the Act." It may also be mentioned that pursuant to Section 3 of that Act, a Special Officer with prescribed qualifications was appointed by the State Government for preparation of the consolidated record of rights and duties of different sevaks and pujaries and other persons connected with the seva, puja or management of the Temple as also for preparation of a list of the immovable properties endowed to Lord Jagannath Temple and the extent of the premises of the Temple and what it comprises. In the report prepared by the said Officer which was published in the Orissa Gazette (Extraordinary) and is final and entries whereof cannot be questioned except in the manner provided in Section 5 of that Act, it is recorded that the Temple of Lord Jagannath occupies an area of 10 acres and its premises include all appurtenant and subordinate shrines and the outer and inner compounds and that the suit plot No. 167 lies in the 'Baisi Pahacha' area in between the inner and outer compounds of the Temple and that access to it is through the main gate i.e. 'Singhadawara' (lion's gate) of the Temple. It is, therefore, clear beyond any manner of doubt that the suit premises form part of the Temple. The first contention of counsel for the appellants is, therefore, repelled.

8. For a proper appreciation of the second contention, it is necessary to bear in mind the essential difference between a lease and a licence. It is now well settled by a catena of decisions of this Court that it is the creation of an interest in immovable property that distinguishes a lease from a licence. Reference in this connection may be made with advantage to the decision of this Court in *Associated Hotels of India Ltd. v. R. N. Kapoor*, AIR 1959 SC 1262 where Subba Rao, J. (with whom Das, J. agreed) observed as follows:—

"If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in *Errington v. Errington*, 1952-1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at page 155:

The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

"The Court of Appeal again in *Cobb v. Lane*, 1952-1 All ER 1199, considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At page 1201, Somervell L. J., stated:

".....the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties."

Denning L. J. said much to the same effect at page 1202:

"The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

The following propositions may, therefore, be taken as well established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties—whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, *prima facie*, he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease."

9. Again in *Qudrat Ullah v. Municipal Board, Bareilly*, (1974) 2 SCR 530 = (AIR 1974 SC 396) this Court observed:—

"There is no simple litmus test to distinguish a lease as defined in Section 105, Transfer of Property Act from a licence as defined in Section 52, Easements Act, but the character of the transaction turns on the operative intent of the parties. To put in pithily, if an interest in immovable property, entitling the transferees to enjoyment, is created, it is a lease; if permission to use land without right to exclusive possession is alone granted, a licence is the legal result."

10. Then again in *Board of Revenue v. A. M. Ansari*, Civil Appeals Nos. 67-122 and 238 of 1969 decided on 17-3-1976 = (reported in AIR 1976 SC 1813), this very Bench while approving the observations made by Lord Shaw while delivering the judgment of the Board

in *Kauri Timber Co. Ltd. v. Commr. of Taxes*, 1913 AC 771 (776) held that in order that an agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and possession of land. The following observations made therein are apposite:—

"A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form."

11. Bearing in mind the above observations, let us now scrutinize the terms of Sanand (Exhibit-I) which reads thus:—

"Order hereby is issued to the Parichhas Karjees (Officers) of the temple as follows:—

One Gangadhara Suar of Kundhaibenta Sahi has filed an application before the Raja for opening a 'Sera Ghara' (store room of Mahaprasad) at the top step of twenty two steps adjoining the inner compound of the temple and the Eastern Gate Way having space of 10 cubits of length towards south width of 10 cubits.

It is ordered that he is permitted to open the said store room with hereditary right on payment of one gold Mohara as Salami and rupees seven as annual rent. If he at any time constructs a pucca house, he shall pay rupees fourteen as annual rent."

12. A careful perusal of the recitals in the Sanand (which does not reveal the identity of the plot with precision) would show that the Sanand did not create any interest in the site in question in favour of the plaintiff's great grandfather. It merely permitted him to open a 'Saraghara' which meant a room for storing articles for the sole purpose

of preparing Bhog for the three presiding deities. The Sanand did not also confer the right of exclusive possession of the suit property on the grantee. This is evident from the right of 'dakhale khas' of the respondents in the suit property as also from the proved fact that 'Saraghara' was not kept open by the Temple authorities from midnight to 6.00 A. M. during which interval, the plaintiff could in no case occupy it nor could he have access to it. It has also been found to have been established from the plaintiff's evidence itself that the employees of the Raja of Puri used to clean the refuse etc. which got accumulated before the suit 'Saraghara.' Thus none of the elements of lease can be said to be present in the instant case. In *M. N. Clubwala v. Fida Hussain Saheb*, AIR 1965 SC 610 this Court rejected the claim of holders of certain stalls in a market that they were lessees and not licencees thereof on the ground that they had no right to use them after the closure of the market at night and the responsibility of cleaning and disinfecting the stalls and closing the market at night lay on the landlord and not on the stall-holders.

13. No help can be derived by the appellants from Exhibit-II which relates to a quarrel in 'Kotha Bhog Nities' and is not relevant for the purpose with which we are concerned at the present stage.

14. Now assuming without holding that the Sanand amounted to a lease, it cannot even then be held to be valid as permanent alienation of the temple debutter property is prohibited. The position is stated thus at page 489 of Mulla's Treatise on Principles of Hindu Law (11th Edition):—

"The power of a shebait or a mohunt to alienate debutter property is analogous to that of a manager for an infant heir as defined by the Judicial Committee in *Hunooman Pershad v. Mt. Babooee*, (1856) 6 Moo Ind App 393 (PC). As held in that case, he has no power to alienate debutter property except in a case of need or for the benefit of the estate. He is not entitled to sell the property for the purpose of investing the price of it so as to bring in

an income larger than that derived from the property itself. Nor can he, except for legal necessity grant a permanent lease of debutter property, though he may create proper derivative tenures and estates conformable to usage."

15. In the present case, the position of the Raja of Puri who granted the Sanand (Exhibit-I) was merely that of a shebait. He could not have granted a permanent lease of the property in question to the great grandfather of the plaintiff without necessity or without benefit to the estate which have not at all been made out in this case.

16. Again the lease being a permanent one for a fixed rent could not have been granted at all by the Raja of Puri. Reference in this connection may usefully be made to page 931 of Mayne's Treatise on Hindu Law (11th Edition), where the position is stated as follows:—

"It is beyond the powers of a manager to grant a permanent lease at a fixed rent in the absence of unavoidable necessity; for, to fix the rent, though adequate at the time, in perpetuity in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty on the part of the manager. In *Talaniappa Chetty v. Streemath Devasikamony*, 44 Ind App 147 = (AIR 1917 PC 33), Lord Atkinson observed: "Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debutter lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that, by this means, the debutter estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

17. In *Palaniappa Chetty v. Devasikamony Pandara*, 44 Ind App 147 = (AIR 1917 PC 33) alluded to in the above quoted passage, it was also held:—

"A permanent lease of temple lands at a fixed rent, or rent free

for a premium, whether the lands are agricultural lands or a building site, is valid only if made for a necessity of the institution. It is not justified by a local custom, or by a practice of the institution, to grant lands in that manner.

The phrase "benefit of the estate", as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir or by the trustee of a religious endowment cannot be precisely defined, but includes the preservation of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances."

18. The present case is, in our opinion, fully covered by the decision in *Shibessouree Debia v. Mothooranath Acharjo*, (1869) 13 Moo Ind App 270 (PC) where it was laid down as a general rule that apart from unavoidable necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time would be a breach of duty in the mohunt.

19. Thus viewed from any angle the 'Sanand' could not be held to be any more than a licence and could not clothe the ancestors of the plaintiff or the plaintiff with the status of a lessee.

20. This takes us to the last contention raised before us by counsel for the appellants which is also devoid of substance. A bare perusal of Exhibit-I is enough to show that it does not confer any right of selling 'Mahaprasad' on the plaintiff or on his legal representatives. Exhibit II cannot also be usefully pressed into service by the appellants as it relates to the sale of 'Rahani Bhog', and not of 'dry Mahaprasad'.

21. Thus all the contentions raised by counsel for the appellants fail. For the foregoing reasons, we affirm the judgment of the High Court and dismiss the appeal with costs. The appellants are, however, as mutually agreed to between the parties, given one month's time to vacate the premises. The cumulative penalty of Rs. 4,600/- to which the

appellants have been subjected also being excessive is reduced to Rupees 500/-.

Appeal dismissed.

AIR 1976 SUPREME COURT 1866

(From: Jammu and Kashmir)*

P. N. BHAGWATI, A. C. GUPTA
AND S. MURTAZA FAZL ALI, JJ.

Mohd. Yassin Shah, Appellant
v. Ali Akbar Khan, Respondent.

Civil Appeal No. 1141 of 1974,
D/- 14-4-1976.

(A) J. and K. Representation of
the People Act (4 of 1957). S. 98 —
Election Petition — Interested or
partisan evidence — Appreciation.

The election of a duly returned candidate cannot be set at naught on the basis of interested or partisan evidence which is not backed by cogent circumstances or unimpeachable documents. (Para 4)

(B) J. and K. Representation of
the People Act (4 of 1957), S. 47 (2)
(c) — Scrutiny of nominations —
Absence of candidate or his proposer
— Effect. Election Petn. No. 4 of
1972, D/- 10-6-1974 (J. & K.), Re-
versed.

It is true that under Sec. 47 (2) (c) it is not open to the Returning Officer to reject a nomination paper merely on the ground of the absence of the candidate or his proposer. But where, in the order rejecting nomination paper, the Returning Officer had indicated the objection taken by the Returned candidate regarding the genuineness of the signature of the proposer of another candidate and had also observed that in view of the objection it was not possible to verify the signature in the absence of the candidate and the proposer;

Held, that the absence of the candidate and the proposer had been used not for the purpose of rejecting the nomination paper but for the purpose of supporting the conclusion of the Returning Officer that the signature of the proposer was not genuine. (Para 36)

*(Ele. Petn. No. 4 of 1972, D/- 10-6-1974—(J. & K.)).

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The returned candidate had clearly raised the question that the nomination paper could be properly rejected under Section 47 (2) (c) of the Act even on the ground that the signature of the proposer was not genuine. The Court therefore committed an error in not deciding this particular plea and finding that the Returning Officer had improperly rejected the nomination paper on the ground of the absence of the candidate and the proposer and allowing the election petition. Election Petn. No. 4 of 1972, D/- 10-6-1974 (J. and K.), Reversed. (Para 37)

(C) J. and K. Representation of the People Act (4 of 1957), S. 47 — Scrutiny of nominations — Duty of Returning Officer.

Sec. 47 of the Act does not require a well reasoned decision. All that is necessary is that the Returning Officer should apply his mind and determine the question in a summary manner. (Para 36)

(D) J. and K. Representation of the People Act (4 of 1957), S. 47 — Scrutiny of nominations — Rejection not on permissible ground — Validity.

Even if the ground on which the nomination paper has been actually rejected is not a permissible ground, if the successful candidate can make out a case that the nomination paper could have been properly rejected on one of the grounds mentioned in Section 47 of the Act, the rejection would not be improper and the election would be upheld. AIR 1959 SC 422, Rel. on. (Para 36)

Cases Referred: Chronological Paras

AIR 1976 SC 1599	4
AIR 1975 SC 290 = (1975) 1 SCR 643	4
AIR 1974 SC 66 = (1974) 1 SCR 822	39
AIR 1959 SC 422 = 1959 Supp (1) SCR 623	36
(1957) Spl. Appeal No. 1 of 1957 (Andh Pra)	36
AIR 1954 Raj 204 = (1954) 9 Ele LR 193	36
(1952) 2 Ele LR 301 (Ele Tribunal Ajmer)	36
AIR 1949 PC 32 = 75 Ind App 252	39

Mr. A. K. Sen, Sr. Advocate, (M/s. Altaf Ahmed and M. Veerappa,

Advocates with him), for Appellant; Mr. G. S. Pathak, Sr. Advocate, (Mr. O. C. Mathur, and Shri Narain, Advocates of M/s. J. B. Dadachanji and Co. Advocates with him), for Respondent.

Judgment of the Court was delivered by

FAZL ALI, J.:— This is an election appeal against the judgment of the High Court of Jammu & Kashmir dated June 10, 1974, by which the learned Judge allowed the election petition filed before him by the respondent Ali Akbar Khan and set aside the election of the returned candidate Mohd. Yasin Shah who is the appellant before us. The returned candidate will, for short, be referred to by us as 'the appellant' and the respondent Ali Akbar Khan will be referred to as 'the petitioner'. It appears that during the elections held in the year 1972 in the State of Jammu and Kashmir both the appellant and the petitioner were the candidates for election to the Karnah Assembly Constituency of the District of Baramulla in the State of Jammu and Kashmir. There were other candidates also some of whom had withdrawn. One Mohd. Yunis was the Congress candidate for this constituency but he was defeated. The petitioner, according to the appellant, was merely a covering or a shadow candidate for the Congress candidate Mohd. Yunis. The petitioner filed his nomination paper on February 7, 1972 and his proposer was P. W. 1 Ghulam Mohiuddin. According to the petitioner the nomination paper was presented to the Returning Officer R. W. 3 Abdul Rehman Mir on February 7, 1972 by the petitioner who was accompanied with his proposer Ghulam Mohiuddin who had signed as the proposer. The Returning Officer received the nomination paper and granted a receipt for the same. A sum of Rs. 250/- being the election deposit was also deposited and other formalities were duly observed. February 9, 1972, was the last date fixed for the scrutiny of the nomination papers of all the candidates. According to the petitioner he reached the office of the Returning Officer at about 10 A. M. on February 9, 1972 but as he was

suffering from dysentery he went to attend the call of nature and instructed his proposer P. W. 1 Ghulam Mohiuddin to take time on his behalf if the name of the candidate was called out. The petitioner's case before the High Court was that the Returning Officer after scrutinising the nomination papers accepted all of them but rejected the nomination paper of the petitioner on the ground of his absence in spite of the fact that P. W. 1 Ghulam Mohiuddin requested him to wait for the petitioner who had gone to attend the call of nature. It was further alleged that when the petitioner returned he beseeched the Returning Officer not to reject his nomination paper but the Returning Officer refused to reopen the matter as the nomination paper of Mohd. Yunis the Congress candidate had been accepted. The nomination paper of Mohd. Yasin Shah the appellant was also accepted. Thereafter the poll was held on March 8, 1972 and the results were declared on March 12, 1972. The appellant Mohd. Yasin Shah was declared elected, while Mohd. Yunis was defeated. After the results were declared the petitioner applied for a certified copy of the order of rejection of his nomination paper on April 1, 1972, and according to him the Returning Officer tried to avoid giving the copy of the said order which was ultimately given to him on April 3, 1972, April 2, being a Sunday. The sheet-anchor of the case of the petitioner was that the Returning Officer was particularly biased against him and he rejected the nomination paper in order to support the returned candidate in whom he was interested. The petitioner further pleaded that the only ground on which the nomination paper was rejected was that the petitioner did not appear when the Returning Officer called out his name at the time of the scrutiny of his nomination paper. The petitioner further averred that under the law the Returning Officer could not have rejected his nomination paper on the ground of his absence even if it was so. Not content with these allegations the petitioner went to the extent of making a serious and irres-

possible allegation against the Returning Officer by averring that the Returning Officer had committed forgery by subsequently adding certain words in the order of rejection and overwriting the signature of the proposer Ghulam Mohiuddin on the nomination paper. Thus, in short, according to the petitioner as his nomination paper was improperly rejected by the Returning Officer, the election of the appellant was void on that ground alone.

2. The petitioner filed the present election petition with the allegations aforesaid on April 12, 1972. It was alleged that at the time when P. W. 1 Ghulam Mohiuddin was examined as a witness there was some overwriting on the signature of Ghulam Mohiuddin the proposer of the petitioner on the nomination form. Accordingly the petitioner made an application to the Court for permission to file an amended petition by incorporating the fact that the overwriting was brought into existence after the scrutiny of the nomination papers was over and behind the back of the petitioner. The learned Judge, after hearing the parties, ultimately allowed the application and accordingly an amended petition was filed by the petitioner where the allegations regarding interpolation etc. were made. The appellant was also given an opportunity to file his additional written statement.

3. The petition was stoutly resisted by the appellant who denied, inter alia, all the allegations made by the petitioner and contended that there was absolutely no overwriting on the signature of Ghulam Mohiuddin nor was any forgery committed by the Returning Officer. It was further averred that as neither the petitioner nor his proposer was present when the scrutiny of the nomination paper of the petitioner was taken up by the Returning Officer and as the appellant himself raised the objection that the signature of Ghulam Mohiuddin on the nomination paper was not genuine the Returning Officer having applied his mind upheld the objection and rejected the nomination paper on the

ground that the signature of Ghulam Mohiuddin was not genuine as it could not be verified. The appellant also vehemently denied the allegation that the Returning Officer was in any way biased or prejudiced against the petitioner. On the other hand it was averred that the Returning Officer was an independent officer and since the petitioner was a candidate of the Congress if the Returning Officer could have any leaning at all it would be towards the petitioner rather than the appellant who was an independent candidate opposing the Congress party. The learned Judge, after taking the evidence of the parties, came to the conclusion that from the order of the Returning Officer it would appear that the nomination paper of the petitioner was rejected mainly on the ground of his absence which was not a lawful ground on which the nomination paper could have been rejected under Section 47 (2) of the Jammu and Kashmir Representation of the People Act. On the question of the overwriting the learned Judge held that there was no doubt that there was overwriting on the signature of P. W. 1 Ghulam Mohiuddin on the nomination form of the petitioner and perhaps the overwriting was made some time after the scrutiny. But the learned Judge refrained from giving any finding as to who made the interpolation and in what circumstances. As regards the allegation that the Returning Officer had committed forgery the learned Judge does not appear to have accepted the same or given any clear finding on this point, and he steered clear of this fact by observing that as the first part of the order of the Returning Officer rejecting the nomination paper was based on the ground of the absence of the petitioner, the Returning Officer became functus officio and any subsequent observation which he may have made was irrelevant. The learned Judge further seems to have held that the petitioner was not present when the scrutiny of his nomination paper was taken up and the Returning Officer was not justified in law in rejecting his nomination paper on that ground alone. On these findings the learned Judge held that as the nomi-

nation paper of the petitioner was illegally rejected the election of the appellant was void and was liable to be set aside under Sec. 108 (1) (c) of the Jammu and Kashmir Representation of the People Act — hereinafter referred to as 'the Act', as amended upto date.

4. In support of the appeal Mr. Altaf Ahmed learned counsel for the appellant who was followed by Mr. Asoke Sen submitted that the learned Judge has misconstrued the order passed by the Returning Officer rejecting the nomination paper of the petitioner and that the judgment of the High Court is against the weight of the evidence on the record. It was also argued that the learned Judge completely overlooked some of the essential features appearing in the case which completely demolished the petitioner's case. Mr. G. S. Pathak appearing for the petitioner, however, supported the judgment of the High Court and contended that the order of the Returning Officer was mainly passed on the ground of the absence of the petitioner which was not justified by the provisions of Section 47 (2) (c) of the Act. He also submitted that a bare perusal of the order of the Returning Officer would clearly show that the second part of the order regarding the genuineness of the signature of the proposer Ghulam Mohiuddin appears to have been inserted subsequently. Lastly, it was submitted that although this Court could reappraise the evidence for itself it should not interfere with the judgment of the High Court on facts unless the High Court had committed an error in its appreciation of evidence or overlooked any material fact. It was further argued that this Court should keep in mind the slowness of the appellate court to disturb a pure finding of fact based on appreciation of evidence by the trial Court which had the initial advantage of watching the demeanour of the witnesses examined by it. There can be no dispute with the propositions adumbrated by Mr. Pathak, but we would like to mention that it is well settled that the sanctity and parity of electoral process in the country must be maintained. The

election of a duly returned candidate cannot be set at naught on the basis of interested or partisan evidence which is not backed by cogent circumstances or unimpeachable documents. In *Rahim Khan v. Khurshid Ahmed*, (1975) 1 SCR 643 at page 656 = (AIR 1975 SC 290 at pp. 298-99) this Court observed as follows:

"We must emphasize the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. x x

There is no X-ray whereby the dishonesty of the story can be established and, if the Court were gullible enough to gulp such oral versions and invalidate elections, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of Killkenny cat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witness. The Court must look for serious assurance, unlying circumstances or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life." In *D. Venkata Reddy v. R. Sultan*, C. A. No. 1170 of 1973 decided on 24-2-1976 = (reported in AIR 1976 SC 1599) this Court, in which one of us (Fazl Ali J.) was also a party, reiterated the principles in the following words:

"In a democracy such as ours, the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process must be preserved and maintained. The valuable verdict of the people at the polls must be given due respect and candour and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or on evidence which is of a shaky or prevaricating character. It is well settled that the onus lies heavily on the election petitioner to make out a strong case for setting aside an election. In our country election is a fairly costly and expensive venture

and the Representation of the People Act has provided sufficient safeguards to make the elections fair and free. In these circumstances, therefore, election results cannot be lightly brushed aside in election disputes."

5. We would now proceed to discuss the various aspects of the case in the light of the principles enunciated by this Court in the aforesaid cases. To begin with, we might mention that most of the facts on which evidence appears to have been led by the petitioner were not pleaded in the election petition at all. For instance, the definite case made out by the petitioner in his evidence was that at the time of the scrutiny of the nomination papers when the name of the petitioner was called out P. W. 1 Ghulam Mohiuddin the proposer of the petitioner was present who drew the attention of the Returning Officer to the fact that the petitioner had gone to attend the call of nature and that he should wait for him but the Returning Officer refused to wait and rejected the nomination paper on the ground of the absence of the petitioner. It was further sought to be proved in the evidence that on return the petitioner tried to persuade the Returning Officer to reopen the matter and in fact filed an application before him for recalling the order of rejection of the nomination paper but the Returning Officer was so much prejudiced against him that he tore off the petition submitted before him by the petitioner. It will be noticed that neither in the original petition nor in the amended one there is any mention of the fact that P. W. 1 Ghulam Mohiuddin drew attention of the Returning Officer and asked him to wait, nor is there any mention of the fact that the petitioner on his return submitted a petition to the Returning Officer which was torn into pieces by the Returning Officer. We shall show that these facts are also not proved even by some of the witnesses examined by the petitioner. It may be pertinent to note here that while in paragraph 14 it was mentioned that when the nomination form of the petitioner was taken up it was reported to the Returning Of-

ficer that the petitioner had gone to attend the call of nature, but significantly enough it is not mentioned therein as to who was the person who had drawn the attention of the Returning Officer. It seems to us that even at the time of filing his amended petition which was filed after the trial had started the petitioner was not certain of his case and had not yet decided to allot this part to his proposer Ghulam Mohiuddin. P. Ws. 1, 2 and 6 have no doubt asserted in their evidence that P. W. 1 Ghulam Mohiuddin requested the Returning Officer to wait for the petitioner who had gone to attend the call of nature. P. W. 1 Ghulam Mohiuddin who was the proposer of the petitioner and therefore the most interested witness in this case has no doubt testified to the fact that he had drawn the attention of the Returning Officer when the nomination paper of the petitioner was taken up for scrutiny, but the Returning Officer did not heed his request and rejected the nomination paper. This witness also stated that the petitioner himself told the Returning Officer that he was going to attend the call of nature and that he should wait for him. But the witness does not appear to be sure of his statement as he immediately volunteered to state that as there was lot of noise at that time evidently the Returning Officer did not hear him. The petitioner also says the same thing.

6. P. W. 2 Qazi Mohammad Abdullah also tries to support the fact that at the time of scrutiny the petitioner was not present and Ghulam Mohiuddin P. W. 1 informed the Returning Officer that the petitioner had gone to attend the call of nature. This witness, however, did not support the allegation of the petitioner that a petition was submitted by him before the Returning Officer which was torn by him. The witness stated thus:

"The petitioner did not submit any petition before the Returning Officer in my presence on the day of scrutiny. There was no such incident in my presence such as the filing of a petition before the Returning Officer and the tearing off that petition by him."

7. P. W. 6 the petitioner himself no doubt supported his case that he had gone to attend the call of nature when the scrutiny of his nomination paper was taken up and had instructed P. W. 1 Ghulam Mohiuddin to remain present and to ask the Returning Officer to wait. Thus this fact is not proved by any independent witness.

8. On the other hand the fact that Ghulam Mohiuddin did not respond to the call even though he was instructed, as the petitioner would have us believe, is admitted even by a witness of the petitioner, namely, P. W. 4 Ghulam Qadir Mir, who deposed as follows:

"At the time when the scrutiny of the nomination paper of Ali Akbar Khan was taken up, he himself was not present there. His proposer Ghulam Mohi-ud-Din was present there. The name of Ali Akbar Khan was called out but no one responded and so the Returning Officer wrote down that the candidate was absent and his nomination paper was being rejected. In my presence nothing else happened there."

It would therefore appear from the evidence of this witness that even though Ghulam Mohiuddin was present he did not at all respond when the name of the petitioner was called out. This knocks the bottom out of the story put forward by the petitioner that Ghulam Mohiuddin had been instructed to ask the Returning Officer to wait or that Ghulam Mohiuddin stood up and requested the Returning Officer to wait for the petitioner. Thus the entire story given out by P. Ws. 1, 2 and 6 on this point is falsified by one of the witnesses examined by the petitioner himself.

9. There is yet another circumstance which throws considerable doubt on this part of the story of the petitioner. P. W. 5 Girdhari Lal counsel engaged by the petitioner at the time of scrutiny according to whose evidence Ghulam Mohiuddin had signed the nomination form in his presence, was also present at the time when the scrutiny of the nomination paper of the petitioner was taken up and in spite of this fact

when the name of the petitioner was called out and according to the witness the Returning Officer announced that since he was absent his nomination paper was rejected this witness did not enter a protest on behalf of his client, the petitioner, that the Returning Officer could not have rejected the nomination paper on the ground of the absence of the petitioner. This somewhat unusual conduct on the part of the witness who is a lawyer of some experience clearly shows that neither Ghulam Mohiuddin was present nor the petitioner was present and it is therefore extremely doubtful if this witness was also present at the time when the scrutiny of the nomination paper of the petitioner was taken up by the Returning Officer.

10. As against this contradictory and discrepant evidence there is consistent evidence of the appellant's witnesses R. Ws. 1, 2, 3 and 4 to the effect that neither the petitioner nor his proposer Ghulam Mohiuddin was present when the scrutiny of the nomination paper of the petitioner was taken up. R. W. 3 is the Returning Officer himself and he appears to us to be an absolutely independent witness being a high Government officer of sufficient experience and there is absolutely no reason for him to depose falsely against the petitioner. The Returning Officer stated thus:

"When in spite of repeated calls neither the petitioner nor his proposer turned up before me, then I began to write out the order on the back of the nomination form."

11. R. W. 1 Mohammad Anwar Shah Masoodi also appears to be an independent witness who was an active Congress worker but he did not see eye to eye with the Congress on the candidature of Mohd. Yunis for the constituency in question. There is nothing to show that this witness was in any way interested in the appellant. This witness also categorically stated that neither the petitioner nor the proposer of the petitioner turned up at the time when the name of the petitioner was called out.

12. R. W. 2 Ghulam Hassan Malik who was also one of the can-

didates from the Karnah Assembly Constituency and who is a lawyer also corroborated the evidence of the Returning Officer and of R. Ws. 1 & 3 that no one stood up on behalf of the petitioner when the name of the petitioner was called out and that the proposer of the petitioner was also not present at that time in the room. This witness has further stated that no one brought it to the notice of the Returning Officer that the petitioner was ill or that he would be coming soon. The evidence of the witnesses examined by the appellant therefore is fully corroborated by the evidence of P. W. 4 Ghulam Qadir Mir a witness of the petitioner as shown above.

13. Furthermore we find it difficult to believe why the Returning Officer who was an independent person and a Government Officer would refuse to wait for the petitioner if his attention was really drawn to the fact that the petitioner was ill and had gone to attend the call of nature by Ghulam Mohiuddin or anybody on behalf of the petitioner. This fact, therefore, clearly shows that the case of the appellant that neither the petitioner nor his proposer was present at the time when the scrutiny of the nomination paper of the petitioner was taken up is true. Even the learned Judge is also inclined to accept this part of the case of the appellant. On a consideration of the evidence of the parties referred to above we are clearly of the opinion that the petitioner has failed to prove that at the time when the scrutiny of his nomination paper was taken up by the Returning Officer either the petitioner or his proposer Ghulam Mohiuddin was present and made any request to the Returning Officer to wait which was not acceded to by the Returning Officer.

14. Apart from the interested testimony of P. Ws. 1, 3 and 6 that the petitioner had submitted a petition to the Returning Officer which was torn out by him there is no reliable evidence to prove this fact. To begin with, this fact is not at all mentioned even in the election petition filed by the petitioner even

after amendment. The petitioner admits in his statement that he did not mention this fact while instructing his lawyer. Furthermore, if indeed the Returning Officer actually behaved in the manner as the petitioner would have us believe, then it was a very serious matter and the petitioner is not likely to have slept over the matter but would have filed a regular complaint against the Returning Officer to his superior officers. In fact when there was a delay of only one day in the giving of the copy of the rejection order the petitioner made a great fuss and furore over this petty lapse. Is it possible to believe that the petitioner would sit quiet if the Returning Officer had behaved in such a manner with him by tearing off the petition which was submitted to the Returning Officer? Apart from that P. W. 3 Mohammad Maqbool Mir at page 87 of the Paper Book has clearly admitted that in his presence no petition was filed by Ali Akbar Khan before the Returning Officer. Even P. W. 5 who was the lawyer of the petitioner stated that he cannot say that Ali Akbar Khan presented any petition before the Returning Officer which the latter tore off. P. W. 4 also says that he did not see the petitioner Ali Akbar Khan or his proposer presenting any application to the Returning Officer which the latter tore off. Thus the mischievous allegation made by the petitioner against the Returning Officer is completely disproved not only from his own conduct but also by the evidence of his own witnesses as discussed above.

15. Finally even though a very serious allegation was made against the Returning Officer personally, yet, when he was deposing as a witness for the appellant, no suggestion was put to him that any petition was presented to him which he tore off instead of taking any action thereon. Further while P. W. 1 Ghulam Mohiuddin categorically stated in his evidence that the petition which was submitted to the Returning Officer was scribed by Abdul Ahad the petition writer, yet the petitioner made no attempt to examine Abdul Ahad in order to prove

this part of his case. In these circumstances, therefore, we disbelieve this part of the case of the petitioner that he had filed any petition to the Returning Officer for reopening the order rejecting his nomination paper. It seems to us that this allegation was a made up story and appears to have been invented in order to make out a case that the Returning Officer was biased against the petitioner and that is why the nomination paper of the petitioner was illegally rejected by him. The petitioner has, however, miserably failed to prove this part of the case. If this story is found to be false, it would also demonstrate the falsity of the main allegation made by the petitioner regarding the overwriting on the signature of Ghulam Mohiuddin as also interpolation in the order passed by the Returning Officer rejecting the nomination paper of the petitioner.

16. This brings us now to the question as to the nature of the order passed by the Returning Officer which is Ext. RW 3/3. Before, however, taking up this matter it may be necessary to dispose of the case of the petitioner regarding the overwriting alleged to have been made subsequently on the signature of Ghulam Mohiuddin on the nomination paper Ext. PW 5/2. The definite case of the petitioner was that at the time when the nomination paper was filed before the Returning Officer R. W. 3, or even at the time of the scrutiny on February 9, 1972, there was no overwriting at all which appears to have been made subsequently. On the other hand the case of the appellant is that the overwriting was already there from before and in fact it was deliberately made so as to afford a ground to the petitioner to set aside the election of the appellant in case he was duly elected. It was suggested that this lacuna was deliberately left so as to invite the Returning Officer to reject the nomination paper and then use this infirmity to upset the election of the appellant. In support of this case the appellant relied upon the following circumstances:

(i) that the petitioner was a mere covering or shadow candidate of the

Congress and was not at all interested in contesting the election;

(ii) that once the nomination paper of Mohd. Yunis who was the official candidate of the Congress was accepted the petitioner was not at all interested in pursuing his election and it was for this reason that when the scrutiny of the nomination paper of the petitioner was taken up neither the petitioner nor his proposer was present and an imaginary story was invented that the petitioner was ill and had gone to attend the call of nature and Ghulam Mohiuddin the proposer asked the Returning Officer to wait but he rejected the nomination paper of the petitioner; and

(iii) that P. W. 1 Ghulam Mohiuddin the proposer of the petitioner has in an unguarded moment admitted in his statement that on the very day when the nomination paper was rejected i.e. on February 9, 1972, the petitioner informed the witness that he will file a case in the Court against Mohd. Yasin the appellant. P. W. 1 deposed thus:

"The petitioner had only then informed me after the rejection i.e. on 9-2-1972 that he will now file a case in the Court against Mohammad Yasin respondent."

This statement clearly lets the cat out of the bag and shows that the petitioner's intention really was to prepare a ground for setting aside the election of the appellant if he was duly elected. Unless this was so, it is not understandable why the petitioner should have made such a statement to P. W. 1 on the date when the nomination paper was rejected and when he obviously did not know whether or not the appellant would succeed in the election.

17. We shall now deal with each of these circumstances relied upon by the appellant in support of his case that the entire story of overwriting etc. was a figment of the imagination of the petitioner's mind and perhaps the whole thing was stage-managed so as to invite the Returning Officer to reject the nomination paper of the petitioner.

18. The appellant has clearly stated in his evidence that the peti-

tioner was merely a covering candidate of the Congress and was put up only as a shield to take the place of Mohd. Yunis if the nomination paper of Mohd. Yunis was rejected. R. W. 1 who, as we have already pointed out, was an independent witness and was an active worker of the Congress at one time has also categorically asserted that the petitioner was a covering candidate of the Congress. The witness stated thus:

"The petitioner was a candidate set up by the Congress that is to say he was a covering candidate. The congress had given the mandate to Kh. Mohd. Yunis but the latter had set up the petitioner as a candidate by way of precaution."

The evidence of this witness appears to have a ring of truth in it. He has clearly stated that he did not agree with the Congress organization when a mandate was given to Mohd. Yunis to stand from the Assembly constituency of Karnah, because in his opinion Mohd. Yunis had lost his popularity and there was little chance of his being elected. The result of the election demonstrated that the apprehension of this witness was undoubtedly correct, because while the appellant was duly returned, Mohd. Yunis was defeated. In these circumstances we do not see any reason to distrust the evidence of this witness on this point.

19. R. W. 2 Gulam Hassan Malik who was a lawyer and also a candidate has also stated that the petitioner Ali Akbar Khan was a covering candidate of Mohd. Yunis.

20. The appellant also in his evidence categorically asserted that the petitioner was a covering candidate of the Congress for Mohd. Yunis. It is true that the petitioner has not admitted this fact, but the somewhat contradictory stand taken by him on this point clearly shows that he was undoubtedly a covering candidate. The witness (petitioner) said that if his nomination paper had been accepted he would not have contested as an independent candidate but he had been assured that if the nomination paper of Mohd. Yunis as also of the petitioner were accepted then the Congress was to decide as to who would contest the election. At the same time the petitioner admit-

ted that the mandate of the Congress was given to Mohd. Yunis prior to the filling up of the nomination forms. Indeed if the mandate was given by the Congress party to Mohd. Yunis alone, the petitioner was bound to be a dummy candidate only. Another intrinsic circumstance that supports this fact is that while Mohd. Yunis and other candidates filed a number of nomination papers so that if one of them was rejected on the ground of any defect or infirmity the remaining nomination forms may be accepted and the candidature of the candidates would not run into difficulty, the petitioner admittedly filed only one nomination paper and did not think it necessary to file another nomination paper. These facts taken together with the subsequent conduct of the petitioner and his proposer Ghulam Mohiuddin in not being present at the time of the scrutiny of the nomination paper as found by us lends sufficient support to the case of the appellant that the petitioner was merely a dummy candidate.

21. As regards the other circumstances that after the nomination paper of Mohd. Yunis was accepted, the petitioner was not at all interested in fighting the elections, we find that there is overwhelming evidence to support this inference. We have already pointed out that from the evidence led by the parties it has been established that neither the petitioner nor his proposer were present at the time when the scrutiny of the nomination paper was taken up by the Returning Officer on February 9, 1972. In these circumstances, therefore, it follows as a logical corollary that the story of the petitioner that a request made to Returning Officer by Ghulam Mohiuddin to wait for the petitioner or that any petition was filed before the Returning Officer which was torn by him is a complete myth and has been invented to give credence to the made up story bolstered up by the petitioner. Another intrinsic circumstance which shows that the petitioner was not at all interested in pursuing his election is the fact that the two important persons who were very much interested in his nomination paper not being rejected did

not lodge any protest before the Returning Officer or took the trouble of drawing the attention of the Returning Officer that the nomination paper could not be rejected due to the absence of the petitioner. One of these persons was no one else but Girdhari Lal the counsel of the petitioner himself. According to his evidence he knew full well that P. W. 1 Ghulam Mohiuddin had signed the nomination paper in his presence and yet when the nomination paper was taken up for scrutiny he did not care to tell the Returning Officer that as the proposer had signed in his presence there was no question of rejecting his nomination paper. Similarly Mohd. Yunis who was the official candidate of the Congress also remained completely silent and did not draw the attention of the Returning Officer when the nomination paper of the petitioner who was also a Congress candidate was rejected. All these facts, therefore, lead to the inescapable conclusion that the petitioner was not at all interested in contesting the election and by his deliberate conduct he created a situation in which the nomination paper could be rejected so that if necessary he could use this lacuna to upset the election of the appellant.

22. As regards the last circumstance, namely, that the whole thing appears to have been stage-managed by Mohd. Yunis in order to furnish a ground for setting aside the election of the appellant in case he was elected appears to be probable, particularly in view of the admission made by P. W. 1 Ghulam Mohiuddin to which a reference has already been made. The best person to explain these facts would have been Mohd. Yunis himself and the petitioner has not examined him as a witness at all. It appears from the order-sheet that Mohd. Yunis was summoned and he was present but the petitioner did not choose to examine him. It seems to us that Mohd. Yunis being fully aware that he was the architect of the whole drama did not want to face the Court.

Apart from this circumstance, the evidence led by the petitioner

on the question that there was some overwriting in the signature of his proposer P. W. 1 Ghulam Mohiuddin on the nomination form subsequent to the date of the scrutiny is far from convincing.

23. In view of our finding that neither the petitioner P. W. 6 nor Ghulam Mohiuddin P. W. 1 was present on February 9, 1972 when the nomination paper of the petitioner was taken up for scrutiny by the Returning Officer, these two witnesses are not at all competent to depose as to whether or not on that date there was any overwriting in the signature of P. W. 1. In these circumstances, therefore, the evidence of P. Ws. 1 and 6 will have to be excluded on this point. Even so it will be interesting to note that the petitioner P. W. 6 does not say that there was any overwriting on the signature of P. W. 1 Ghulam Mohiuddin on the nomination form but he states that on a perusal of the nomination paper it appears that some ink was spread over his signature. An examination of the signature of Ghulam Mohiuddin would reveal to the naked eye that there is no question of the spreading of any ink over the signature but what has been done is that there is clear overwriting on the signature.

24. P. W. 2 Qazi Mohammad Abdullah appears to be a close acquaintance of the petitioner and had helped him in engaging the services of Girdhari Lal for the purpose of filling up the nomination paper which was also done at his own house. This witness also states that Ghulam Mohiuddin had affixed his signature in his presence with the fountain-pen of the petitioner. He further asserts that on the date of his deposition he found that there was an overwriting over the signature of Ghulam Mohiuddin. This witness was one of the proposers of Mohd. Yunis who had set up the petitioner as his dummy candidate as held by us. In these circumstances, therefore, this witness was interested and has tried to help the petitioner. Moreover he does not say that on February 9, 1972 when the scrutiny of the nomination paper of the petitioner was taken up by the Return-

ing Officer he had an opportunity to inspect the nomination paper in order to find out whether there was any overwriting on the signature. His evidence, therefore, does not exclude the possibility of the overwriting having been made after Ghulam Mohiuddin had signed the nomination paper at the residence of the witness and before the nomination paper was filed or its scrutiny taken up. Further more, the witness admits that he is also a Congress worker and knew the petitioner for the last four years. For these reasons, therefore, in the first place the evidence of this witness is interested, and secondly it does not appear to be of any assistance to the petitioner.

25. The other witness examined on this point is P. W. 3 Mohd. Maqbool Mir. A perusal of the evidence of this witness convinces us that he is an utterly unreliable witness. Although a lawyer of sufficient experience the witness seems to have scant regard for the purity of the legal profession or the norms of professional ethics. He was a counsel of the appellant and had been engaged by him at the time of filing of the nomination paper and its scrutiny. He was present on February 9, 1972 before the Returning Officer on behalf of the appellant. He further admits that he had also agreed to become the agent of other contesting candidates. The order Ext. RW 3/3 clearly mentions that the witness did raise objection on behalf of the appellant regarding the genuineness of the signature of P. W. 1 Ghulam Mohiuddin and yet the witness who appears to have transferred his loyalty to the petitioner deposes with impunity that he did not raise any objection regarding the genuineness of the signature of Ghulam Mohiuddin and that the overwriting did not exist at the time of the scrutiny. The dramatic manner in which he has made his appearance as a witness for the petitioner speaks volumes against the credibility of his testimony. He admits that he had never appeared before the High Court and he happened to come to Srinagar on November 13, 1972 to make some purchases for his uncle who was proceeding on a pilgrimage

to Mecca. As he happened to be in the Court premises his name was called out and he was directed to appear as a witness without receiving any summons from the Court. The appellant has categorically stated in his evidence that he had informed this witness that he might have to be examined on his behalf in the trial before the High Court and yet the witness knowing full well that he was the retained counsel of the appellant readily agreed to depose for the petitioner. Finally the witness admits that he deals with about 100 cases per month and yet he does not pay any income-tax. In view of these circumstances, therefore, we are not in a position to place any reliance on the evidence of this witness. In fact the learned Judge was also not inclined to place implicit reliance on the testimony of this witness and in this connection the learned Judge observed as follows:

"There have been great comments made with regard to the veracity and dependability of the statement of this witness and if the matter had rested only on the testimony of this witness, then it could have been said that some how or other this witness had changed sides and has come to depose but his testimony and the statements made by him have to be judged in the light of the other evidence and the facts and circumstances of the case."

26. We are now left with the evidence of P. W. 5 Girdhari Lal. This witness was admittedly counsel for the petitioner and was therefore thoroughly interested in supporting the case of the petitioner. The witness has also stated that the nomination paper bore the signature of Ghulam Mohiuddin but at the time when he was deposing there was some overwriting in his signature. The witness says that he was present at the time of the scrutiny and had inspected the nomination form and found that the signature of Ghulam Mohiuddin did not contain any overwriting at that time. He, however, admits that the petitioner Ali Akbar Khan was not present when the scrutiny was taken up and his nomination paper was rejected by the

Returning Officer. Indeed if this was so, as a retained counsel for the petitioner, it was his duty to point out to the Returning Officer that under Section 47 of the Act the Returning Officer was not legally competent to reject the nomination paper merely on the ground of the absence of the petitioner or his proposer. He, however, remained absolutely silent. This clearly shows that either he was aware that the overwriting on the signature of Ghulam Mohiuddin was already there at the time of the scrutiny or that he did not know about it, nor did he care to examine the nomination paper at that time. The witness admitted at page 106 of the Paper Book that the rejection of the nomination paper on the ground of the absence of the candidate or his proposer was in his opinion improper under Section 47 of the Act. In spite of this fact it is not at all understandable why he did not draw the attention of the Returning Officer to this fact, if the Returning Officer had rejected the nomination paper merely on the ground of the absence of the petitioner or his proposer. In these circumstances, therefore, there appears to have been a method in his silence which indicates that he was a privy to the whole show put up by the petitioner and wanted that somehow or the other the nomination paper of the petitioner may be improperly rejected so as to afford a ground to his client to upset the election of the successful candidate. In these circumstances, therefore, we are not in a position to place any reliance on the evidence of this witness.

27. This is all the evidence that the petitioner has led in support of his case that the overwriting on the signature of Ghulam Mohiuddin was made subsequent to the scrutiny of the nomination form.

28. As against this there is clear and categorical evidence of the appellant Mohd. Yasin Shah R. W. 4 who stated thus:

"After examination of the nomination form, I raised objection that the signature of the proposer appeared to be doubtful and I also said that probably it is not his

signature. No one at that time appeared to rebut this objection of mine and to assert that it was the signature of the proposer."

His evidence was fully corroborated by the Returning Officer Abdul Rehman Mir, R. W. 3, who has clearly stated thus:

"The nomination form already marked Ext. P. W. 5/2 was presented before me in the same condition in which it is at present. I was also the Returning Officer of Lolab. Kupwara assembly constituencies besides the Karnah assembly constituency."

We have already pointed out that R. W. 3 is an independent witness being a high Government Officer. The allegations made by the petitioner against him have not at all been substantiated and appear to be totally unfounded as found by us. There is neither any suggestion nor any evidence to show that he was in any way interested in the appellant or biased against the petitioner. On the other hand, R. W. 3 being an independent Government officer would naturally have no leanings towards either party. Furthermore, the most important question to be determined was, if any overwriting was made, who would be interested in making the same? It is obvious that the Returning Officer had absolutely no motive to make any overwriting on the signature of P. W. 1. The Returning Officer has also admitted in his statement that after the scrutiny the record was deposited by him personally with the District Treasury Officer, Baramulla, as per the directions of the Deputy Commissioner, Baramulla, who was also the District Election Officer. In these circumstances, therefore, why should the Returning Officer have taken the grave risk of tampering with the record after the same was deposited with the District Treasury Officer on the directions of the Deputy Commissioner, Baramulla, and why should he at all do it? Perhaps it was for this reason that the learned Judge did not like to go into this question at all and refrained from making any observation on this aspect of the matter but casually observed that the overwriting might have been brought into existence

after the scrutiny. We think that there is absolutely no evidence to support this fact.

29. Finally there is another intrinsic circumstance which shows that the overwriting must have been there when the nomination paper was filed or was taken up for scrutiny by the Returning Officer. The order of the Returning Officer Ext. R. W. 3/3 clearly shows that an express objection was taken by Mohammad Maqbool Mir on behalf of Mohammad Yasin that the signature of the proposer was not genuine. If the overwriting would not have been there, there was absolutely no occasion for the appellant to have raised any such objection. We have examined the signature purported to be of Ghulam Mohiuddin, P. W. 1, and we find that there is clear overwriting by which various letters of the signature of Ghulam Mohiuddin have been tampered with. The Returning Officer has also deposed that he had given time to the candidates to examine the nomination papers at the time of the scrutiny in order to submit objections, if any. The appellant and his counsel examined the nomination paper of the petitioner and did raise an objection regarding the genuineness of the signature of his proposer P. W. 1. This objection has been recorded in the order passed by the Returning Officer. In view of these circumstances we see no reason at all to distrust the evidence of the Returning Officer R. W. 3 on the point that the nomination paper was in the same condition at the date of the scrutiny as it was on the date when he was deposing.

30. There is yet another matter on which there appears to be a serious controversy between the parties. The petitioner's case was that the appellant Mohd. Yasin had not at all raised any objection to the genuineness of the signature of P. W. 1 Ghulam Mohiuddin on the nomination form and that the aforesaid objection was subsequently incorporated by the Returning Officer in his order by committing interpolation. On the other hand the appellant's definite case was that after inspecting the nomination paper he raised a clear objection before the Returning Officer regarding the genuineness of the

signature of the proposer Ghulam Mohiuddin and this objection was not only recorded by the Returning Officer at that very time but was also sustained. The case of the appellant is substantially corroborated by the recitals in Ext. R. W. 3/3 the order passed by the Returning Officer which must be presumed to be genuine as there is nothing to show that it was either interpolated or brought into existence subsequently. The petitioner's case however, rests purely on the oral evidence of a few interested witnesses. To begin with, so far as the evidence of P. W. 1 Ghulam Mohiuddin and P. W. 5 the petitioner is concerned the same would be of no assistance in deciding this question because as held by us these two persons were not present at the time of the scrutiny and therefore they were not competent to depose whether or not any objection was taken by the appellant regarding the genuineness of the signature of Ghulam Mohiuddin. It is true that P. W. 3 Mohammad Maqbool Mir who was the counsel for the appellant has stated that he never raised any objection on behalf of the appellant at the time of the scrutiny. We have already discussed the evidence of this witness and held that he was an utterly unreliable witness for the reasons which we have already given. Moreover he appears to be a turn-coat type of witness and has changed sides as observed by the learned Judge. Finally his evidence is clearly contradicted by the document Ext. R. W. 3/3 wherein it is clearly mentioned that the witness Mohd Maqbool did raise objection regarding the genuineness of the signature of P. W. 1 Ghulam Mohiuddin on behalf of the appellant before the Returning Officer at the time of the scrutiny. In these circumstances, therefore, we are not able to place any reliance on the evidence of this witness.

31. The last witness on the point is P. W. 4 Gulam Qadir Mir who has no doubt stated that no objection was taken by anybody at the concerned time. This witness, however, was an agent of a different candidate and was not at all interested in the appellant and as, ac-

cording to him, he was at some distance from the Returning Officer it is possible that he may not have heard the objection taken by the appellant before the Returning Officer. At any rate, the evidence of this witness by itself is not sufficient to demolish other circumstances appearing in the case, particularly the recitals in the document R. W. 3/3.

32. As against this, R. W. 1, who, as we have already pointed out, is an independent witness, and being a candidate himself was present at the time when the scrutiny of the nomination took place, and his interest was by no means identical with the appellant and, therefore, had no reason to depose falsely to help the appellant. This witness has categorically stated thus:

"Respondent No. 1 (appellant) at that time raised an objection that he was challenging the signature of the proposer on the nomination paper of the petitioner.

x x x x x

When there was an objection to the nomination paper of the petitioner by Mohd. Yaseen then he (Returning Officer) scrutinised the nomination paper and passed an order which was announced in the absence of the petitioner."

Similarly R. W. 3 the Returning Officer has also clearly deposed that an objection was raised by the appellant which was recorded in his order. The evidence of R. Ws. 1 and 3 finds ample corroboration from the recitals in the document Ext. R. W. 3/3. Apart from this R. W. 2 who is no doubt a counting agent of the appellant has testified to the fact that the appellant had raised an objection regarding the genuineness of the signature of P. W. 1 Ghulam Mohiuddin. As the evidence of this witness is corroborated by two independent witnesses R. Ws. 1 and 3 we see no reason to disbelieve him. Lastly there is the categorical statement of the appellant himself that he did raise an objection. In these circumstances, therefore, we are satisfied that the evidence led by the appellant far outweighs the interested oral testimony led by the petitioner. In these circumstances, therefore, we find that it has been proved beyond doubt that the ap-

pellant did raise an objection regarding the genuineness of the signature of P. W. 1 Ghulam Mohiuddin before the Returning Officer on February 9, 1972, at the time of the scrutiny of nomination papers.

33. It is, therefore, established that at the time when the nomination paper of the petitioner was taken up for scrutiny the overwriting on the signature of P. W. 1 Ghulam Mohiuddin was already there and there is a strong possibility that the overwriting had been deliberately made at the instance of the petitioner so as to furnish a ground for setting aside the election of the successful candidate if the official candidate of the Congress failed to win the election.

34. Mr. Pathak learned counsel for the petitioner submitted that a bare perusal of the order of the Returning Officer would clearly show that there has been some tampering. Before examining this contention we may mention that from the evidence and circumstances discussed above, the following facts emerge:

(i) that the petitioner was a dummy candidate of the Congress;

(ii) that R. W. 1 Mohd. Anwar Shah Masoodi had expressed his clear apprehension that there was very little chance of Mohd. Yunis the official candidate of the Congress to win the election, and, therefore, there was every motive for the petitioner to have prepared some ground for assailing the election of the appellant in case he was successful;

(iii) that on the date of the scrutiny of the nomination papers neither the petitioner nor his proposer was present before the Returning Officer;

(iv) that at the time of the scrutiny the appellant either personally or through his counsel definitely raised an objection about the genuineness of the signature of P. W. 1 Ghulam Mohiuddin on the nomination paper Ext. P. W. 5/2; and

(v) that the overwriting on the signature of P. W. 1 Ghulam Mohiuddin was present even at the date of the scrutiny and perhaps even on the date when the nomination paper was filed before the Returning Officer.

35. In the background of these proved facts, we would now examine whether or not the contention raised by the learned counsel for the petitioner is correct. The order passed by the Returning Officer rejecting the nomination paper of the petitioner which is Ext. R. W. 3/3 runs thus:

"The candidate and the proposer are not present. Hence rejected, also an objection has been raised to the genuineness of the proposer's signature by one Mohd. Maqbool counsel for Mohd. Yaseen Shah candidate. I could not verify it for absence of candidate and the proposer."

It was contended by Mr. Pathak that this order runs into two parts. By the first part of the order the Returning Officer appears to have rejected the nomination paper merely on the ground of the absence of the candidate and the proposer. By the second part, which according to the counsel for the petitioner appears to have been added subsequently, the objection taken by the appellant regarding the genuineness of the proposer's signature has been recorded, and even so, the Returning Officer has not given any decision on this point. We have perused the original order passed by the Returning Officer very carefully, but we find that the entire order has been written in the same ink with the same pen and appears to have been written in one sitting. There is nothing to show that the second part of the order was added subsequently because the strokes of the letters, the ink which has been used and the general tenor of the writing appears to be the same throughout. In these circumstances, therefore, we reject the contention of the petitioner that the second part of the order was added subsequently. We accordingly hold that the allegations made by the petitioner against the Returning Officer in paragraph-26 of the election petition are totally unfounded and the petitioner has miserably failed to prove the same. The entire order of the Returning officer was written in one sitting and there can be no question of any interpolation having been made by him nor had the Returning Officer any motive to do so. Nevertheless it is true that

after having written the order "Hence rejected", the Returning Officer appears to have recorded the fact that an objection was raised regarding the genuineness of the proposer's signature. For this R. W. 3 the Returning Officer appears to have given a very convincing and reasonable explanation. He says that while he was writing his order and had not completed the same, an objection was taken by Mohd. Maqbool counsel for Mohd. Yaseen regarding the genuineness of the signature of the proposer. At that time the clerk had already put the seal and, therefore, the Returning Officer recorded the objection raised by the appellant in the space left and completed his order and thereafter he signed above the seal. The Returning Officer R. W. 3 in this connection stated thus:

"When in spite of repeated calls neither the petitioner nor his proposer turned up before me, then I began to write out the order on the back of the nomination form.....
..... After the scrutiny by them, Mohammad Yaseen as well as his counsel brought this fact to my notice that the signature of the proposer on the nomination form of the petitioner was not genuine..... The portion in my order regarding the non-appearance of the petitioner or his proposer as well as the portion regarding the objection about the genuineness of the signature were written by me contemporaneously at the time of passing the order on the nomination form in respect of the scrutiny. The seal is not below my order but it is just in the midst of the portion of my order and the reason for this is that at the time of the scrutiny when I was passing the order, my clerk was also standing by my side and he was affixing the seal and it so happened that while I was hearing the objection in respect of this nomination form, the clerk affixed the seal at that place." The Returning Officer further stated in his evidence that he upheld the objection of the appellant as there was nobody on behalf of the candidate to rebut the objection raised by the appellant. The explanation given by the Returning Officer is

fully corroborated by the evidence of the appellant and his witnesses, particularly R. W. 1, who is undoubtedly an independent witness. As we have already held that the Returning Officer was an independent witness and a Government official, there is absolutely no reason why he should have added a part of the order subsequently.

36. It was then contended by Mr. Pathak that even though the Returning Officer recorded the objection taken by the appellant he has not expressed any final opinion or taken any decision in the matter. Our attention was drawn to Section 47 (2) (c) of the Act which runs thus:

"47. (2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:—

x x x x x

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine."

It was submitted that the Returning Officer has nowhere held as a fact that the signature of the proposer was not genuine. He has merely indicated the objection raised by the appellant but has not examined the validity of that objection and, therefore, the order must be read as having rejected the nomination paper merely on the ground of the absence of the candidate and his proposer. It is true that under Section 47 (2) (c) which is the only relevant provision which applies to this case it was not open to the Returning Officer to reject the nomination paper merely on the ground of the absence of the candidate or his proposer. The learned Judge seems to have accepted the petitioner's argument on his interpretation of the order and found that the nomination paper was rejected merely on the ground of the absence of the candidate and his proposer. The learned Judge has also held that having rejected the nomination paper any

subsequent observations which the Returning Officer made would have to be ignored as he became functus officio. This interpretation of the learned Judge has been adopted by Mr. Pathak learned counsel for the petitioner. On a close and careful reading of the order of the Returning Officer, as a whole, we are unable to agree with the interpretation put by the learned Judge or adopted by the learned counsel for the petitioner. We have already pointed out the facts proved which clearly show that at the time when the Returning Officer passed the order he had before him the signature of Ghulam Mohiuddin with an overwriting. Both P. W. 1 Ghulam Mohiuddin and counsel for the petitioner have categorically admitted in their statements that the signature in the present form with the overwriting was not the signature of Ghulam Mohiuddin. P. W. 1 at page 66 of the Paper Book deposed as follows:

"Question: Do you accept this signature to be yours in its present form as it stands?

Answer: I do not accept this to be my signature in the form as it stands at present."

Similarly P. W. 5 who is counsel for the petitioner and in whose presence P. W. 1 had signed the nomination paper also admits in clear terms thus:

"In the present form I do not accept that it is the signature of Ghulam Mohi-ud-Din."

Thus if the person who had signed the nomination paper and the lawyer in whose presence Ghulam Mohiuddin had signed the nomination paper were convinced that the signature as overwritten was not the signature of Ghulam Mohiuddin, how can we find fault with the Returning Officer if he also, on a bare perusal of the nomination paper, doubted the genuineness of the signature? The suspicion of the Returning Officer regarding the genuineness of the signature of the proposer was further reinforced by the fact that a specific objection on this point was taken by counsel for the appellant as recorded in the order itself. Thus the order read as a

whole clearly shows that the nomination paper was rejected not only on the ground that the candidate or his proposer was not present but also on the ground that the signature of the proposer on the nomination paper was not genuine. It is true that the Returning Officer has not given any clear finding on this point, but Section 47 of the Act does not require a well-reasoned decision. All that is necessary is that the Returning Officer should apply his mind and determine the question in a summary manner. The Returning Officer has, in the instant case, indicated the objection taken by the appellant regarding the genuineness of the signature of the proposer and has also clearly observed that in view of the objection it is not possible to verify the signature in the absence of the candidate and the proposer. Thus the absence of the candidate and the proposer has been used not for the purpose of rejecting the nomination paper but for the purpose of supporting the conclusion of the Returning Officer that the signature of the proposer was not genuine. Even assuming for the sake of argument that the Returning Officer had in effect and in substance rejected the nomination paper on the ground of the absence of the candidate and the proposer which was not a valid ground for rejection of the nomination paper, this does not put an end to the controversy. There is abundant authority for the proposition that even if the ground on which the nomination paper has been actually rejected is not a permissible ground, if the successful candidate can make out a case that the nomination paper could have been properly rejected on one of the grounds mentioned in Sec. 47 of the Act, the rejection would not be improper and the election would be upheld. This Court considered this question in *Veluswami Thevar v. Raja Nainar*, (1959) Supp (1) SCR 623 = (AIR 1959 SC 422) and observed as follows:

"The argument is that if the jurisdiction of the Tribunal is co-extensive with that of the returning officer, then the enquiry before it must be confined to the grounds which were urged before the return-

ing officer. Now, the observations quoted above were made statedly with reference to R. 47, and assuming that they apply to an enquiry under Section 100 (1) (c), the question still remains, what is the jurisdiction of the returning officer in hearing objections to nomination papers? His jurisdiction is defined in Section 36 (2), and the Tribunal must therefore have jurisdiction to decide all the questions which can be raised under that section. The fact that a particular ground which could have been raised was not, in fact, raised before the returning officer does not put an end to his jurisdiction to decide it, and what he could have decided if it had been raised could be decided by the Tribunal, when raised."

"They held, with one solitary exception, that it is permissible, and indeed, it is stated in *Mengh Raj v. Bhimandas*, (1952) 2 Ele LR 301, 310 (Ele. Tribunal Ajmer) — as settled law that the rejection of a nomination paper can be sustained on grounds not raised before the returning officer. If the legislature which must be taken to have knowledge of the law as interpreted in those decisions wanted to make a departure from it, it would have said so in clear terms, and in the absence of such an expression, it would be right to interpret Section 100 (1) (c) as not intended to alter the law as laid down in those decisions."

"The question now under consideration came up directly for decision before the High Court of Rajasthan in *Tej Singh v. Election Tribunal, Jaipur*, (1954) 9 Ele LR 193 = (AIR 1954 Raj 204) and it was held that the respondent to an election petition was entitled to raise a plea that the nomination of the petitioner rejected on one ground by the returning officer was defective on one or more of the other grounds mentioned in Section 36 (2) of the Act, and that such a plea, if taken, must be enquired into by the Election Tribunal."

"An unreported judgment of the Andhra Pradesh High Court in *Badrivishal Pitti v. J. V. Narsing Rao* — Special Appeal No. 1 of 1957 — has been cited before us, and

that also takes the view that in an enquiry before the Election Tribunal, it is open to the parties to support an order of rejection of a nomination paper on grounds other than those which were put forward before the returning officer. We are in agreement with these decisions."

Mr. Pathak learned counsel for the petitioner sought to distinguish this decision on the ground that while it is open to the Tribunal, or the High Court in the instant case, to examine other grounds on which the nomination paper could have been rejected, yet in the present state of pleadings no such question appears to have been raised before the High Court. This argument does not appear to be factually correct. This plea was specifically raised by the appellant in paragraph 8 of his written statement relevant part of which may be extracted thus:

"The answering respondent challenges the genuineness of the signature of the proposer of the petitioner which could neither be rebutted nor challenged by the petitioner or his proposer as both were absent and hence the rejection of the petitioner was announced by the Returning Officer, who under the circumstances was justified under Section 47 of the R. P. Act to reject the nomination paper of the petitioner and as such this rejection cannot be deemed to be in law as improper rejection and the petitioner cannot now challenge the same as there is no infirmity in the order of rejection by the Returning Officer."

Furthermore in the additional written statement, filed by the appellant after the learned Judge allowed the petitioner to amend his election petition, this point was reiterated in paragraph 2 (iv) thus:

"That the signature of the proposer on the nomination form as was also challenged before the Returning Officer is not genuine and the rejection is not improper."

In paragraph 4 of the said additional written statement it was stated thus: "That the signature of the proposer Ghulam Mohi-ud-din not being genuine on the nomination form the rejection is not improper and the petition is liable to be dismissed."

37. The learned Judge had framed issue No. 1 in the widest possible terms which includes rejection of the nomination paper even on the ground that the signature of the proposer was not genuine which is undoubtedly a valid ground under Section 47 (2) (c) of the Act. The issue framed by the learned Judge was as follows:

"1. Whether the nomination paper of the petitioner was improperly and illegally rejected? O. P. P."

It is manifest that this issue covers the decision on the question as to whether various grounds on which the nomination paper could have been improperly rejected including the ground mentioned in Section 47 (2) (c) of the Act, namely, the fact that the signature of the proposer was not genuine. Even the learned Judge clearly understood the pleadings of the appellant to include the fact that the nomination paper was rejected because of the genuineness of the signature of the proposer. In this connection the learned Judge in his order dated November 7, 1972 observed as follows:

"It appears from the petition that the ground was the absence of the petitioner at the time of the scrutiny of the nomination paper but it also appears from the written statement filed by the respondent as well as from the order of the Returning Officer that the nomination paper had also been rejected because of the genuineness of the signature of the proposer. The nomination paper can be rejected on the question of the genuineness as contemplated by clause (c) of the Section 47 of the J and K Representation of the People Act of the State."

It was for these reasons that the learned Judge did not think it necessary to recast the issue, because he thought that the plea taken by the appellant in his written statement was fully covered by the issue already framed. In these circumstances, it is clear that the appellant had clearly raised the question that the nomination paper of the petitioner could be properly rejected under Section 47 (2) (c) of the Act even on the ground that the signature of the proposer was not genu-

ine. The learned Judge committed an error in not deciding this particular plea taken by the appellant when he found that the Returning Officer had improperly rejected the nomination paper on the ground of the absence of the candidate and the proposer.

38. We have, however, examined the various aspects of this question and from the facts found by us it is clear that the overwriting in the signature which was present at the date of the scrutiny also throws considerable doubt on the genuineness of the signature of the proposer Ghulam Mohiuddin as clearly admitted by him and the lawyer of the petitioner himself. The fact that the proposer and the petitioner were both absent on the date of the scrutiny lends sufficient support to the inference that the signature of the proposer Ghulam Mohiuddin on the nomination form does not appear to be genuine. It is also clearly established as found by us that the appellant did raise an objection regarding the genuineness of the signature of the proposer Ghulam Mohiuddin on the nomination form and that there was no one present on behalf of the candidate to rebut or refute the objection taken by the appellant. On the other hand P. W. 5 who was the counsel for the petitioner and in whose presence the proposer Ghulam Mohiuddin had signed the nomination form was actually present at the time of the scrutiny and yet, for reasons best known to him, he did not choose to stand up and point out to the Returning Officer that the objection raised by the appellant was not tenable because the proposer had signed the nomination form in his presence. Lastly the signature which contains the overwriting ex facie shows that it was not genuine. In these circumstances, therefore, the only irresistible inference that could be drawn would be that the signature containing the overwriting in the present form, which was in existence even at the time of the scrutiny, could not have been the signature of P. W. 1 Ghulam Mohiuddin. To add to this is the fact that P. W. 1 himself clearly admitted that in the

present form, namely, the signature containing the overwriting, he was not in a position to admit that it was his signature. This assertion was fully supported by P. W. 5 Girdhari Lal counsel for the petitioner in whose presence P. W. 1 is said to have signed the nomination form. The learned Judge appears to have entered into the domain of speculation by brushing aside the clear and categorical admission made by P. W. 1 on the ground that the question put to him had placed him on the horns of a dilemma. Once it is proved that the signature in the present form existed even at the time of the scrutiny, then the question put to the witness P. W. 1 was most relevant and the answer given by the witness was both clear and unambiguous. We do not see any vagueness or ambiguity in the answer given by the witness. Instead of taking the clear admission of P. W. 1 on its face value the learned Judge tried to brush it aside on purely speculative grounds. In these circumstances we are unable to agree with the view taken by the learned Judge which is based on a misreading and misinterpretation of the evidence of P. W. 1. For the same reason, we reject the contention of Mr. Pathak that the admission of P. W. 1 was vague. In these circumstances, therefore, we hold that it has been proved to the satisfaction of the Court that the signature of P. W. 1 Ghulam Mohiuddin which contained the overwriting was not his genuine signature. The nomination paper of the petitioner, therefore, could have been properly rejected on the ground that the signature of the proposer was not genuine. Thus the rejection of the nomination paper by the Returning Officer could be supported even on a ground different from the one which may have been taken by the Returning Officer. This being the position the rejection of the nomination paper was proper and the election of the appellant could not be assailed under Section 108 (1) (c) of the Act under which the election could be declared void only if there was an improper rejection of the nomination paper. In the instant case, the rejection of the nomi-

nation paper by the Returning Officer being proper one, Section 108 (1) (c) was not at all attracted.

39. It was lastly contended by counsel for the petitioner that this Court ought not to interfere with the decision of the learned Judge unless there were special reasons for doing so. In support of his contention the learned counsel relied upon a decision of this Court in *Laxminarayan v. Returning Officer*, (1974) 1 SCR 822 = (AIR 1974 SC 66) where this Court observed as follows:

"Section 116A of the Act provides for an appeal to this Court from an order of the High Court dismissing an election petition. The appeal lies both on issues of law and of facts. The power of the appellate Court is very wide. It can reappraise the evidence and reverse the trial Court's findings of fact. But like any other power it is not unconfined: it is subject to certain inherent limitations in relation to a conclusion of fact. While the trial Court has not only read the evidence of witnesses on record but has also read their evidence in their faces, looks and demeanour. The appellate Court is confined to their evidence on record. Accordingly "the view of the trial Judge as to where credibility lies is entitled to great weight." (See *Veeraswami v. Narayana*, AIR 1949 PC 32). However, the appellate court may interfere with a finding of fact if the trial Court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial Court."

The propositions enunciated by this Court are well established and there can be no dispute with the propositions mentioned above. In the instant case, however, we find that the approach of the learned Judge was not correct. We have already pointed out a number of salient features appearing in the evidence which have rendered the case of the petitioner inherently improbable. The learned Judge appears to have overlooked these essential features. Further,

the learned Judge himself had observed that issue No. 1 which he had framed was wide enough to include the plea of the appellant, and even if the order of the Returning Officer in rejecting the nomination paper on the ground of the absence of the candidate or his proposer was wrong, it could still be supported on the ground that the signature of the proposer was not genuine. The learned Judge has not determined this aspect of the matter. In these circumstances, therefore, we feel that the judgment of the High Court is erroneous both on fact and in law and although the appellate Court is extremely slow in disturbing the findings of fact, in the instant case, we are satisfied that the judgment of the High Court is against the weight of the evidence on record and preponderance of probabilities.

40. For the reasons given above, the appeal is allowed, the order of the High Court setting aside the election of the appellant Mohd. Yasin Shah is quashed and the election petition filed by the petitioner is hereby dismissed. The appellant will be entitled to his costs throughout.

Appeal allowed.

AIR 1976 SUPREME COURT 1886

(From: Madhya Pradesh)*

P. K. GOSWAMI AND S. MURTAZA
FAZL ALI, JJ.

Kanhaiyalal, Appellant v.
Mannalal and others, Respondents.

Civil Appeal No. 870 of 1974,
D/- 23-3-1976.

(A) Representation of the People Act (1951), S. 123 (4) — Corrupt practices under — Burden of proof — Nature — Corrupt practices under sub-section (4), held, not proved on facts. Ele. Petn. No. 8 of 1972, D/- 7-3-1974 (Madh Pra), Reversed.

Section 123 (4) consists of three types of corrupt practices, namely (1) the publication of an offending or incriminating statement by a candi-

*(Ele. Petn. No. 8 of 1972, D/- 7-3-1974 — (Madh. Pra.)).

ET/ET/B141/76/CWM

date, (2) by his agent within the meaning of the explanation (1) to Section 123 and (3) by any other person with the consent of the candidate or his election agent.

(Para 13)

Section 123 (4) is a punitive rule against character assassination of candidate during the period of election. A charge of electoral corrupt practices being of a quasi-criminal character, the onus on an election petitioner is heavy as if in a criminal charge. The allegations must be established beyond reasonable doubt to the satisfaction of the court by cogent and unimpeachable evidence.

(Para 21)

Held, on facts and circumstances, that the decision of the High Court allowing the election petition alleging corrupt practices under Section 123 (4) was liable to be set aside. The High Court committed a serious error in linking up the printing of the pamphlet at the instance of returned candidate for which there was no evidence whatsoever with the distribution of the same by the returned candidate in the constituency. Ele. Petn. No. 8 of 1972, D/- 7-3-1974 (Madh Pra), Reversed.

(Paras 29, 48, 50)

(B) Representation of the People Act (1951), S. 116A — Finding of High Court regarding appreciation of evidence — Ordinarily the Supreme Court will be slow to interfere with such findings except for good and sufficient reasons — (Supreme Court interfered with the findings of High Court in this case). (Para 29)

(C) Representation of the People Act (1951), Ss. 86, 87 — Election petition — Oral testimony — Appreciation — Duty of Court.

Oral testimony will have to be judged with the greatest care and an electoral victory cannot be allowed to be nullified by a mouthful of oral testimony without contemporaneous assurance of a reliable nature from an independent source.

(Paras 22, 46)

An election dispute is not a private feud between one individual and another. The whole constituency is intimately involved in such a dispute. Shaky and wavering oral

testimony of a handful of witnesses cannot still the dominant voice of the majority of an electorate. (Para 46)

Cases Referred: Chronological Paras
AIR 1975 SC 290 = (1975) 1 SCR 643 23

M/s. B. R. Nahata and Rameshwar Nath, for Appellant; Mr. Har-dayal Hardy Sr. Advocate, (Mr. S. K. Gambhir, Advocate with him), for No. 1, M/s. S. S. Khanduja and Sushil Kumar Jain, Advocates, for No. 4, for Respondents; Respondents Nos. 2 and 3, ex parte.

Judgment of the Court was delivered by

GOSWAMI, J.:— This is an appeal under Section 116A of the Representation of the People Act, 1951, against the Judgment of the High Court of Madhya Pradesh in an election petition filed by an elector named Mannalal (respondent No. 1 in this appeal), hereinafter to be described as the petitioner, for setting aside the election of the appellant Kanhaiyalal Nagori.

2. The constituency was Javad Constituency of the Madhya Pradesh Legislative Assembly. The poll took place on March 8, 1972 and the result was declared on March 12, 1972. There were four contesting candidates. The appellant Kanhaiyalal who was a Congress candidate and respondent No. 1 in the election petition, obtained 25,594 votes. Virendrakumar Saklecha (for brevity Saklecha) who was a Jan Sangh candidate, being respondent No. 4 both in the election petition as well as in this appeal, obtained the second highest number of votes viz., 23,064. Ravishankar Sharma (respondent No. 2) who was a Socialist candidate, obtained 1300 votes and Jagmohan (respondent No. 3) an independent candidate obtained 1104 votes. The last two candidates forfeited their security deposit. The appellant Kanhaiyalal was declared elected by a margin of 2530 votes.

3. Saklecha was being returned from this constituency since 1957 having won the election in that year and in the next two successive years 1962 and 1967. In the 1967 election wherein he won, there was an election petition against him. The High

Court set aside the election on the ground of certain corrupt practices, but this Court set aside the judgment of the High Court in January 1972.

4. In the year 1968, Congress Government was defeated and Samyukt Vidhayak Dal (briefly S. V. D.) came into power in the State. Saklecha was the Deputy Chief Minister in that Government from July 1967 to March 1969. The S. V. D. Government fell in 1969.

5. As stated earlier the election of the appellant was challenged by an elector Mannalal by an election petition filed on April 24, 1972, alleging corrupt practices under Section 123 (4) of the Representation of the People Act (briefly the Act) which reads as follows:—

123. "The following shall be deemed to be corrupt practices for the purposes of this Act:—

x x x x x

(4) The Publication by a candidate or his agent or by any other person, with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

It may be appropriate to describe from the election petition itself the allegations against the returned candidate, Kanhaiyalal Nagori:

"5. That the election of the returned candidate, respondent No. 1 is liable to be declared void and set aside on the following grounds:—

(A) That the respondent No. 1 got published through Block Congress Committee, Javad, a pamphlet entitled "Saklecha Ke Karyakal Par Ek Nazar" and it was distributed throughout the Javad constituency by the respondent No. 1 himself and by his workers and agents with his consent. The said pamphlet was printed in Shriram Press, Neemuch and the signatories to the said pamphlets are all members and impor-

tant office-bearers of the Congress party and who were actively conducting the election propaganda of the respondent No. 1. Respondent No. 1 was official Congress candidate and he was also Provincial Congress Committee member representing Block Committee Javad and President Janpad Panchayat Javad. The said pamphlet is in Malvi dialect and was distributed on a large scale throughout the constituency by the candidate himself and through his workers and agents by his consent and connivance. By the said pamphlet the respondent No. 1 through his agents Parasram Agarwal of Singoli, Chosarmalji of Singoli, Bhanwaral Badolia of Kadwasa, Ghanshyam Patidar of Neemuch, Vijayshankar Sharma of Neemuch, Shankarlal Bhatevara, President of Block Congress, Javad and Dheeraj Vyas, Secretary, Block Yuvak Congress Javad, published statements of fact which are totally false and which the respondent No. 1 and his said agents believed to be false or did not believe to be true, in relation to the personal character or conduct of the Respondent No. 4 being statements reasonably calculated to prejudice the prospects of the election of Respondent No. 4. The said pamphlet contained allegations against the respondent No. 4, which are totally false to the knowledge of respondent No. 1 and his said agents and other persons who distributed the said pamphlet. The aforesaid pamphlet (an English rendering) reproduced below (sic) false allegations against the personal character and conduct of respondent No. 4

"Ex. P-1

INDIRA GANDHI JINDABAD
PRAKASHCHAND SETHI JIND-
ABAD

Election
Symbol

Bird's-Eye View of Saklecha's
Regime

Dear Villagers,

This is the election period. In our constituency voting shall be on 8th, the Wednesday. We have been returning the Deepakwala — Saklecha for the last 15 years and he has been sitting in the Assembly for the

last 15 years. Saklecha has remained Deputy Chief Minister but did no work. He only served his interest. You have read this news in 'Nai Dunia' newspaper, that Saklecha has devoured lacks of rupees from Dacoits. During his period of rule he has tortured people by selecting them. He troubled people indiscreetly. Saklecha has ploughed thousands of bighas of land on the Sukand side, when people are not getting land.

Saklecha has ploughed the grass-land of Bhutiakhal of Baval and has installed electric water pump on the Khal, when people are starving for water for irrigation of their land. This is a matter for consideration that what has been done by Saklecha for the villagers.

He filled his belly. You gave him opportunity to work for 15 years, but he did nothing. Arey? You think about it, that if you would have given water to a Babool tree, then it would have also given you a blessing, but Saklecha has done nothing in 15 years. On our side we have a great scarcity of water, if he would have desired, then at the time of his Govt. he would have got Tube wells prepared. But he did not think about it as for him there is a water pump fitted at Bhutia Khal and there is road for him to go to his home. He has helicopter and aeroplane for his travel. He talks only in the Air. In Saklecha's Govt. they purchased Dodge Chassis in place of Mercedes and did much bungling with (sic) which God alone knows. He has devoured the land of one Baba of Javad Area. This is known to the whole world. Therefore you have to consider it and be not deceived this time otherwise we will lag behind for other five years. Our area is lagging behind. This is a matter for you to remember. Therefore for the development of the area and for removal of shortage of water you have to put your seal on the Cow & Calf symbol of Kanhaiyalal Nagori and make him succeed. Remember this. Our interest lies in this. You have to strengthen the hands of Indiraji. Do not forget it.

You have to put your seal this time on Cow and Calf.

Parasram Agarwal, Singoli, Vice-President of Janpad Panchayat Javad, Chosarmal, Sarpanch, Panchayat Singoli, Bhanwarlal Badolia, Sarpanch, Panchayat Kadwasa, Ghanshyam Patidar, Pleader, Neemuch (Janakpur), Vijayshankar Sharma, Neemuch (Mahudia), Shankarlal Bhatevara, President, Block Congress Javad, Cheeraj Vyas, Secretary, Block Youth Congress, Best place for Printing — Shriram Printing Press, in front of Jaju Bhawan, Neemuch."

"5 (B). The said pamphlet was distributed by the respondent No. 1 and with his consent and in his presence and under his direction by his agents and workers who were accompanying him in the jeep while touring the constituency the particulars of which are given below:—

Name of the person who distributed pamphlet.	Place	Date
1. Kanhaiyalal Nagori	Newad	2-3-1972
2. Shankarlal Bhatevara of Javad, President, Block Congress, Javad.	Jawi	2-3-1972
	Thadoli	2-3-1972
	Lasur	2-3-1972
	Daroli	2-3-1972
1. Kanhaiyalal Nagori	Diken	3-3-1972
2. Dheeraj Vyas Mantri of Ratangarh, Block Yuvak Congress, Javad.	Ratangarh	3-3-1972
	Garwada	
	Alori	
	Kabriya	3-3-1972
	Singoli	3-3-1972

5 (C). The said pamphlet was also distributed with the consent of respondent No. 1 by the following persons the particulars whereof are as follows:—

Name of the person	Place	Date
1. Ghanshyam Patidar		
2. Jagdishchandra Airen	Village Dhaneria and	25-2-72
3. Shivalal Rawat, Advocate of Neemuch	Jawi	
4. Parasmal s/o. Kanhaiyalal Nagori.	Neemuch.	

(Contd. on Col. 2)

Name of the person

1. Modidas Bairagi, village Newad.
2. Madanlal Sharman, village Jawi.
3. Onkarlal Khati, village Thadoli.
4. Ramniwas Patidar, village Lasoor.

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The said persons were active workers and agents of the respondent No. 1 and the said Parasmal is his son and agent. The said persons distributed the said pamphlet which they were carrying on for the respondent No. 1.

The statements contained in the said pamphlet are false and which the said persons and the respondent No. 1 believed to be false and did not believe to be true.

5 (D) That the respondent No. 1 through the Block Congress Committee Javad published an election bulletin dated 6-3-1972 under the caption of 'Congress Tatha Anya Dali Kee Sachchi Hakeekat' and got it distributed free on a large scale throughout the Javad constituency. In this bulletin there is a reference to an interview with the Congress candidate respondent No. 1 in the form of questions and answers. The questions put to him and answers given by him included the following question-answers."

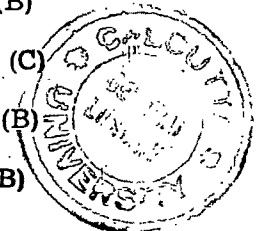
6. It is not necessary to reproduce what was published in the "Haquikat" particularly because the charge of distribution of the same by Kanhaiyalal on 6th March, 1972, in various places such as Morwan Daroli, Diken, Ratangarh, Singoli and Jhantla, is not being pressed by Mr Hardy although evidence was led to that effect in the trial Court.

7. In the affidavit annexed to the election petition, the petitioner stated as follows:—

"(c) The information regarding distribution has been received as detailed below:—

Place of corrupt practice committed and para of the petition

Newad	5 (B)
Jawi	5 (B) (C)
Thadoli	5 (B)
Lasoor	5 (B)



5. Mishrilal Tailor, village Diken.

6. Lakshminarayan Ladha, village Ratangarh.

7. Shankarlal Charan, village Garwada Aloni.

8. Bhanwar Singh, village Kabriya.

9. Bapulal son of Bhanwarlal, village Dhaneria, Singoli.

10. Keshar Singh, village Dhaneria.

11. Khemraj Moti Jat, village Morwan.

12. Balooram Dhankar, village Jhatla.

Diken 5 (B) (D)

Ratangarh 5 (B) (D)
Garwada

Aloni 5 (B)

Kabriya 5 (B)

Singoli 5 (B) (D)

Dhaneria 5 (C)

Morwan 5 (D)

Jhatla 5 (D)"

8. The petition was contested only by Kanhaiyalal. He denied the printing, publication and distribution of the aforesaid two pamphlets either by himself or by others with his consent.

9. On the pleadings the following issues were raised in the trial:—

"1. Whether respondent No. 1 Kanhaiyalal through the Block Congress Committee, Javad, got published the pamphlet (Saklecha Ke Karyakal Par Ek Nazar) as reproduced in para 5 (A) of the petition?

2 (a) Whether respondent No. 1 Kanhaiyalal and with his consent, in his presence and under his direction his agents and workers named in paragraph 5 (B) of the petition also distributed the said pamphlet at the places and on the dates mentioned in the said paragraph?

(b) (i) Whether the said pamphlet was also distributed with consent of respondent No. 1 Kanhaiyalal by the persons at the places and on the dates mentioned in paragraph 5 (c) of the petition?

(ii) Whether the persons named in paragraph 5 (c) of the petition were active workers and agents of the respondent No. 1?

3. Whether the said pamphlet contained statements of facts which were false and/or which the respondent No. 1 and his alleged agents and workers did not believe it to be true?

4 (a) Whether respondent No. 1 Kanhaiyalal through the Block Congress Committee, Javad, published the bulletin as reproduced in para

5 (D) of the petition and also got it freely distributed on a large scale and on the dates mentioned in para 5 (D) of the petition?

(b) Whether the statement of facts in the said bulletin was false and/or which the respondent No. 1 did not believe it to be true in regard to the personal character and conduct of respondent No. 4?

(c) Whether the said statement was calculated to prejudice the result of the election of respondent No. 4?

5. To what relief the parties are entitled to?"

10. The trial Judge answered the first question in favour of the election petitioner. Issue No. 2 (a) also in favour of the petitioner except at the places Newad and Kabriya, Issue No. 2 (b) (i), 2 (b) (ii) and Issue No. 3 in favour of the petitioner, Issue No. 4 (a) also in favour of the petitioner except at the places, Dadoli, Diken and Jhantla, and Issue No. 4 (b) and (c) also in favour of the petitioner. The trial Judge answered Issue No. 5 holding that the petition deserved to be allowed.

11. Mr. Nahata, who appeared on behalf of the appellant, the returned candidate, has addressed us with reference to all the issues that were held against him. Mr. Hardy, the learned counsel on behalf of the petitioner (respondent), however, did not press the charges with regard to the distribution of "Haquikat" (Ex. P-13). He also did not press the charges with regard to the distribution of Ex. P-1 by agents and by workers of the returned candidate with his consent, as alleged in the

election petition, some of which have even been held in his favour by the High Court. He, however, submits that pamphlet Ex. P-1 is a false and libellous document affecting the personal character or conduct of the respondent, Saklecha, and so far as the same was distributed by Kanhaiyalal personally at Jawi and Thadoli on 2nd March, 1972, the charges have been fully established and this Court should not interfere with the findings of the High Court in favour of the appellant, Mr. Khanduja appearing on behalf of the respondent, Saklecha, adopted the submission of Mr. Hardy in toto.

12. Before we proceed further we should observe that in the trial the petitioner produced evidence to prove all the allegations mentioned in the election petition by examining as many as 42 witnesses including himself and by producing relevant documents. The appellant also gave rebuttal evidence with regard to all the charges levelled against him by examining 21 witnesses including himself and by producing various documents.

13. In this appeal we are concerned with only one species of corrupt practice contemplated in Section 123 (4) of the Act. Section 123 (4) consists of three types of corrupt practices, namely (1) the publication of an offending or incriminating statement by a candidate, (2) by his agent within the meaning of the Explanation (1) to Section 123 and (3) by any other person with the consent of the candidate or his election agent. We are not concerned in this appeal with the types in (2) and (3) in view of the stand taken by Mr. Hardy and Mr. Khanduja.

14. We may first examine whether Ex. P-1 comes within the mischief of Section 123 (4). The allegations mentioned in Ex. P-1, if false, and believed to be so, or not believed to be true, would come within the mischief of Section 123 (4). We have gone through the document and we are clearly of opinion that the allegations mentioned in the document relate to the personal character and conduct of Saklecha and are reasonably calculated to pre-

judice the prospects of Saklecha's election. If the distribution of the same by Kanhaiyalal is established and it is also established that the statements of facts therein are false and Kanhaiyalal either believed them to be false or did not believe them to be true, he will be guilty of corrupt practice under Section 123 (4) of the Act.

15. Since the pamphlet on the face of it is shown as being printed at Shriram Printing Press, Neemuch, evidence was led by the petitioner by examining Harishankar (P. W. 32) the proprietor of the Press, who produced the register containing the printing orders. He stated that during the last General Elections 5000 copies of the pamphlet like Ex. P-1 were printed in his Press. He was, however, unable to state who had come to place the order as he was indisposed and his son Shivshankar took the order. The entry in the register also was not made by him but was made by his son, Shivshankar, who was not examined in the case. From the entry in the register Ex. (P-14) it appears that on 24th February, 1972, Congress Committee Javad placed orders for printing of 5000 pamphlets with the caption "Saklecha Ke Karyakal Par Ek Nazar." There is an obvious interpolation in the entry showing that Ghanshyam Patidar placed the orders on behalf of the Block Congress Committee, but the witness could not say who had made this interpolation. He could not identify the handwriting in the interpolation. The trial Judge has noted the demeanour of this witness stating that "it appears that he did not intend to stick to any particular answer and tried to change his version as and when he found it convenient." The petitioner wanted to establish that Ghanshyam Patidar, who, according to him, was actively working for the Congress went to the Press for placing the orders and later on even distributed some pamphlets with the consent of Kanhaiyalal. It is in that context that this interpolation assumes significance. We are unable to hold that on the evidence of P. W. 32 the fact of Ghanshyam Patidar placing the order is established. There was no attempt to examine

the son who had personal knowledge about the placing of the orders. Even so, we are satisfied that the pamphlets were printed in this Press but it is difficult to hold as to who placed the orders for printing. That this pamphlet was printed in order to advance the cause of the Congress candidate and to prejudice the interests of Saklecha cannot be in doubt. Apart from this the proprietor was prosecuted for printing this pamphlet for contravention of the provisions of Section 123A of the Representation of the People Act, and he was convicted on his plea and sentenced to pay a fine of Rs. 50/-. We are, therefore, satisfied that the pamphlet was printed in the Shriram Printing Press, but, in the absence of the evidence of Shivshankar we are unable to agree with the High Court that Ghanshyam Patidar had anything to do with the placing of the orders or printing of Ex. P-1.

16. We must next consider as to when this document came into existence. The register of the Press shows that the order for Ex. P-1 was placed on 24th February, 1972 that is to say about two weeks before the poll and the allegations of its distribution were on 25th February and on 2nd March, 1972. Having come to know of the distribution of this offending pamphlet, Saklecha complained to the Returning Officer by a letter dated 26th February, 1972, by enclosing a panchnama testifying to the distribution of the pamphlet at Jawi. Although it is not specifically established that this letter was posted on 26th February, 1972, or that it was received by post by the Returning Officer, it is clear even from the application on behalf of the respondent Kanhaiyalal for summoning the Returning Officer that Saklecha had personally handed over this complaint to the Returning Officer on 5th March, 1972, which was definitely prior to the poll. There is a further fact which has been established. Under the instructions of Saklecha, Hiralal Mehta, Advocate (PW 1) sent out registered notices dated 27th February, 1972, to seven signatories of the pamphlet (Ex. P-1), namely, Parasram Agarwal, Chosarmal, Bhanwarlal, Ghanshyam Patidar, Vijayshankar, Shar-

man Shankarlal Bhatevara and Dheeraj Vyas. Some of the witnesses examined on behalf of the respondent, Kanhaiyalal, (PWs. 5, 6 and 8) admitted to have received the registered notices of the Advocate to which they did not send any reply. The fact of denial by Ghanshyam Patidar (PW 1) is not of much significance. There is, therefore, no doubt whatsoever that the pamphlet (Ex. P-1) was in existence during the election period prior to the date of poll on 8th March, 1972.

17. We are satisfied that 5000 copies of the pamphlet were printed in the Shriram Printing Press. Evidently these were printed for the purpose of distribution in order to advance the cause of the appellant and to harm the interest of Saklecha. We are not concerned in this appeal with the distribution of the pamphlet on 25th February, 1972. Since these pamphlets were alleged to be distributed on 25th February, 1972, not by the appellant himself but by other persons, the petitioner had also to establish consent of the appellant in the distribution. Although the High Court has held that even consent was established, Mr. Hardy has not pressed his case regarding the allegation of distribution of the pamphlet on 25th February, 1972.

18. Mr. Nahata submits that in view of the newspaper reports and the Assembly proceedings, in particular the statements on the floor of the Assembly on a vote of no confidence against the S. V. D. Ministry where particular reference had been, inter alia, made in severe terms creating a furore about the activities of Saklecha in his capacity as the Deputy Chief Minister in-Charge of the Home Department, any person reading these will have reasonable belief that the allegations in Ex. P-1 are true and at least not false. It is also emphasised by counsel that at no time Saklecha ever publicly contradicted the allegations, nor took any action against the publishers.

19. Mr. Hardy submits that none of the correspondents of the newspapers, nor the authors of the allegations whether made through the Press or on the floor of the

House, or through a regular complaint, were examined by the appellant to make out even a prima facie case for reasonable belief of the truth of the wild allegations against the personal character and conduct of Saklecha. It is submitted by Mr. Hardy that the statements made on the floor of the Assembly are privileged and they are also privileged when published in the authorised organs under the order of the House, but to publish these again without the authority of the House will not be protected by privilege under Article 194 (2) of the Constitution.

20. Section 123 (4) is a punitive rule against character assassination of candidates during the period of election. A charge of electoral corrupt practices being of a quasi-criminal character, the onus on an election petitioner is heavy as if in a criminal charge. The allegations must be established beyond reasonable doubt to the satisfaction of the court by cogent and unimpeachable evidence. That being the position in law the petitioner will have to satisfy the court that the returned candidate had reason to believe that the allegations in the offending pamphlet were false or not true. Even assuming this ingredient is satisfied, since the charge may fail, if it is not established that the appellant himself distributed the offending pamphlet as alleged, we will immediately address ourselves to that aspect of the matter.

21. Before advertng to the evidence we have to take note of certain factors. Ex concessis, the allegations of the publication of the pamphlet (Ex. P-1) on 25th February, 1972, by the workers and agents with the consent of the appellant have to be held as not established. So far as the distribution of the pamphlet on 25th February, 1972, at Jawi and at Dhaneria, two respective panchnamas were exhibited. A complaint enclosing a copy of the panchnama regarding the distribution of the pamphlet on 25th February, 1972, was lodged before the Returning Officer and it was received by him prior to the poll although the exact date was not proved. So far as the distribution of the pamphlet

Ex. P-1 on 25th February, 1972, there was, therefore, both oral and documentary evidence. Even so, since the appellant was not associated with the distribution, it could not be established that the distribution, even if it took place, was with his consent. The charges relating to the 25th February, 1972, were, therefore, rightly abandoned before us.

22. So far as, however, the distribution of the pamphlet on 2nd March, 1972, at Jawi and Thadoli, which alone survives for consideration, the petitioner relies entirely upon oral testimony and the court will have to be cautious and circumspect in accepting the same.

23. This Court in *Rahim Khan v. Khurshid Ahmed*, (1975) 1 SCR 643 = (AIR 1975 SC 290) dealing with the oral testimony in election cases pithily observed at page 656 as follows:—

"We must emphasize the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. It must be remembered that corrupt practices may perhaps be proved by hiring half-a-dozen witnesses apparently respectable and dis-interested to speak to short of simple episodes such as that a small village meeting took place where the candidate accused his rival of personal vices. There is no x-ray whereby the dishonesty of the story can be established and, if the Court were gullible enough to gulp such oral versions and invalidate elections, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of kill-kenny cat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The Court must look for serious assurance, unlying circumstances or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life."

24. Ordinarily this Court will be slow to interfere with the find-

ings of the High Court regarding appreciation of evidence except for good and sufficient reasons. Have we good and sufficient reasons to depart from the findings of the High Court? Our answer is in the affirmative and we will set out the reasons:

(1) The High Court while dealing with the distribution of the pamphlet (Ex. P-1) at Jawi by Ghanshyam Patidar and others felt assured from "the subsequent conduct on the part of Virendrakumar Saklecha" in preparing panchnama (Ex. P-11), instructing Advocate, Hiralal (PW 1) to serve registered notices (Ex. P-17) to the distributors of the pamphlet and in making a complaint (Ex. P-18) to the Returning Officer enclosing a panchanama. The High Court held that "this subsequent conduct on the part of Virendrakumar Saklecha naturally lends corroboration to his statement and the statements of the petitioner's witnesses who have deposed about the publication and distribution of this pamphlet on the dates referred to by them in their statements. Thus on a consideration of the petitioner's evidence I feel satisfied that the pamphlet Ex. P-1 was distributed by Ghanshyam Patidar, Jagdishchandra Airen, Shivalal Rawat and Parasmal in Jawi and Dhaneria as alleged in the petition."

The above approach, which is correct, particularly in an election matter, was totally lost sight of by the High Court in dealing with the allegations of distribution of the pamphlet (Ex. P-1) by Kanhaiyalal at Jawi and Thadoli on March 2, 1972. The High Court did not look for or adopt the same test with regard to the aforesaid distribution of the pamphlet (Ex. P-1).

(2) The High Court arrived at a completely erroneous finding regarding the printing of the document Ex. P-1 at the instance of Ghanshyam Patidar. As shown earlier, there was no legal evidence before the High Court on which it could come to the conclusion that "the person who got this Ex. P-1 printed in the Press of PW 32 Harishankar was none else than RW-1 Ghanshyam Patidar on behalf of the Javad Block Congress

Committee." In the absence of any direct evidence from the Press the above finding cannot be sustained in law from the fact that Ghanshyam Patidar denied receipt of and did not reply to the registered notice of the Advocate and that he denied his signature in a certain tour programme Ex. P-29.

(3) The High Court committed a serious error in linking up the printing of the document Ex. P-1 by Ghanshyam Patidar at the instance of Kanhaiyalal for which there was no evidence whatsoever with the distribution of the same by Kanhaiyalal in the constituency for holding:

"If the respondent Kanhaiyalal had not in any way been associated with the printing and publication of this pamphlet, then he would not have been one of the persons who would have distributed this pamphlet, as alleged in para 5 (B) of the petition."

The High Court committed an error of law in not dealing with the two matters of printing of the pamphlet and of its distribution separately and independently:

(4) The High Court did not adopt a uniform standard in appreciating the evidence of the witnesses of the two contending parties. For example, while RW2 was disbelieved by the High Court holding "admittedly he was the polling agent of the respondent Kanhaiyalal and must have had sympathies for him during the election period", polling agents of the respondent Saklecha did not come under the same hostile comment for rejecting their testimony.

(5) It is manifest that the High Court was largely influenced by its finding that the pamphlet was printed by the Javad Block Congress Committee through Ghanshyam Patidar at the instance of the appellant. When this finding disappears, as we have shown above, the edifice of the judgment cracks and it is no more a matter of mere reappraisal by us of the evidence, simpliciter, but of proper appreciation of only oral evidence produced regarding distribution of the pamphlet by Kanhaiyalal at Jawi and Thadoli on March 2, 1972, which we will, next, undertake.

25. Saklecha took care to prepare panchnamas for the distribution of the offending pamphlets at Jawi and Dhaneria on 25th February, 1972. He instructed his lawyer to serve registered notices on the signatories of the pamphlets and registered notices bear the date 27th February, 1972. Saklecha lodged a complaint dated 26th February, 1972, with the Returning Officer about the distribution of the pamphlet enclosing a copy of the panchnama prepared at Jawi on 25th February, 1972. This was quick action indeed. All this documentary evidence lends corroboration to the existence of the pamphlet prior to the poll and even to its circulation. On the other hand, there is no documentary evidence of any complaint of service of lawyer's notice or preparation of a panchnama regarding distribution of the pamphlet by Kanhaiyalal Nagori on 2nd March, 1972. It is absurd to suppose that if Kanhaiyalal had actually personally distributed the pamphlet at Jawi and Thadoli the matter would not have taken air and Saklecha would not have moved in the matter. This is particularly so, since, in the case of distribution by workers and other persons, consent of Kanhaiyalal was necessary to establish the corrupt practice whereas if Kanhaiyalal had personally distributed, the charge would have been established without the requirement of proof of consent.

26. So far as the distribution of the pamphlet Ex. P-1 at Jawi on 2nd March, 1972, is concerned, we have the evidence of PWs. 2, 3, 4 and 5 on behalf of the petitioner and RWs 15, 16, 17 and 21 in rebuttal on behalf of the appellant.

27. Madanlal (PW 2), Nanalal (PW 3), Mohanlal (PW 4) and Ramshankar (PW 5) stated about distribution of the pamphlet (Ex. P-1) by Kanhaiyalal and Shankarlal Bhatevara at Jawi Bazar on March 2, 1972.

28. There is a significant revelation in the evidence of Madanlal (PW 2) which the High Court has absolutely failed to consider. According to Madanlal he did not personally know about the pamphlet be-

ing distributed on 25th of February, 1972 at Jawi. He also did not see a panchnama being prepared. He deposed only about the distribution of the pamphlet by Kanhaiyalal and Shankarlal Bhatevara at Jawi about five or six days before the date of poll. This would show that he was deposing only with regard to the distribution of the pamphlet by Kanhaiyalal on 2nd March, 1972. He stated in his evidence:

"I met Saklecha the same day when I saw Ex. P-1. I had a talk with Saklecha regarding the pamphlet Ex. P-1."

He further stated that—

"This pamphlet was given to me by Kanhaiyalal... I handed over the same pamphlet to Saklecha which was given to me by Kanhaiyalal."

If the above statements are true, he met Saklecha on 2nd March, 1972. In the way Saklecha reacted to the distribution of the pamphlet on 25th February, 1972, his utter inaction with regard to the distribution of the pamphlet by Kanhaiyalal on 2nd March, 1972, is absolutely inexplicable. The absence of any complaint to the Returning Officer against Kanhaiyalal even after receipt of the information and the pamphlet from Madanlal would go to show that the entire allegation regarding Kanhaiyalal's distribution of the pamphlet is an afterthought to reinforce the charge against the returned candidate. In the way Saklecha was following a certain procedure of his own regarding the alleged illegal activities of the appellant's campaigners, there was no reason why a panchnama would not have been prepared at Jawi on 2nd March, 1972, when Madanlal informed him about Kanhaiyalal's distribution of the pamphlet which was even handed over to him that very evening.

29. We find that Madanlal (PW 2) is contradicted by Nanalal (PW 3). Although Madanlal, who is the informant about the distribution of the pamphlet by Kanhaiyalal at Jawi on 2nd March, 1972, denied the fact of the panchnama being prepared on 25th February, 1972, at Jawi, Nanalal (PW 3) stated:—

"While the panchnama was under preparation Ramshankar, Madanlal

Tiwari, who has been examined today, and two others had also come there."

It is difficult to appreciate why Madanlal had suppressed the fact of his knowledge of the panchnama prepared on 25th February, 1972. It will be relevant to note here that in the affidavit annexed to the election petition, Madanlal has been shown as the informant regarding the distribution of the pamphlet at Jawi on 25th February as well as on 2nd March, 1972. Madanlal, however, in his evidence disowns personal knowledge about the distribution of the pamphlet on 25th February, 1972. According to Nanalal (PW 3) after the preparation of the panchnama on 25th February, 1972, Saklecha addressed a meeting in front of his shop by the public address system. Madanlal (PW 2) also deposed that he only saw once Saklecha addressing some persons assembled in front of Nanalal's shop by the public address system. He further stated that he handed over the pamphlet to Saklecha on that date. This falsifies his evidence regarding March 2, 1972. Madanlal's statement about distribution of the pamphlet by Kanhaiyalal to him on 2nd March 1972, is open to grave suspicion, rather smacks of padding.

30. Madanlal is admittedly a member of the Jan Sangh party although, according to him, he is not an active worker. Since his evidence is intrinsically unacceptable, it is not necessary to refer to the various contradictions in his evidence. To mention one instance only, he contradicted himself in the cross-examination when he stated that "some time before the pamphlet was given to me by Kanhaiyalal, I got another copy of the same pamphlet from some boys in the village earlier and that was given by me to Saklecha. I cannot say if the pamphlet given to me by Kanhaiyalal is or is not still with him (sic)."

31. Nanalal (PW 3) deposed to the distribution of the pamphlet at Jawi on 25th February as well as on 2nd March, 1972. In the course of cross-examination he stated that he did not personally tell anyone that Kanhaiyalal had distributed

the pamphlet in the village. He did not have any talk with Nanalal Agarwal (the petitioner) regarding the pamphlet. He further stated that when Kanhaiyalal Nagori gave the pamphlet to him he was the only person present in his shop. He admitted that on the date of poll he acted as a Polling Agent of Saklecha. If the same standard has to be adopted which the High Court has done with regard to the appreciation of the evidence of Shivalal Rawat (RW 2) whose testimony was rejected because he acted as the Polling Agent of Kanhaiyalal, Nanalal's evidence would have to be treated in the same manner. Even by the standard adopted by the High Court the testimony of this witness cannot be accepted.

32. Mohanlal Jain (PW 4) is the second grocer examined on behalf of the petitioner. He deposed to the distribution of the pamphlet on both the dates, on 25th February and on 2nd March, 1972. He admitted that he exhibited posters and put up banner of the Jan Sangh party. He is, therefore, a highly interested witness. He also admitted that he did not tell anyone that any pamphlet had been given to him by Kanhaiyalal. His evidence also cannot be acted upon.

33. The last witness examined with regard to Jawi distribution is Ramshankar (RW 5), a real brother of Madanlal (PW 2). The evidence of Madanlal about distribution in Jawi is that the offending pamphlet was distributed to all the shopkeepers and to also those who met them. It appears that the Jawi Bazar has about eight or nine shops. Yet only two shopkeepers, namely, Nanalal and Mohanlal Jain were examined. Madanlal and his brother, Ramshankar are cultivators and not shopkeepers at Jawi bazar. As against this the appellant examined two shopkeepers of Jawi, namely Ratanlal (RW 15) and Gordhanlal (RW 16), who denied the distribution of the pamphlet by Kanhaiyalal. Kanhaiyalal himself also stated on oath that he did not distribute the pamphlet nor accompanied Shankarlal Bhatevara for the purpose of distribution of the pamphlet. Similarly, Shankarlal Bhate-

vara. (PW 8) also denied the distribution. It is not even necessary to closely scrutinise the evidence of the appellant and his witnesses when we are satisfied that the petitioner has not been able to establish the allegations about the distribution of the pamphlet by Kanhaiyalal at Jawi on 2nd March, 1972. We are of opinion that the High Court is not right in its conclusion that the charge of distribution of pamphlet by Kanhaiyalal at Jawi is established against the appellant.

34. This takes us to the distribution of the pamphlet by Kanhaiyalal on 2nd March, 1972, at Thadoli. Onkarlal Khati (PW 9) was the informant regarding the distribution at Thadoli. According to him about five or six days before the date of poll he was sitting with a few others by the side of the village temple when he saw Kanhaiyalal Nagori and Shankarlal Bhatevara coming to them. Amongst others, Tulsiram (PW 7) and Bhanwarlal (PW 8) were also sitting with him. He stated that Kanhaiyalal told them that the Jan Sangh candidate was being elected for the last fifteen years and the constituency was very much handicapped and that this time the Congress candidate should be elected. Then he distributed the pamphlet similar to Ex. P-1. The pamphlet was distributed both by Kanhaiyalal and Shankarlal Bhatevara. He further stated that about six days after the poll he met Mannalal and talked to him about "the incorrect statement circulated in the form of pamphlet" which affected the result of the election. In the course of cross-examination he stated that Kanhaiyalal and Shankarlal Bhatevara were not accompanied by any person on that day. He denied that he was a Jan Sangh worker. He did not preserve the pamphlet which was given to him and it was destroyed after he had read it. Two other witnesses are Tulsiram (PW 7) and Bhanwarlal (PW 8) to corroborate him about the distribution of the pamphlet by Kanhaiyalal and Shankarlal Bhatevara five or six days before the date of poll.

35. Amongst these Tulsiram was a Polling Agent for Saklecha at

Thadoli as has been admitted by Saklecha himself. This witness, however, suppressed this fact and denied that he was a Polling Agent of Saklecha.

36. Bhanwarlal (PW 8) similarly deposed that five or six days before the date of poll when he and others were sitting in the temple precincts he saw Kanhaiyalal and Shankarlal Bhatevara coming to them and after some canvassing both of them distributed pamphlets like Ex. P-1.

37. We are invited to rely on the above oral testimony to hold that Kanhaiyalal distributed the offending pamphlet.

38. Kanhaiyalal (RW 21) and Shankarlal Bhatevara (RW 8) have denied the allegations. The appellant also examined Mangilal of Thadoli (RW 18) to state that Tulsiram, Bhanwarlal and Onkarlal are the Jan Sangh party workers at Thadoli. He was admittedly a person who accompanied the distributors to the village. There is thus practically oath against oath with regard to the distribution of the pamphlet by Kanhaiyalal at Thadoli.

39. To summarise this part of the case, the High Court while deciding about the truth or otherwise of the allegations of distribution of the pamphlet by Kanhaiyalal at Thadoli, as also in other places, seems to have a large degree of assurance from its finding that the offending pamphlet was got printed by Kanhaiyalal through Ghanshyam Patidar. That finding, as shown above, no longer survives. We are now only left with the oral testimony of PWs 7, 8 and 9 regarding distribution of the pamphlet at Thadoli by Kanhaiyalal and Shankarlal Bhatevara. These three witnesses are pitted against three others, Kanhaiyalal (RW 21), Shankarlal (RW 8) and Mangilal (RW 18) stating to the contrary. Mangilal was admittedly in the company of the distributors of the pamphlet when they entered Thadoli village. Mangilal as RW 18 denies the visit of Kanhaiyalal to Thadoli. Again PW 7 speaks with two voices regarding the day of Kanhaiyalal's visit to Thadoli for the purpose of distribution of the pam-

phlet. He stated at first that it was ten or twelve days before the poll and then said about five or six days before the poll.

40. Bhanwarlal (PW 8) saw Kanhaiyalal and Shankarlal Bhatevara coming on foot and only heard the sound of vehicle coming near the village. PW 7 saw them coming in a motor vehicle. They were all sitting together and even then they are discrepant as to how Kanhaiyalal and Shankarlal Bhatevara came there. PW 8 makes a curious statement in cross-examination:

"All those who were sitting by my side had seen the distribution of pamphlets. Besides them I did not tell anyone about the distribution of pamphlets."

It passes one's comprehension why he had to tell them. He also stated that—

"Besides Shankarlal and Kanhaiyalal there was no other person who accompanied them."

On the other hand, according to PW 7 Bhanwarlal Sutar and Mangilal Mahajan accompanied them when they entered the village after parking the car outside.

Onkarlal (PW 9) stated in examination-in-chief:

"About six days after the polling I met Mannalal in Neemuch Dhan Mandi where he enquired from me about the result of the election. I then told him as to what was the result. I also talked to him about the incorrect statement circulated in the form of pamphlet."

In the course of cross-examination he stated:

"The only talk that I had with Mannalal was that the false pamphlets had its effect on the election. At that time I had no other talk with him."

41. Whatever be the effect of the above statements which Mr. Hardy wanted to explain away, it is clear that PW 9 did not mention at all that he had told the petitioner, Mannalal, the names of Kanhaiyalal and Shankarlal Bhatevara as distributing the pamphlet at Thadoli. On the other hand, he referred to the only talk which he had about the effect of the pamphlet. He also ad-

mitted that his talk with Mannalal was only a casual talk. This is not the quality of evidence we expect from the only informant of the publication of the pamphlet at Thadoli.

42. We have referred to some of the above incongruities and inconsistencies in the evidence of PWs. 7, 8 and 9 in order to show how unsafe it is to rely merely on oral testimony which is not vouchsafed from any other safe source.

43. It is true that the High Court has relied upon the oral testimony of the above witnesses but we express grave doubt if the High Court would have based its decision to upset an election merely on their oral testimony if it had not come to conclusion that Kanhaiyalal had earlier got the offending pamphlet printed at the press. The latter finding had obviously its decisive effect on the mind of the learned trial Judge.

44. We are unable to suppose that Saklecha would not know of such illegal activities of his opponent, if true. It is alleged that the offending pamphlets had been distributed by Kanhaiyalal in a number of places in the constituency commencing from March 2 and ending on March 6, 1972; in one case, even in a bus stand, watched by the petitioner. It is impossible to imagine that such nefarious activities, if true, would not reach the ears of Saklecha with his net-work of workers and campaigners for the purpose of the election. Between March 2 and March 8, no complaint had been made by Saklecha or by anyone regarding distribution of the offending pamphlet by Kanhaiyalal. We are, therefore, unable to hold that a serious charge of this nature is established on the mere oral testimony of the aforesaid three witnesses.

45. Before concluding, we may only refer to the petitioner, Mannalal's evidence to highlight how far oral testimony can go. Both Kanhaiyalal and Mannalal are residents of village Daroli. It is the evidence of Mannalal (PW 42) that Kanhaiyalal distributed the offending pamphlet Ex. P-1 on 2nd March, 1972, at Daroli to him and to many others. Although we are not con-

cerned with the distribution of the pamphlet by Kanhaiyalal at Daroli in this appeal, it is absurd that Kanhaiyalal would choose to hand over an offending pamphlet of this nature to Mannalal who is an active worker of Jan Sangh party and keen supporter of Saklecha unless he foolishly chose to create evidence against him. It is true that the charge regarding distribution at Daroli is not pressed before us but we cannot close our eyes to the extent to which the petitioner could go in levelling charges of corrupt practice against the appellant.

46. Oral testimony, therefore, will have to be judged with the greatest care and an electoral victory cannot be allowed to be nullified by a mouthful of oral testimony without contemporaneous assurance of a reliable nature from an independent source. The matter would have been different if there had been an immediate written complaint to the Returning Officer against Kanhaiyalal as had been made in the case of his workers.

47. An election dispute is not a private feud between one individual and another. The whole constituency is intimately involved in such a dispute. Shaky and wavering oral testimony of a handful of witnesses cannot still the dominant voice of the majority of an electorate.

48. We are, therefore, clearly of opinion that the distribution of the pamphlet (Ex. P-1) by Kanhaiyalal at Jawi and Thadoli has not been satisfactorily established on the oral testimony of the witnesses.

49. It is, therefore, not necessary to deal with the submission of Mr. Nahata as to whether Kanhaiyalal had reason to believe that the statements of facts in Ex. P-1 were not false or that they were not untrue.

50. In the result the appeal is allowed with costs in this Court as well as in the High Court. The judgment of the High Court is set aside and the election petition stands dismissed.

Appeal allowed.

AIR 1976 SUPREME COURT 1899

A. N. RAY, C. J., M. H. BEG AND JASWANT SINGH, JJ.

(From Orissa: ILR (1974) Cut 731)

Baradakanta Mishra, Appellant v. High Court of Orissa and another, Respondents.

Civil Appeals Nos. 1512 and 1513 of 1974, D/- 6-5-1976.

(A) Constitution of India, Article 235 — Word "Control" — Meaning — Control of High Court — Nature and scope of — High Court, if can reduce in rank or dismiss a District Judge. ILR (1974) Cut 731, Reversed. (Orissa Civil Services (Classification, Control and Appeal) Rules (1962), Rule 14).

The word "control" as used in Article 235 includes disciplinary control over District Judges and Judges inferior to the post of District Judge. The word "control" includes something in addition to the mere superintendence of these courts. The control is over the conduct and discipline of Judges. The High Court alone can make enquiries into disciplinary conduct. AIR 1966 SC 447, AIR 1962 SC 1704 and AIR 1975 SC 613, Followed. (Para 20)

The High Court of course cannot terminate the services or impose any punishment on District Judge by removal or reduction. The control over District Judge is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceeding any District Judge is to be removed from service or any punishment is to be imposed, that will be in accordance with the conditions of service.

(Paras 21, 26, 27)

The High Court within the power and control vested under Article 235 can hold disciplinary proceedings against a District Judge and can recommend the imposition of punishment of reduction in rank on him. The actual power of imposition of the major punishments, viz., reduction in rank and dismissal is exercisable by the Governor who is the appointing authority. The orders of the High Court reducing a person in rank from the post of an Addi-

1900 S.C. [Prs 1-7] B. Mishra v. Orissa High Court (Ray C. J.) A.I.R.

tional District and Sessions Judge to that of Addl. District Magistrate (Judicial) and further dismissing him from service are therefore, unconstitutional and must be quashed because under conditions of service the High Court cannot reduce in rank or dismiss a District Judge. (Para 24)

If the order of the initial authority is void an order of the appellate authority cannot make it valid. The confirmation by the Governor cannot have any legal effect because that which is valid can be confirmed and not that which is void. If the reduction in rank of Additional Dist. Judge is without jurisdiction then he is deemed to continue as an Addl. District Judge. The High Court cannot dismiss him. AIR 1975 SC 613 and AIR 1974 SC 2192, Followed; ILR (1974) Cut 731, Reversed.

(Paras 25, 28)

(B) Constitution of India, Article 311 — Words “dismiss, remove or reduce in rank” — Distinction.

Reduction in rank is one of the major punishments mentioned in Article 311. The major punishments are dismissal, removal, or reduction in rank. The words “dismiss, remove or reduce in rank” have a stigma, namely, the meaning which they bear as three major punishments in Service Rules. The difference between dismissal and removal is that dismissal ordinarily disqualifies any future employment and removal ordinarily does not. If one is reverted by way of punishment for misconduct Article 311 (2) is attracted. Losing some places in the seniority list in the same cadre does not amount to reduction in rank under Article 311 (2). Reduction in rank may be brought about in the garb of a reversion. AIR 1958 SC 36, AIR 1962 SC 1704 and AIR 1970 SC 77, Followed. (Para 22)

Cases Referred: Chronological Paras

AIR 1975 SC 613 = (1975) 3 SCR 365 = 1975 Lab IC 375 20, 21, 28

AIR 1974 SC 710 = (1974) 2 SCR 282 = 1974 Cri LJ 631 14

AIR 1974 SC 2192 = (1975) 1 SCR 814 = 1974 Lab IC 1380 28

AIR 1973 Orissa 244 = ILR (1973) Cut 134 (FB) 14

AIR 1970 SC 77 = (1970) 1 SCR 220 22

AIR 1966 SC 447 = (1966) 1 SCR 771 20, 23

ILR (1966) Cut 503 = 8 Orissa J.D. 290 7

AIR 1962 SC 1704 = (1963) 1 SCR 437 20, 22

AIR 1958 SC 36 = 1958 SCR 828 22

Judgment of the Court was delivered by

A. N. RAY C. J.:— This appeal arises out of the judgment dated 3 December, 1973 of the High Court of Orissa.

2. The appellant filed a writ petition for quashing the order of the High Court dated 8 December, 1972 reducing the appellant in rank and for quashing orders dated 3 December, 1973 passed by the High Court dismissing the appellant from service.

3. The High Court dismissed the petition of the appellant.

4. The questions for consideration are two. First, whether the High Court was competent to reduce the appellant in rank. Second, whether the High Court could pass orders dismissing the appellant from service.

5. The appellant was appointed by the Governor as a Munsiff in the State of Orissa in 1947. He was in course of time promoted to the post of a Subordinate Judge. The appellant was appointed by the Governor on 28 March, 1962 as Additional District Magistrate (Judicial).

6. In 1961 a separate cadre of Additional District Magistrates (Judicial) was created by the Government. This new cadre was called “Superior Judicial Service Junior Branch.” This cadre is not the same as that of District Judges and Additional District Judges who belonged to Superior Judicial Service Senior Branch.

7. The appellant was on 15 January, 1963 reverted from the post of the Additional District Magistrate (Judicial) to the rank of Subordinate Judge. The appellant challenged the order of reversion in a writ petition in the High Court of Orissa. The writ petition was dismissed as will appear from the judgment reported in ILR (1966) Cut 503. The appel-

lant made an application for special leave to appeal to this Court being Special Leave Petition (Civil) No. 53 of 1967. The application was rejected.

8. On 5 February, 1968 the High Court appointed the appellant to the post of Additional District Magistrate (Judicial) by promotion. It is said that under Rule 10 of the Orissa Superior Judicial Service Rules, 1963 the High Court is the appointing authority empowered to appoint Additional District Magistrates (Judicial) by promotion from the rank of Subordinate Judge.

9. On 31 July, 1968 the appellant was appointed by the Governor as an Additional District Judge.

10. On 8 December, 1972 the High Court imposed on the appellant the punishment of reduction in rank from the post of Additional District and Sessions Judge to an Additional District Magistrate (Judicial). The order passed by the High Court dated 8 December, 1972 records that in pursuance of the control vested in the High Court under Article 235 of the Constitution in a disciplinary proceeding initiated on charges dated 29 April, 1972 against the appellant an officiating member of the Orissa Superior Judicial Service Senior Branch the appellant is reduced in rank with immediate effect and is released from suspension.

11. On 30 March, 1972 the High Court passed an order in exercise of powers under Article 235 to the effect that the appellant was placed under suspension forthwith because a disciplinary proceeding against the appellant was contemplated.

12. On 29 April, 1972 charges were served on the appellant. He was asked to submit an explanation. He did not do so. He thereafter asked for inspection of certain documents. A date was appointed but he did not inspect any document. With regard to the enquiry pursuant to the charges delivered to the appellant on 29 April, 1972 the learned Judge of the High Court who was the Enquiring Judge came to the conclusion that one of the charges was established that the appellant after pronouncing judgment on

22 June, 1971 penned through his signatures on the judgment and entered into the order-sheet that it was not delivered. The Enquiring Judge also found the appellant guilty of tampering with the records of the Court. The Enquiring Judge also found the appellant guilty of the charge that though the appellant was ordered by the Court pending enquiry and during his suspension to fix the Headquarters at Cuttack he did not comply with the order.

13. In the background of this Enquiry the High Court ordered that the appellant be reduced to the rank of Additional District Magistrate. The appellant challenged this order.

14. After the order of reduction on 8 December, 1972 the High Court issued orders posting the appellant as Additional District Magistrate Sambalpur and directed him to join at his new station. The appellant did not join the new station nor did he apply for leave. A fresh disciplinary proceeding was started against the appellant for wilful absence from duty. The matter was enquired into by a Judge of the High Court. The appellant submitted that the order reducing him was beyond the powers of the High Court. The Enquiring Judge found him guilty. The appellant was given an opportunity to show cause against the order. The appellant did not do so. The High Court thereupon imposed the punishment of dismissal on the appellant and dismissed him. One of the orders of dismissal recited that in pursuance of the order passed by the Court in exercise of its powers under Article 235 of the Constitution in a disciplinary proceeding initiated on charges dated 1 February, 1973 the appellant an officer of the Orissa Judicial Service Class I officiating in the Junior Branch of the Orissa Superior Judicial Service is dismissed from service with immediate effect. Another order of 3 December 1973 recited that in pursuance of the order passed by the Court in exercise of its powers under Article 235 the appellant an officer of the Orissa Judicial Service Class I, officiating in the Junior Branch of the Orissa Superior Judicial Service, who has been convicted

on the charge of criminal contempt by judgment of the Orissa High Court reported in ILR (1973) Cut 134 = (AIR 1973 Orissa 244 FB) Registrar of the Orissa High Court v. Baradakanta, which was confirmed by the Supreme Court by judgment D/- 19-11-1973 (Baradakanta Mishra v. Registrar, Orissa High Court) in Criminal Appeal No. 41 of 1973 = (AIR 1974 SC 710) is on the ground of conduct leading to such conviction, dismissed from service with immediate effect. The Judgment of this Court is reported in (1974) 2 SCR 282 = (AIR 1974 SC 710).

15. The respondents contended that the High Court has disciplinary control over District Judges and in exercise of that power the High Court can hold an enquiry and can impose all punishments other than dismissal or removal. The punishment of reduction in rank is said by the respondents not to be dismissal or removal because reduction in rank does not result in ouster from service. The respondents, therefore, submit that the order of 8 December, 1972 reducing the appellant in rank was within the control vested under Article 235 of the Constitution in the High Court.

16. With regard to the orders of dismissal the respondents submitted that the appellant preferred appeals from the orders. The appeals were heard and dismissed by the Governor. The respondents, therefore, submit that the dismissal in effect and substance is by the Governor. The orders of dismissal are said by the High Court to be recommendation to the Governor of dismissal of the appellant. The respondents submit that the appellant did not challenge the order of the Governor, and, therefore, the orders have become final.

17. Article 233 provides that the appointment, posting and promotion of District Judges is by the Governor. The posting of a District Judge is the initial or the first posting as District Judge. The promotion of District Judge is appointment of persons by promotion to District Judges. When a Subordinate Judge is appointed as a District Judge the appointment is by promotion but it

is a fresh appointment by promotion to be a District Judge.

18. Article 234 provides that appointment of persons other than District Judges to the Judicial Service of a State shall be made by the Governor in consultation with the State Public Service Commission and with the High Court.

19. Article 235 is relevant for the purpose of present appeal. The Article states that control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this Article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

20. The scope of Article 235 has been examined by this Court in several decisions. The important decisions are State of West Bengal v. Nripendra Nath Bagchi, (1966) 1 SCR 771 = (AIR 1966 SC 447); High Court of Calcutta v. Amal Kumar Roy, (1963) 1 SCR 437 = (AIR 1962 SC 1704); High Court of Punjab and Haryana v. State of Haryana (In the matter of N. S. Rao), (1975) 3 SCR 365 = (AIR 1975 SC 613). The effect of the decisions is this. The word "control" as used in Art. 235 includes disciplinary control over District Judges and Judges inferior to the post of District Judge. This control is vested in the High Court to effectuate the purpose of securing independence of the subordinate judiciary and unless it included disciplinary control as well the very object would be frustrated. The word "control" is accompanied by the word "vest" which shows that the High Court is made the sole custodian of the control over the judiciary. Control is not merely the power to arrange the day-to-day working of the court but contemplates disciplinary jurisdiction on the presiding Judge. The

word "control" includes something in addition to the mere superintendence of these courts. The control is over the conduct and discipline of Judges. The inclusion of a right of appeal against the orders of the High Court in the conditions of service indicates an order passed in disciplinary jurisdiction. The word "deal" in Art. 235 also indicates that the control is over disciplinary and not mere administrative jurisdiction. The control which is vested in the High Court is complete control subject only to the power of the Governor in the matter of appointment including initial posting and promotion of District Judges and dismissal, removal, reduction in rank of District Judges. Within the exercise of the control vested in the High Court, the High Court can hold enquiries, impose punishments other than dismissal or removal subject however to the conditions of service to a right of appeal if granted by the conditions of service, and to the giving of an opportunity of showing cause as required by clause (2) of Article 311 unless such an opportunity is dispensed with by the Governor acting under the provisos (b) and (c) to that clause. The High Court alone could make enquiries into disciplinary conduct.

21. In N. S. Rao's case (AIR 1975 SC 613) (supra) this Court said "The Governor has power to pass an order of dismissal, removal or termination on the recommendations of the High Court which are made in exercise of the power of control vested in the High Court. The High Court of course cannot terminate the services or impose any punishment on District Judge by removal or reduction. The control over District Judge is that disciplinary proceedings are commenced by the High Court. If as a result of any disciplinary proceeding any District Judge is to be removed from service or any punishment is to be imposed, that will be in accordance with the conditions of service.

22. It is indisputable that the appellant was promoted to the post of Additional District and Sessions Judge. That is the cadre of District and Sessions Judge. He was reduced in rank. Reduction in rank is one

of the major punishments mentioned in Article 311. The major punishments are dismissal, removal, or reduction in rank. The words "dismiss, remove or reduce in rank" have a stigma, namely, the meaning which they bear as three major punishments in Service Rules. The difference between dismissal and removal is that dismissal ordinarily disqualifies any future employment and removal ordinarily does not (See *Parshotam Lal Dhingra v. Union of India*, (1958 SCR 828) = (AIR 1958 SC 36). If one is reverted by way of punishment for misconduct Article 311 (2) is attracted. The expression "reduction in rank" means that the person who holds the position of a Subordinate Judge has been reduced to the post of a Munsiff. The rank of a Subordinate Judge is higher than that of the Munsiff. But Subordinate Judges in the same cadre hold the same rank though they have to be listed according to their seniority in the Civil List. Therefore, losing some places in the seniority list in the same cadre does not amount to reduction in rank under Article 311 (2). (See *High Court of Calcutta v. Amal Kumar Roy*, (1963) 1 SCR 437 = (AIR 1962 SC 170)). Reduction in rank may be brought about in the garb of a reversion. (See *Debesh Chandra Das v. Union of India*, (1970) 1 SCR 220 = (AIR 1970 SC 77)).

23. It was argued in N. N. Bagchi's case (AIR 1966 SC 447) (supra) that the extent of control exercisable by the High Courts under Article 235 must be so cut down as to keep disciplinary jurisdiction out. This argument was not accepted by this Court. This Court said that the provisions that certain powers are to be exercised by the Governor and not by the High Court do not take away other powers from the High Courts. This Court however incidentally added that in exercising these special powers in relation to inquiries against District Judges, the Governor would always have regard to the opinion of the High Court in the matter. This Court concluded by holding that there is nothing in Article 311 which compels the conclusion that the High Court is ousted of the jurisdiction to hold the enquiry.

24. The High Court within the power and control vested under Article 235 could hold disciplinary proceedings against the appellant and could recommend the imposition of punishment of reduction in rank on the appellant. The actual power of imposition of one of the major punishments, viz., reduction in rank is exercisable by the Governor who is the appointing authority. The order passed by the High Court on 8 December, 1972 reducing the appellant in rank is unconstitutional and is quashed.

25. The two orders of dismissal dated 3 December, 1973 are based on the order of 8 December, 1972. The substratum of the orders of dismissal being unconstitutional the orders of dismissal cannot have any legal force. Further, the contention of the High Court that the orders of dismissal passed by the High Court merged in the orders passed by the Governor cannot be accepted. If the order of the initial authority is void an order of the appellate authority cannot make it valid. The order of the Governor used the word "confirm". The appellant filed appeals to the Government. The appeals were dismissed. The confirmation by the Governor cannot have any legal effect because that which is valid can be confirmed and not that which is void.

26. For the foregoing reasons as is pointed out in N. S. Rao's case the High Court cannot terminate the services or impose any punishment on the District Judge if as a result of a disciplinary proceeding any District Judge is to be removed from service or any punishment is to be imposed that should be in accordance with the conditions of service.

27. In the present case the conditions of the Civil Services (Classification, Control and Appeal) Rules, 1962, framed under Article 309 provides in Rule 14 (4) that the appointing authority alone can impose penalties as specified in clauses (vi) to (ix) of Rule 13. Clause (vi) is the penalty of reduction in rank and clause (ix) is dismissal from service. Therefore, under the conditions of service the High Court cannot reduce in rank or dismiss a District Judge.

28. If the reduction of the appellant is without jurisdiction then the appellant is deemed to continue as a District Judge. The High Court could not dismiss the appellant. Dismissal could only be by the Governor. This is clear from the decisions of this Court in N. S. Rao's case (AIR 1975 SC 613) (supra) and Shamsheer Singh v. State of Punjab, (1975) 1 SCR 814 = (AIR 1974 SC 2192).

29. The appeal is, therefore, accepted. The judgment of the High Court is set aside. The orders passed by the High Court on 8 December, 1972 and 3 December, 1973 are quashed.

30. In view of the orders being quashed the appellant will be deemed to be an Additional District Judge up to the date he retired. Parties will pay and bear their own costs.

CIVIL APPEAL NO. 1513 of 1974

31. This appeal was not pressed. The appeal is dismissed. There will be no order as to costs.

Order accordingly.

AIR 1976 SUPREME COURT 1904

(From: Andhra Pradesh)*

A. N. RAY C. J., P. N. BHAGWATI, A. C. GUPTA, S. MURTAZA FAZL ALI AND JASWANT SINGH, JJ.

The Principal, Guntur Medical College, Guntur and others, Appellants v. Y. Mohan Rao, Respondent.

Civil Appeal No. 984 of 1975, D/- 6-4-1976.

(A) Constitution of India, Arts. 15 and 29 — Admission to medical college — Reservation of seats for scheduled caste — A born to Christian converts who originally belonged to scheduled caste — If he can claim benefit of reservation after embracing Hinduism. (Hindu Law — Conversion.)

A person whose parents belonged to a scheduled caste before their conversion to Christianity can, on

*(W. A. No. 752 of 1974, D/- 10-2-1975—(Andh. Pra.)).

ET/ET/B362/76/MVJ

conversion or reconversion to Hinduism, be regarded as a member of the scheduled caste only if he is accepted as a member of that caste by the other members of the caste. On such acceptance he would be eligible for the benefit of reservation of seats for scheduled castes in the matter of admission to a medical college.

(Para 7)

It will be seen that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold. It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member. (Para 7)

(B) Constitution (Scheduled Castes) Order 1950, Cl. 3 — Rules issued by Govt. of Andh. Pra. under GO Rt No. 1315 dated 4-12-1973 for admission to MBBS course in Govt. Medical Colleges for academic year 1973-74 R. 2, Note (b) — Validity of Note (b).

The Schedule to this Order in Part I sets out the castes, races or tribes or parts of or groups within castes or tribes which shall in the different areas of the State of Andhra Pradesh be deemed to be Scheduled Castes. One of the castes specified there is Madiga caste and that caste must, therefore, be deemed to be a Scheduled Caste. But by reason of Cl. (3), a person belonging to Madiga caste would not be deemed to be a member of a Scheduled Caste unless he professes Hindu or Sikh religion at the relevant time. It is not necessary that he should have been born a Hindu or a Sikh. The only thing required is that he should at the material time be professing Hindu or Sikh religion. Interpretation of Note (b) to mean that a candidate, in order to be eligible for a seat reserved for Scheduled Castes,

should be a Hindu by birth is erroneous. What Note (b) requires is not that a candidate should be a Hindu by birth but that he should belong to a Scheduled Caste by birth. But even this requirement that a candidate in order to be eligible for a reserved seat should be a member of a Scheduled Caste by birth is beyond the provision in Cl. (3) of the Constitution (Scheduled Castes) Order, 1950 and is void. (Para 3)

Cases Referred: Chronological Paras
AIR 1976 SC 939 = (1976) 1 SCC 863 5, 6
AIR 1940 Mad 513 = (1940) 1 Mad LJ 800 7

Mr. P. Ramachandra Reddy, Advocate General, A. P., (Mr. P. P. Rao and Mr. V. Seetharaman Reddy, Advocates with him), for Appellant; Mr. R. C. Raghavan Sr. Advocate, (Mr. G. Vedanta Rao and B. Kanta Rao, Advocates with him), for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— The short question that arises for determination in this appeal is: whether a person whose parents belonged to a Scheduled Caste before their conversion to Christianity can, on conversion or reconversion to Hinduism, be regarded as a member of the Scheduled Caste so as to be eligible for the benefit of reservation of seats for Scheduled Castes in the matter of admission to a medical college.

2. The parents of the respondent originally professed Hindu religion and belonged to Madiga caste which is admittedly a caste deemed to be a Scheduled Caste in the State of Andhra Pradesh as specified in Part I of the Schedule to the Constitution (Scheduled Castes) Order, 1950. They were both converted to Christianity at some point of time which does not appear clearly from the record, but it was the case of the respondent in his Writ Petition that he was born after their conversion. This was also the assumption on which the arguments proceeded before the High Court and before us, too. The counsel for the respondent expressed his readiness to argue the case on the same assumption, namely,

that the respondent was born after the conversion of his parents, or, in other words, he was born of Christian parents. It appears that in the State of Andhra Pradesh, for the purpose inter alia of admission to medical college, converts to Christianity are treated as belonging to backward class and, therefore, when the respondent applied for admission to Gandhi Medical College in 1973, he described himself as a member of a backward class. But he did not succeed in getting admission. Thereupon he got himself converted to Hinduism on 20th September, 1973 from Andhra Pradesh Arunchatiya Sangham stating that he had renounced Christianity and embraced Hinduism after going through Suddhi ceremony and he was thereafter "received back into Madiga caste of Hindu fold." On the strength of this certificate, claiming to be a member of Madiga caste, the respondent applied for admission to Guntur Medical College and on the basis that he was a member of a Scheduled Caste, he was provisionally selected for admission. But subsequently he was informed by the Principal of the Medical College that his selection was cancelled as he was not a Hindu by birth. The Principal apparently relied on Note (b) to clause (c) of Rule 2 of the Rules issued by the Government of Andhra Pradesh under GO Rt. No. 1315 dated 4th December, 1973 for admission to the M. B. B. S. Course in Government Medical Colleges for the Academic year 1973-74. This Note was in the following terms:

"No candidate other than Hindu including a Sikh can claim to belong to Scheduled Castes. No candidates can claim to belong to the Scheduled Caste except by birth."

The respondent thereupon preferred in a writ petition in the High Court of Andhra Pradesh challenging the validity of cancellation of his admission on the ground that Note (b), which required that a candidate, in order to be eligible for a seat reserved for Scheduled Caste, should belong to a Scheduled Caste by birth, went beyond the scope of the Constitution (Scheduled Castes) Order, 1950 and was, therefore, void and

the Principal was not entitled to cancel his admission on the ground that he was not a Hindu or a member of a Scheduled Caste by birth. This ground of challenge was accepted by a Single Judge of the High Court and on appeal, a Division Bench of the High Court also took the same view. In fact, it was conceded before the Division Bench by the learned Government Pleader appearing on behalf of the State that Note (b) was repugnant to the provisions of Cl. (3) of the Constitution (Scheduled Castes) Order, 1950, since the only requirement of that clause was that in order to be a member of a Scheduled Caste, a person should be professing Hindu or Sikh religion and it did not prescribe that he should be a Hindu by birth. The State did not succeed in obtaining leave to appeal from the High Court and hence it preferred a special leave petition to this Court. When the special leave petition came up for hearing, there was no decision of this Court dealing with the question as to whether a convert or reconvert to Hinduism can become a member of a Scheduled Caste and if so, in what circumstances and hence we granted special leave to the State, on the State agreeing that whatever be the result of the appeal, the admission of the respondent will not be disturbed and that the State will, in any event, pay the costs of the respondent. It may be pointed out that since then a decision on this question has been rendered by a Bench of three Judges of this Court to which we shall refer later.

3. It is clear on a plain reading of clause (4) of Art. 15 that the State has power to make special provision for Scheduled Castes and in exercise of this power, the State can reserve seats in a medical college for members of Scheduled Castes without violating Art. 15 or Cl. (2) of Art. 29. The expression 'Scheduled Castes' has a technical meaning given to it by cl. (24) of Art. 366 and it means "such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution." The President in exercise

of the power conferred upon him under Art. 341 has issued the Constitution (Scheduled Castes) Order, 1950. Paras. (2) and (3) of this Order are material and they read as follows:

"2. Subject to the provisions of this Order, the castes, races or tribes or parts of or groups within caste or tribes specified in Parts I to XIII of the Schedule to this Order shall, in relation to the States to which these parts respectively relate, be deemed to be scheduled castes so far as regards members thereof resident in the localities specified in relation to them in those Parts of that Schedule.

3. Notwithstanding anything contained in Paragraph 2, no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of a Scheduled Caste."

The Schedule to this Order in Part I sets out the castes, races or tribes or parts of or groups within castes or tribes which shall in the different areas of the State of Andhra Pradesh be deemed to be Scheduled Castes. One of the castes specified there is Madiga caste and that caste must, therefore, be deemed to be a Scheduled Caste. But by reason of Cl. (3) a person belonging to Madiga caste would not be deemed to be a member of a Scheduled Caste unless he professes Hindu or Sikh religion at the relevant time. It is not necessary that he should have been born a Hindu or a Sikh. The only thing required is that he should at the material time be professing Hindu or Sikh religion. Now, Note (b) was interpreted by the Principal of the Medical College to require that a candidate, in order to be eligible for a seat reserved for Scheduled Castes, should be a Hindu by birth. This interpretation was plainly erroneous because what Note (b) required was not that a candidate should be a Hindu by birth but that he should belong to a Scheduled Caste by birth. But even this requirement that a candidate in order to be eligible for a reserved seat should be a member of a Scheduled Caste by birth went beyond the provision in

Cl. (3) of the Constitution (Scheduled Castes) Order, 1950 and was rightly condemned as void and no reliance was placed upon it on behalf of the State.

4. The principal argument advanced on behalf of the State was that when the respondent was converted to Hinduism, he did not automatically become a member of the Madiga caste, but it was open to the members of the Madiga caste to accept him within their fold and it was only if he was so accepted, that he could claim to have become a member of the Madiga caste. There was no evidence in the present case, contended the State, showing that the respondent, on his conversion to Hinduism, was accepted as a member of the Madiga caste by the other members of that caste and, therefore, he was not at the time of his application for admission a member of a Scheduled Caste.

5. Now, before we proceed to consider this contention, it is necessary to point out that there is no absolute rule applicable in all cases that whenever a member of a caste is converted from Hinduism to Christianity, he loses his membership of the caste. This question has been considered by this Court in *C. M. Arumugam v. S. Rajgopal*, (1976) 1 SCC 863 = (AIR 1976 SC 939) and it has been pointed out there that ordinarily it is true that on conversion to Christianity, a person would cease to be a member of the caste to which he belongs, but that is not an invariable rule. It would depend on the structure of the caste and its rules and regulations. There are some castes, particularly in South India, where this consequence does not follow on conversion, since such castes comprise both Hindus and Christians. Whether Madiga is a caste which falls within this category is a debatable question. The contention of the respondent in his writ petition that there are both Hindus and Christians in Madiga caste and even after conversion to Christianity, his parents continued to belong to Madiga caste and he was, therefore, a member of a Madiga caste right from the time of his birth. It is not necessary for the

purpose of the present appeal to decide this question. We may assume that, on conversion to Christianity, the parents of the respondent lost their membership of Madiga caste and that the respondent was, therefore, not a Madiga by birth. The question is: could the respondent become a member of Madiga caste on conversion to Hinduism? That is a question on which considerable light is thrown by the decision of this Court in *C. M. Arumugam v. S. Rajgopal* (supra).

6. The main question which arose for decision in *C. M. Arumugam v. S. Rajgopal* (AIR 1976 SC 939) (supra) was whether S. Rajgopal, who belonged to Adi Dravida caste before his conversion to Christianity could, on reconversion to Hinduism, once again become a member of the Adi Dravida caste. This Court, after examining the question on principle and referring to the decided cases, pointed out that the consistent view taken in this country since 1886 was that on reconversion to Hinduism, a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. This Court observed that there was no reason, either on principle or on authority, which should compel it to disregard this view which has prevailed for almost a century and lay down a different rule on the subject and concluded that on reconversion to Hinduism, S. Rajgopal could once again revert to his Adi Dravida caste, for he was accepted by the other members of the caste.

7. The reasoning on which this decision proceeded is equally applicable in a case where the parents of a person are converted from Hinduism to Christianity and he is born after their conversion and on his subsequently embracing Hinduism, the members of the caste to which the parents belonged prior to their conversion accept him as a member within the fold. It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is a social

combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member. The only requirement for admission of a person as a member of the caste is the acceptance of the person by the other members of the caste, for, as pointed out by Krishnaswami Ayyangar, J., in *Durgaprasada Rao v. Sudarsanaswami*, AIR 1940 Mad 513, "in matters affecting the well being or composition of a caste, the caste itself is the supreme judge." (emphasis supplied). It will, therefore, be seen that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold.

8. This view would have ordinarily required us to find whether, on the material on record, it could be said to have been established by the respondent that, on conversion to Hinduism, he was accepted as a member of Madiga caste by the other members of that caste, for it is only if he was so accepted that he could claim to be a member of a Scheduled Caste. But it is not necessary for us to undertake this inquiry because, as already pointed out, it has been agreed by the State that, whatever be the result of this appeal, the admission of the respondent will not be disturbed.

9. We accordingly dismiss the appeal with costs in favour of the respondent.

Appeal dismissed.

AIR 1976 SUPREME COURT 1909

(From: Gujarat)*

A. N. RAY C. J., M. H. BEG
AND JASWANT SINGH, JJ.

Chhaganbhai Norsinbhai, Appellant v. Soni Chandubhai Gordhanbhai and others, Respondents.

Civil Appeal No. 88 of 1975, D/- 23-3-1976.

(A) Contempt of Courts Act (1971), S. 2 (b) — "Undertaking given to Court" — Order passed in view of undertaking — Order held not mere consent order — Its breach amounted to breach of injunction of Court.

The appellant in the instant case had, in previous revision proceedings before the High Court, given a solemn undertaking to the Court to hand over certain premises in his possession. The undertaking was on record and in view of it the revision was dismissed. There was a breach of the undertaking.

Held that there was nothing in the conditions of the undertaking to imply that it was merely a consent order passed upon an agreement between the parties to which the order of the Court had been superadded. It was clearly a case of express undertaking to the Court incorporated in the order. (Para 2)

The case being a case of a deliberate violation of an undertaking to the Court the effect was the same as that of breach of an injunction. Hence it amounted to contempt of Court. (Para 6)

Cases Referred: Chronological Paras
(1927) 71 Sol. J. 911 = 1927 WN 276 5

Mr. M. F. Thakkar and Mr. S. S. Khanduja, Advocates, for Appellant; M/s. M. C. Shah and M. V. Goswami, Advocates, for Respondents.

The Judgment of the Court was delivered by

BEG, J.:— This is an appeal under Section 19 (1) (b) of the Contempt of Courts Act, 1971. The defendant-appellant was convicted by the Division Bench of the High

*(M. C. A. No. 576 of 1974, D/- 10-1-1975—(Guj.)).

Court of Gujarat for having deliberately violated an order secured from the High Court on 22 January 1973 upon undertakings given to it. The very first term of the order is:

"The defendant gives solemn undertaking to this Hon'ble High Court that he will vacate suit premises by handing over the key of the premises to the Court of the Civil Judge, Junior Division, Anand, in pursuance of the decree within one and a half months after receipt of the notice from the plaintiffs that the plaintiff Dr. I. G. Soni has returned from abroad and intends to start medical practice in the suit premises."

2. He also undertook to clear the arrears of mesne profits and to continue to pay them regularly as and when due. Furthermore, he undertook not to part with possession in favour of any person other than the landlord decree-holder until he received the notice contemplated by the first condition. It is not disputed that the appellant received that notice on 10 October 1974. There is nothing in the conditions of the undertaking to imply that it was merely a consent order passed upon an agreement between the parties to which the order of the Court had been superadded. The order incorporated express undertakings to the Court although these may have induced the plaintiff to agree to the passing of the order in the form in which it was passed instead of pressing for an order of dismissal of the revision application before the High Court after which he could have executed his decree immediately. This feature, in itself, could not convert the order actually passed upon the undertakings given into a mere consent order. It was clearly a case of express undertakings to the Court incorporated in the order. The order passed on 22 January 1973, ended as follows:

"In view of the respective undertakings given by the parties to this proceeding, which undertakings are on record, the petitioner does not wish to proceed with this CRA and does not therefore survive. The application is dismissed. No order as to costs in this circumstance of the case."

3. The defendant appellant not only did not abide by the undertakings given to the High Court but his counsel took up the impossible position that it was a mere agreement between the parties to which an order of the Court had been appended. On this flimsy and unsustainable ground, an argument put forward before us was that there was no breach of any undertaking. The High Court found that express undertakings had been violated. We have no hesitation whatsoever in holding that the High Court's finding is correct upon the recorded admissions on behalf of the defendant-appellant. It is true that the defendant-appellant surrendered possession after the initiation of contempt proceedings in 1974. But, that made no difference to the initial wrong committed.

4. Another feature of the case is that the appellant gave no sign of even regret at any stage not to mention an apology of any kind. Even in this Court, learned counsel for the appellant took up the impossible position that there had been no breach of any undertaking. We agree with the High Court that this is a case of a perverse and deliberate flouting of undertakings given by a litigant who, evidently, had no intention to abide by them. The undertakings seemed to have been taken very lightly by him as mere cloaks for obtaining an order which would not have been passed but for the undertakings. The High Court rightly observed that it had no option except to convict the appellant and to sentence him to three months imprisonment in civil jail.

5. Before parting with this case we may refer to Halsbury's Laws of England — Fourth Edn. Vol. 9, page 42 (paragraph 71) where, after citing *Dashwood v. Dashwood*, (1927) 71 Sol. J. 911 for the proposition that, when a party fails to comply merely with the terms of a consent order, "the remedy of the injured party is to apply, not for committal, but for an order for specific performance or an injunction, and then to base proceedings for contempt on any subsequent breach". the observation is made: "Where,

however, there is an express direction or undertaking in the body of the order, a breach will enable an immediate application for committal to be made." In the same volume, at page 44 (para 75) we find the law thus stated:

"An undertaking given to the Court by a person or corporation in pending proceedings, on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the Court and a breach of the undertaking is misconduct amounting to contempt."

6. The case before us being a case of a deliberate violation of an undertaking to the Court the effect was the same as that of breach of an injunction.

7. Consequently, finding ourselves in agreement with the High Court, we affirm the judgment and order of the High Court and dismiss this appeal with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1910

(From: Bombay)*

Y. V. CHANDRACHUD, V. R.
KRISHNA IYER AND A. C.
GUPTA, JJ.

Pandurang Dnyanoba Lad, Appellant v. Dada Rama Methe and others, Respondents.

Civil Appeal No. 475 of 1973,
D/- 24-2-1976.

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sections 32-G and 32-O — Inam land — Portion of land in possession of tenant — Tenant's right to purchase land — Effect of provisions of Bombay Act (22 of 1955) — (Bombay Merged Territories Miscellaneous Alienations Abolition Act (22 of 1955), Sections 4 and 28).

None of the provisions of the Bombay Tenancy Act 1948, particularly the provisions contained in Section 32 of the Act under which tenants became entitled to purchase the

*(Spl. Civil Appln. No. 165 of 1972.
D/- 26-4-1972—(Bom.)).

FT/FT/A694/76/MVJ

lands held by them in that capacity on the tillers' day, is in any way inconsistent with any of the express provisions of the Bombay Merged Territories Miscellaneous Alienations Abolition Act. Section 32 must therefore govern the rights of the ex-Inamdar and his tenants notwithstanding the abolition of the Inams brought about by the Alienations Abolition Act. Since the respondents tenants did not cease to be tenants of the appellant Inamdar on the introduction of the Alienations Abolition Act, they are entitled to purchase the land under Section 32. Consequently it was competent to the Agricultural Lands Tribunal to commence the price fixation proceedings under Section 32-G of the Tenancy Act. (Para 5)

S. 32-O applies only to tenancies created after the tillers' day. As the relationship of landlord and tenant between the parties did not come to an end it could not be said that a new relationship of landlord and tenant came into existence between the parties so as to attract S. 32-O. (Para 6)

Under S. 4 of the Alienations Abolition Act all rights of the Inamdars stood determined on the introduction of the Alienations Abolition Act but the rights of tenants continued to exist and were expressly protected by Section 28 of the Act. (Para 6)

The Alienations Abolition Act is included in Schedule III of the Tenancy Act as item No. 21. Thus, even if the land, after the abolition of the Inam effected under the Alienations Abolition Act, was re-granted to the appellant on condition that it was not transferable, such a condition cannot affect the right of the respondent to purchase the land under Sections 32 and 32-G of the Tenancy Act. (Para 7)

M/s. S. B. Wad and M. S. Ganesh Advocates, for Appellant; Mr. P. H. Parekh, Advocate, for Respondents.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellant owned a land, Survey No. 72, at Shirol in the district of Kolhapur. The land was held by the appellant

for the performance of miscellaneous inferior services and was classified as a Huzur Sanadi Inam land. Respondents have been in possession of a portion of the land as tenants and were declared as purchasers under the Bombay Tenancy and Agricultural Lands Act, LXVII of 1948, (hereinafter called the Tenancy Act). Consequent upon the declaration, the Agricultural Lands Tribunal, Hatkanagale, fixed the price of the land under Section 32G of the Tenancy Act. That decision was confirmed in appeal by the Special Deputy Collector, Kolhapur, and in revision by the Maharashtra Revenue Tribunal. The appellant filed a petition in the Bombay High Court under Article 227 of the Constitution to challenge the decision of the Revenue Tribunal but that petition was dismissed summarily by a learned Single Judge. This appeal by special leave is directed against the order of the High Court.

2. The Tenancy Act provides by Section 32 that on April 1, 1957, called the "tillers' day", every tenant shall, subject to certain conditions, be deemed to have purchased from his landlord the land held by him as a tenant. Section 32G requires the Agricultural Land Tribunal to determine the purchase price of the land in accordance with a statutory formula. The dispute before us is not as regards the arithmetic of the price fixation but as regards whether the respondents are qualified at all to purchase the land under Section 32 of the Tenancy Act. The right of a tenant to opt for a compulsory purchase of the agricultural land held by him is no longer open to constitutional doubt or difficulty. But, the respondents' right to purchase the land is questioned by the appellant on the ground that they ceased to be tenants and have therefore no right of purchase.

3. This plea is founded on the provisions of the Bombay Merged Territories Miscellaneous Alienations Abolition Act, XXII of 1955, (hereinafter called the Alienations Abolition Act). It is argued that with the abolition of Inams effected under that Act, the old relationship of landlord and tenant between the ap-

pellant and respondents came to an end, that with the re-grant of occupancy rights to the appellant a new relationship of landlord and tenant came into existence between them and since the respondents did not exercise their right to repurchase the land within the period prescribed by Section 32-O of the Tenancy Act, they have forfeited that right. According to the appellant, the provisions of the Tenancy Act and the Alienations Abolition Act are in a material respect inconsistent and the inconsistency has to be resolved by giving precedence to the latter Act.

4. The merit of these contentions depends upon the validity of the basic premise that with the abolition of Inams which the Alienations Abolition Act brought about, the relationship of landlord and tenant between the appellant and the respondents came to an end. We see no warrant for this premise.

5. By Section 4 of the Alienations Abolition Act, all alienations in the merged territories were abolished with effect from the appointed date. As a result of the abolition of Inams effected by Section 4, all alienated lands became liable under Section 5 to the payment of land revenue in accordance with the provisions of the Bombay Land Revenue Code, 1879. Sections 6, 7, 8 and 9 of the Alienations Abolition Act provide for the grant of occupancy rights in respect of the erstwhile Inam lands. There is no provision in that Act by virtue of which the relationship of landlord and tenant between the ex-Inamdar and his tenant would stand extinguished. On the contrary, Section 28 provides that nothing contained in the Act shall in any way be deemed to affect the application of any of the provisions of the Tenancy Act to any alienated land or, "the mutual rights and obligations of a landlord and his tenants save in so far as the said provisions are not in any way inconsistent with the express provisions of this Act." None of the provisions of the Tenancy Act, particularly the provision contained in Section 32 of the Tenancy Act under which tenants became entitled to purchase the lands held by them in that

capacity on the tillers' day, is in any way inconsistent with any of the express provisions of the Alienations Abolition Act. Section 32 of the Tenancy Act must therefore govern the rights of the ex-Inamdar and his tenants notwithstanding the abolition of the Inams brought about by the Alienations Abolition Act. Since the respondents did not cease to be tenants of the appellant on the introduction of the Alienations Abolition Act, they are entitled to purchase the land under Section 32. Consequently, it was competent to the Agricultural Lands Tribunal to commence the price fixation proceedings under Section 32G of the Tenancy Act.

6. Section 32-O of the Tenancy Act applies only to tenancies created after the tillers' day. It provides that in respect of such tenancies, a tenant desirous of exercising the right of purchase must give an intimation to the landlord and the Tribunal within one year from the commencement of his tenancy. As observed by us: the relationship of landlord and tenant between the appellants and respondents did not come to an end on the introduction of the Alienations Abolition Act nor indeed is there any legal justification for the theory that on the cesser of that relationship a new relationship of landlord and tenant came into existence between the parties so as to attract the application of Section 32-O. The object of the Alienations Abolition Act was "to abolish..... alienations of miscellaneous character prevailing in the merged territories", that is to say, to abolish the Inam grants prevailing in those territories. The elimination of Inamdars as intermediaries, not the eviction of the tillers of the soil, was the object of that Act. By Section 4, what was abolished was all alienations, all rights legally subsisting in respect of alienations and all other incidents of such alienations. A tenancy created by an Inamdar is not a right in respect of the alienation nor an incident of the alienation. In simple words, all rights of the Inamdars stood determined on the introduction of the Alienations Abolition Act; the rights of tenants continued to exist

and were expressly protected by Section 28 of the Alienations Abolition Act.

7. The provision contained in Section 32G (6) of the Tenancy Act shows that nothing contained in the Alienations Abolition Act can affect the tenant's right of purchase under Section 32. Section 32G (6) provides that if any land is re-granted to the holder under the provisions of any of the Land Tenures Abolition Acts referred to in Schedule III of the Tenancy Act on condition that it was not transferable, such condition shall not be deemed to affect the right of any person holding the land on lease created before the re-grant and such person shall, as a tenant, be deemed to have purchased the land under Section 32G as if the condition that it was not transferable was not the condition of re-grant. The Alienations Abolition Act is included in Schedule III of the Tenancy Act as item No. 21. Thus, even if the land, after the abolition of the Inam effected under the Alienations Abolition Act, was re-granted to the appellant on condition that it was not transferable, such a condition cannot affect the right of the respondent to purchase the land under Sections 32 and 32G of the Tenancy Act. In other words, the statutory purchase of a land by a tenant under the provisions of the Tenancy Act is excepted from the restraint of non-transferability. It is undisputed that the respondents were holding the land on a lease created before the occupancy rights were re-granted to the appellant on the abolition of the Inam.

8. The questions raised before us on behalf of the appellant merited careful consideration and we would have been happy to have the benefit of a considered judgment by the High Court. But the Revenue Tribunal was right in its decision and so the summary dismissal of the Writ Petition by the High Court has not caused failure of justice.

9. In the result, the appeal fails and is dismissed. We are thankful to Shri Parekh for assisting us in the case as *amicus curiae*.

Appeal dismissed.

AIR 1976 SUPREME COURT 1913

(From Patna: 1976 Tax LR 1419)

A. N. RAY C. J., M. H. BEG.,
R. S. SARKARIA AND P. N.
SHINGHAL, JJ.

Civil Appeals Nos. 819-823 of 1975:

Thakur Prasad Sao etc. etc., Appellants v. The Member, Board of Revenue and others, Respondents.

Civil Appeals Nos. 824-827 and 1105 of 1975:

(1) Ayodhya Prasad (In Civil Appeals Nos. 824-827 of 1975); (2) Rajendra Prasad (In Civil Appeal No. 1105 of 1975); Appellants v. The State of Bihar and others, (In all the Appeals), Respondents.

Civil Appeals Nos. 819-823, 824-827 and 1105 of 1975, D/- 18-12-1975.

(A) Bihar and Orissa Excise Act (2 of 1915), Section 22 (1) (d) — Bihar and Orissa Excise Manual, Para 253 — Right to manufacture and sell country liquor — Responsibility of providing place not of Government — Bidder not allowed to open shop by public — Refund of fees and compensation if can be claimed.

The appellant's bid was accepted to open country liquor shops including an out still shop and he paid license fee in advance. He obtained a piece of land for opening the shop (called the "Jalti bhatti") but the people removed the building and the distillation material. The appellant was asked to pay monthly licence fee but he denied his liability and claimed a refund of the money deposited by him and also compensation. The appellant went on bidding at the bids for the subsequent three years and laid similar claims for refund and damages but to no avail. The High Court held that the amounts in question were not due on account of fees but were payable for lease of the exclusive privilege which had been granted to the appellant in respect of out stills.

Held, that the view taken by the High Court was correct and the appellant could not claim refund.

(Para 9)

It has been stated in paragraphs 254 and 255 of the Manual that no

definite area is fixed within which each outstill has the "monopoly of supply of country spirit", but their number is regulated according to rules, and five miles is taken roughly as the minimum distance of one outstill from another. There can be no doubt that the holder of a license under the system acquires the right to manufacture country spirit in his outstill and sell it by retail in his premises without any restriction on the strength or price at which the spirit is manufactured or sold. Moreover he has the monopoly of manufacturing and supplying country liquor within his area. The right is therefore clearly an exclusive privilege within the meaning of Section 22 (1) (d) of the Act and it is futile to contend that the licenses in question were merely licenses for the retail sale of spirit for consumption on the vendor's premises within the meaning of S. 30 of the Act. (Paras 7, 9)

It is not disputed that the licenses were granted in Form 30 (Vol. II, Part I, Bihar and Orissa Excise Manual) on the condition that the appellants would pay to the government, in advance, the monthly fee mentioned therein. It is nobody's case that the licenses were cancelled or suspended under Section 42 of the Act for any of the reasons mentioned in section, or that the licenses were withdrawn under Section 43 so as to entitle the appellant to remission of the fee payable in respect of them or to payment of compensation in addition to such remission, or to refund the fee paid in advance. It is also not the case of the appellant that he surrendered his licenses within the meaning of sub-section (1) of Section 44 so as to justify the remittance of the fee payable by him, or paid by him in advance. In fact it has clearly been provided in sub-section (2) of Section 44 that the provisions of sub-section (1) "shall not apply in the case of a license for the sale of any country liquor in the exercise of an exclusive privilege granted under Section 22." It is true that in its judgment under appeal the High Court has observed that the petitioner before it was at liberty to surrender the license, but it appears that in taking that view it did not notice sub-section (2) of Section

44 even though it had held that what was granted was an exclusive privilege under Section 22. The license of the appellant therefore remained in force for the periods for which it was granted and, by virtue of the express provisions of S. 45, he could have no claim to compensation. (Para 10)

It was an incident of the outstill system that the holder of an outstill license was allowed to manufacture country spirit within a "certain area" and he paid a certain sum of money per mensem for manufacturing country spirit in his outstill and "selling it by retail on his premises." It was therefore permissible for appellant to locate the shop at B or at some other suitable place within his area, with the permission of the Collector. Condition No. 5 of the notice expressly states that the department would not be responsible for providing the place for the location of the outstill. Moreover it was expressly stated that the outstill at B would be settled purely as a temporary measure on condition that an undisputed site was made available for it. There is therefore nothing wrong with the view taken by the High Court that the responsibility for finding a suitable site was of the appellant, and there is no justification for the argument that nothing was payable by him because he could not locate the shop in spite of his best efforts. It may be that the Deputy Commissioner recommended his case for remission, but that would not matter when the appellant was liable to pay the money under the law governing his license. (Para 14)

Cases Referred: Chronological Paras

AIR 1975 SC 360	=	(1975) 2	SCR
861	=	1975 Tax LR 1285	15, 19
AIR 1975 SC 1121	=	1975 Tax LR 1569	15, 19
AIR 1975 SC 1331	=	(1975) 3	SCR
619	=	1975 Lab IC 881	11
AIR 1974 SC 252	=	(1974) 2	SCR
249	=	1974 Lab IC 193	11
AIR 1973 SC 303	=	(1973) 2	SCR
752	=	1973 Lab IC 191	11
AIR 1969 SC 707	=	(1969) 3	SCR
108	=		18
AIR 1959 SC 694	=	1959 Supp	(2)
SCR 227	=		17
AIR 1959 SC 896	=		17

Mr. Basudeo Prasad Sr. Advocate (In Civil Appeals Nos. 819-827 of 1975); Mr. S. N. Prasad Advocate with him, for Appellants (In all Appeals); Mr. Balbhadra Prasad, A. G. Bihar (In Civil Appeals Nos. 819-823) (Mr. U. P. Singh, Advocate with him), for Respondents (In all Appeals).

The Judgment of the Court was delivered by

SHINGHAL, J.:— These ten appeals against two judgments of the High Court of Judicature at Patna raise some common questions of law. They have been argued together, and we shall examine them in this common judgment. Civil Appeals Nos. 824-827 of 1975 arise out of a common judgment dated January 2, 1975 in a bunch of civil writ petitions; Civil Appeals Nos. 819-823 of 1975 arise out of a common judgment dated March 15, 1975 in another bunch of civil writ petitions; while Civil Appeal No. 1105 of 1975 is directed against the aforesaid judgment dated January 2, 1975 by which the civil writ petition giving rise to it was also disposed of by the High Court along with the other petitions. Certificates of fitness have been granted for all the appeals. There is no controversy in regard to some of the basic facts and they are quite sufficient for the disposal of the appeals.

2. A sale notice was published by the authorities concerned for the auction of licenses to open country liquor shops in Singhbhum district with effect from April 1, 1966, including an outstill shop at Bharbharia. Appellant Ayodhya Prasad gave the highest bid which was knocked down in his favour, and he deposited two months' license fee in advance at the rate of Rs. 3,650/- per month. He applied on March 22, 1966 to the Kolhan Superintendent of Singhbhum to settle a piece of land for establishing an outstill shop at Bharbharia, but the application was rejected on September 27, 1966 because of the objection raised by some members of the District Consultative Committee. The villagers of Bharbharia also opposed the opening of the outstill shop. The shop could not therefore be established there.

The appellant however obtained a piece of land in village Chittimitti and applied on July 30, 1966 for permission to open the outstill shop there. This was allowed and the appellant claimed that he began to collect the necessary material but a mob forcibly removed the building and the distillation material. He filed a report with the police about the incident. The approval for opening the outstill shop at Chittimitti was however withdrawn on October 6, 1966 and the appellant was asked to pay the monthly license fee for the period April 1, 1966 to January, 1967. He denied his liability to pay the fee and claimed a refund of the money which had been deposited by him. His case was recommended by the Collector for remittance of the license fee amounting to Rs. 43,800/- for the entire year 1966-67. He also made an application to the Commissioner of Excise for refund of the deposit of Rs. 7,300/- and for payment of compensation for loss of anticipated profits and damages, but the application was rejected. It appears that the appellant went on bidding at the bids for the subsequent three years, and laid similar claims for refund and damages, but to no avail. He then filed the bunch of writ petitions referred to above, for quashing the demand notices, but they have been dismissed as aforesaid by the High Court's judgment dated January 2, 1975. Civil Appeal No. 825 relates to the bid for 1966-67, Civil Appeal No. 824 relates to the bid for 1967-68, while Civil Appeals Nos. 826 and 827 relate to the bids for 1968-69 and 1969-70. These may be said to be group 'A' appeals.

3. Civil Appeals Nos. 819-823 of 1975 relate to the applications of appellants Thakur Prasad Sao and others for reduction of the license fees for outstill liquor shops at Gua, Noamandi, Kiriburu, Andhari, Goiekera, Patajai and Dangusposi for 1974-75. In these cases the licensees were T. P. Sao or his relations or employees. They claimed that they incurred a loss of Rs. 55,874.79 at Gua of Rs. 2,66,651.45 at Noamandi, of Rs. 39,389.53 at Kiriburu, of Rs. 35,169.40 at Andhari, of Rupees 11,649.87 at Goiekera, of Rupees

11,705.95 at Patajai and of Rupees 11,657.21 at Dangusposi.

4. The appellants claimed that there was rivalry and enmity with Bishwanath Prasad and his brother who made speculative bids at the auction, as a result of which the outstill shops were settled for uneconomic amounts. Their grievance was that the Deputy Commissioner did not discharge his duty of refusing to allow the manifestly speculative bids although the percentage of increase in the license fees ranged between 24 to 130 per cent when for other shops the increase was below 12 per cent. The appellants filed application under Section 39 of the Bihar and Orissa Excise Act, 1915, hereinafter referred to as the Act, for reduction of the fees for the year 1974-75, but they were rejected by the Board of Revenue. They then filed the aforesaid writ petitions in the High Court and have now filed the present appeals because the petitions have been dismissed by the High Court's impugned judgment dated March 15, 1975. These will be referred to as group 'B' appeals.

5. As has been stated, the remaining Civil Appeal No. 1105 of 1975 is also directed against the High Court's common judgment dated 2-1-1975. It relates to the grant of a license to the appellant for establishing outstill shops at Mahuadom, Barahi, Asnair, Aksi and Kabri, in Palamau district. The appellant applied for a direction for the refund of Rs. 2,71,340/- which had already been realised from him and for restraining the realisation of a further sum of Rs. 1,40,680/- on the ground that there was no quid pro quo for the fee, but without success. The High Court has taken the view that the amounts in question were not due on account of fees, but were payable for leases of the exclusive privileges which had been granted to the appellant in respect of the outstills.

6. It is in these circumstances that these appeals have come up for consideration before us.

7. As has been stated, the controversy in these appeals relates to the grant of licenses for establishing outstill shops which are also

known as "jalti bhattis". That system has been described in paragraph 253 of the Bihar and Orissa Excise Manual, Volume III, hereinafter referred to as the Manual, as follows,—

"By this system a certain number of stills for the manufacture of country spirit are allowed within a certain area. The holder of an outstill license pays a certain sum per mensem for manufacturing country spirit in his outstill and selling it by retail on his premises. No attempt is made to regulate the strengths or the prices at which spirit is manufactured or sold."

It has been stated in paragraphs 254 and 255 of the Manual that no definite area is fixed within which each outstill has the "monopoly of supply of country spirit", but their number is regulated according to rules, and five miles is taken roughly as the minimum distance of one outstill from another.

8. It has been argued on behalf of the appellants that what was granted to them was not the exclusive privilege of manufacturing and selling country liquor in retail, in the areas for which the licenses were granted, and that the High Court erred in holding that such an exclusive privilege had been granted under Section 22 of the Act. It has been urged that the licenses in question fell within the purview of Section 30 of the Act.

9. We have described the essential features of the outstill system, and there can be no doubt that the holder of a license under the system acquires the right to manufacture country spirit in his outstill and sell it by retail "in his premises" without any restriction on the strength or price at which the spirit is manufactured or sold. Moreover he has the monopoly of manufacturing and supplying country liquor within his area. The right is therefore clearly an exclusive privilege within the meaning of Section 22 (1) (d) of the Act and it is futile to contend that the licenses in question were merely licenses for the retail sale of spirit for consumption on the vendor's premises within the meaning of Section 30 of the Act. The High Court was therefore quite correct in taking that view.

10. It may be mentioned that the appellants have not produced their licenses in support of the contention that exclusive privilege of the nature referred to above was not granted to them even though the licenses were for establishing out-stills in the areas covered by them. It is however not disputed that the licenses were granted in Form 30 (Volume II, Part I, Bihar and Orissa Excise Manual) on the condition that the appellants would pay to the government, in advance, the monthly fee mentioned therein. It is nobody's case that the licenses were cancelled or suspended under Section 42 of the Act for any of the reasons mentioned in the section, or that the licenses were withdrawn under Section 43 so as to entitle the appellants to remission of the fee payable in respect of them or to payment of compensation in addition to such remission, or to refund of the fee paid in advance. It is also not the case of the appellants that they surrendered their licenses within the meaning of sub-section (1) of Section 44 so as to justify the remittance of the fee payable by them, or paid by them in advance. In fact it has clearly been provided in sub-section (2) of Section 44 that the provisions of sub-section (1) "shall not apply in the case of a license for the sale of any country liquor in the exercise of an exclusive privilege granted under Section 22." It is true that in its judgment under appeal (in Civil Appeals Nos. 824-827 of 1975) the High Court has observed that the petitioner before it was at liberty to surrender the license, but it appears that in taking that view it did not notice sub-section (2) of Section 44 even though it had held that what was granted was an exclusive privilege under Section 22. The licenses of the appellants therefore remained in force for the periods for which they were granted and, by virtue of the express provisions of Section 45, they could have no claim to compensation.

11. In such a situation, counsel for the appellants have placed considerable reliance on paragraph 121 of the Manual and have argued that the High Court erred in taking the view that the instructions

contained in it had no statutory force and its benefit was not available to the appellants. Reliance in this connection has been placed on *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 3 SCR 619 = (AIR 1975 SC 1331), *Laljee Dubey v. Union of India*, (1974) 2 SCR 249 = (AIR 1974 SC 252) and *Union of India v. K. P. Joseph*, (1973) 2 SCR 752 = (AIR 1973 SC 303).

12. Paragraph 121 of the Manual states, inter alia, that a person whose bid has been accepted by the presiding officer at the auction must pay the sum required on account of advance fee immediately. It states further that the purchaser would be liable for any loss that may accrue to government in case it becomes necessary to resell the shop for a lower sum in consequence of his failure to pay the sum at the time of the sale. Then there is the following sub-paragraph on which reliance has been placed by counsel for the appellants:

"Deposits will be returned to a person to whom a license may be subsequently refused because the Magistrate declines to grant him a certificate, or because he is unable to obtain suitable premises and satisfies the Collector that he has made bona fide endeavours to secure such, or if a license be refused for any other adequate reason."

It would thus appear that the sub-paragraph deals with the "deposits made immediately on account of advance fees, the consequences of the failure to make such payment and the return of those "deposits" to the person to whom the license may subsequently be refused because (i) the Magistrate declines to grant him a certificate or because he is unable to obtain suitable premises in spite of his bona fide endeavours or (ii) for any other adequate reason. But it was not the case of the appellants that the licenses were "subsequently refused" to them for any reason whatsoever. So even if it were assumed, for the sake of argument, that the instructions contained in paragraph 121 were binding on the authorities concerned, that would not matter for purposes of the present

controversy as it does not relate to refund of the deposits referred to in paragraph 121. In this view of the matter, it is not necessary for us to examine here the larger question whether the instructions contained in the Manual were made under any provision of the law and created any rights in favour of persons whose bids were accepted at public auctions of the shops. It may be mentioned that counsel for the appellants have not been able to refer to any other provision of the law under which the appellants could claim remission of the price or the consideration for the exclusive privilege of manufacturing and selling country liquor.

13. It has however been argued that as appellant Ayodhya Prasad did not succeed in locating the outstill shop at Bharbharia in spite of his best efforts, and he was also not successful in locating it at Chittimitti, he was not liable to pay the fee. It has been pointed that even the approval for locating the shop at Chittimitti was withdrawn by the Superintendent of Excise on October 6, 1966, and Ayodhya Prasad's case for remitting the sum of Rs. 43,800/- was recommended by the Deputy Commissioner of Singhbhum on May 3, 1967 on the ground that he could not open the shop for reasons beyond his control. It has therefore been urged that there was no lack of bona fides on the part of the appellant and it was a matter of no consequence that he did not surrender his license.

14. It will be recalled that it was an incident of the outstill system that the holder of an outstill license was allowed to manufacture country spirit within a "certain area" and he paid a certain sum of money per mensem for manufacturing country spirit in his outstill and selling it by retail on his premises." It was therefore permissible for appellant Ayodhya Prasad to locate the shop at Bharbharia or at some other suitable place within his area, with the permission of the Collector. The notice which had been issued for the public auction is on the record and condition No. 5 thereof expressly states that the department would not be responsible for

providing the place for the location of the outstill. Moreover it was expressly stated that the outstill at Bharbharia would be settled purely as a temporary measure on condition that an undisputed site was made available for it. There is therefore nothing wrong with the view taken by the High Court that the responsibility for finding a suitable site was of the appellant, and there is no justification for the argument that nothing was payable by him because he could not locate the shop in spite of his best efforts. It may be that the Deputy Commissioner recommended his case for remission, but that would not matter when the appellant was liable to pay the money under the law governing his license. The appellant in fact retained the license all through and continued to make the highest bids at the subsequent public auctions for the years 1967-68, 1968-69 and 1969-70 and thereby prevented others from undertaking the responsibility of establishing the outstill and paying the price admissible to the department. As has been stated, the approval for opening the outstill shop at Chittimitti, was withdrawn on October 6, 1966, and the demand for the license fee was made on January 9, 1967. Even so, the appellant did not take any action to save himself from any such liability in the future and, on the other hand, went on making the highest bids in the subsequent years and incurring similar liability to pay the price even though he was not able to establish his outstill anywhere in any year. It is therefore difficult to reject the contention in the affidavit of the respondents that there must have been some other reason for him to do so, particularly as the location of his shop was to be on the border of the State.

15. It has also been contended that the High Court erred in holding that the State Government had the power to require the appellants to pay the amounts under demands as they represented consideration for the contracts. It has been argued that this Court's decisions in *Nashirwar v. State of Madhya Pradesh*, (1975) 2 SCR 861 = (AIR 1975 SC 360) and *Har Shankar v. Deputy*

Excise and Taxation Commissioner, AIR 1975 SC 1121 related to the Excise laws of other States and did not bear on the present controversy. The argument is however futile for we have given our reasons for holding that what was granted to the appellants was the exclusive privilege of manufacturing and selling country liquor within the meaning of Section 22 (1) (d) of the Act, and it has been expressly provided in Section 29 that it would be permissible for the State Government to accept payment of a sum in "consideration" of the exclusive privilege under Section 22. The decisions of this Court in Nashirwar's case and Har Shankar's case have set any controversy in this respect at rest, so that it is well settled that as the State has the exclusive right and privilege of manufacturing and selling liquor, it has the power to hold a public auction for the grant of such a right or privilege and to accept payment of a sum therefor. It was therefore permissible for the State to frame rules for the grant of licenses on payment of fees fixed by auction, for that was only a mode or medium for ascertaining the best price for the grant of the exclusive privilege of manufacturing and selling liquor.

16. As has been stated, Group 'B' appeals relate to the claim for reduction of the license fees for the liquor shops concerned. It has been argued by counsel for the appellants that as the Collector did not discharge his duty under the instructions contained in paragraph 130 read with paragraph 93 of the Regulations, the Board acted arbitrarily in refusing to order reduction of the amounts of the fees which were the subject-matter of the demands under challenge. It has been urged that the bids were highly speculative and should have been reduced.

17. It has been strenuously argued on behalf of the respondent State of Bihar that the instructions contained in the Regulations were not issued under any provision of the law and could not give rise to any right in favour of the appellants. Reference in this connection has been made to *M/s. Raman and Raman Ltd. v. State of Madras*, 1959 Supp (2)

SCR 227 = (AIR 1959 SC 694) and *R. Abdulla Rowther v. State Transport Appellate Tribunal, Madras*, AIR 1959 SC 896. It has been pointed out that there are three volumes of the Bihar and Orissa Excise Manual, 1919. It has been stated in the preface to Volume I that it is complete in itself and contains the whole of the law and the rules which have the force of law "relating to excise opium." Volume II contains the "whole of the law and the rules which have the force of law relating to excisable articles other than opium." It has been stated in the preface to Volume III that it consists of the Board's "instructions with regard to excisable articles other than opium" and that references have been made to the Government Rules and the Board's Rules having the force of law. There is however no such reference to any rule in regard to instructions Nos. 130 and 93. But quite apart from the question whether these instructions were legally enforceable, we have examined the question whether they could justify the argument that the appellants were entitled to reduction of the amounts of the fees payable by them.

18. Instruction No. 93 mentions the circumstances when it would be advisable to accept bids other than the highest. It states that it is not an absolute rule that the highest bids must, on every occasion, be accepted. It states further that the presiding officer at an auction "may also refuse bids which he considers to be purely speculative or which are the outcome of private enmity", and that what is desired is not the highest fee obtainable, but a fee that can fairly be paid out of the profits of a shop without recourse to malpractices. There is therefore nothing in the rule which could be said to give rise to a right in favour of the appellants for reduction of the amounts demanded from them. Instruction No. 130 merely states that reduction of license fees, during the currency of a license, can be made by the Board under Section 39 of the Act. It does not therefore advance the case of the appellants for, under that section, the Board has

been given that power, "if it thinks fit", to order a reduction of the amount of fees payable in respect of a license, "during the unexpired portion of the grant" which is not the case of the appellants. In fact all that has been argued on behalf of the appellants is that as the instructions contained in the note appended to paragraph 130 of the Regulations have not been complied with, their legal right to claim the benefit of the note has wrongly been denied to them. The note reads as follows,—

"Note — Ordinarily it is not the policy of Government to allow reduction in excise settlements. The licensees to a large extent, have only themselves to thank if they exceed in their bidding the figure which should return them a reasonable profit under normal conditions, and they are not therefore entitled to any reduction of fees as of right. The observance of this principle is the more important because it must be remembered that each remission is likely to aggravate the evil and encourage speculative bidding in the hope that should the speculation turn out a failure, Government will not insist on full payment. A remission should not be granted merely because working at a dead loss has been actually proved. Each case should be dealt with on its own merits. Where, for example, it is proved that the Collector has not fulfilled his duty in refusing to allow manifestly speculative bids and has failed to stop the bidding when a figure has been reached which, under normal conditions, might be expected to return a reasonable rate of profit to the vendor, the question would be whether the action of the Collector was so flagrantly opposed to the principles enunciated from time to time by Government as to necessitate remedial action. Such action should not take the form of any promise of resettlement with the existing licensees. It can only take the form of a reduction in the amount of the existing licensees.

"It should not be very difficult for an officer in a contract supply area to realise the stage at which bidding becomes purely speculative. He

knows the issues of spirit during the previous year and the cost to the vendor including duty, carriage, establishment charges and the like, and should thus be able to estimate the figure beyond which a prudent man would not bid. If after warning the bidder, that this point has been reached, the latter still wishes to take the risk no case for remission can arise. The case is, however, different where exceptional reasons which could not at the time be foreseen, operate adversely to the interest of the licensee but at the same time it is not the duty of Government to safeguard licensees from the effects of their own imprudence or ignorance."

It would appear that there is nothing in the note to justify the argument that it gave rise to a right in favour of the appellants to obtain a reduction of the fees. As has been pointed out, that was clearly a matter within the discretion of the Board of Revenue under Section 39, and the wordings of the note appended to paragraph 130 could not overreach that provision of the law. Moreover, the question whether the circumstances mentioned in the note were at all in existence in the case of the appeals under consideration, was a question of fact which could not be tried in these proceedings. The decision in *Rohtas Industries Ltd. v. S. D. Agarwal*, (1969) 3 SCR 108 = (AIR 1969 SC 707) to which our attention has been invited on behalf of the appellants, can be of no avail to them.

19. As has been stated, the writ petition which has given rise to Civil Appeal No. 1105 of 1975 raised the question whether the refund of fees claimed by the appellant was permissible on the ground that there was no quid pro quo for the same. The High Court has rightly rejected that contention for the reason that the amounts in question were payable for the licenses which had been granted for the exclusive privilege in question and, as has been shown, that argument is no longer available to the appellant in view of this Court's decisions in *Nashirwar's case* (AIR 1975 SC 360) (*supra*) and *Har-*

Shankar's case (AIR 1975 SC 1121) (supra).

20. There is thus no force in all these appeals and they are hereby dismissed with costs. It is however ordered that, as has been agreed by the Advocate-General, the authorities concerned would recover the amounts in question in instalments spreading over a period of three years in case of those appellants who are able to furnish security for payment within that period.

Appeals dismissed.

AIR 1976 SUPREME COURT 1921

(From: Punjab and Haryana)*

H. R. KHANNA, V. R. KRISHNA IYER AND P. K. GOSWAMI, JJ.

Dewan Singh, Appellant v. State of Haryana and another, Respondents.

Civil Appeal No. 27 of 1971, D/- 7-5-1976.

(A) Punjab Panchayat Samities and Zila Parishads Act (3 of 1961), Section 124 (2) — Order of dismissal passed without affording reasonable opportunity for making effective representation — Order, held, vitiated — C. W. No. 197 of 1968, D/- 21-5-1970 (Punj. & Har.), Reversed.

The second Proviso to S. 124 (2) provides in unmistakable terms that before passing an order of dismissal or removal of an employee, a notice has to be given to him to show cause against proposed action. The action of dismissal or removal cannot be proposed, in all fairness, unless Tribunal had reached a conclusion about the guilt after making a proper enquiry giving the employee a reasonable opportunity to defend. The principles of natural justice are clearly ingrained in Section 124 (2).

(Paras 4, 9)

Where, apart from giving the show cause notice, no other communication was made to the appellant-employee except the order of dismissal.

Held, that the reasonable opportunity envisaged under Section 124 (2) has not been afforded to the ap-

*(Civil Writ No. 197 of 1968, D/- 21-5-1970—(Punj. and Har.)).

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pellant for making an effective representation to establish his innocence and that the provisions of Section 124 (2), which are of a mandatory character in a departmental enquiry have been violated, vitiating the order. Civil Writ No. 197 of 1968, D/- 21-5-1970 (Punj. and Har.), Reversed. (Paras 10, 11)

(In the particular circumstances of the case, the Supreme Court while quashing the impugned order of dismissal, directed that the appellant shall be reinstated in service with immediate effect and that there shall be no further enquiry into the allegations forming the subject-matter of the charge against him).

(Para 12)

Mr. J. Ramamurthi, for Appellant; Mr. Naunit Lal, Advocate for Mr. R. N. Sachthey, Advocate (for Nos 1 and 2) and Mr. Bishamber Lal Advocate, (for No. 3), for Respondents.

The Judgment of the Court was delivered by

GOSWAMI, J.:— This appeal by special leave is directed against the judgment of the Division Bench of the Punjab and Haryana High Court by which the appellant's application under Article 226 of the Constitution was rejected.

2. The appellant was a Veterinary Compounder serving at the material time under the Chairman, Panchayat Samiti, Hansi-I. The Zila Parishad Tribunal transferred him from Hansi-I block to Singhani (Loharu Block) by its resolution of June 30, 1967. The order appears to be transmitted by Memo No. 3201-A of July 6, 1967. On July 27, 1967, the Chairman of the Panchayat Samiti, Hansi-I, requested the Chairman of the Zila Parishad, Hissar, to reconsider the decision of transfer and to allow him to continue at his village Umra in public interest. A copy of this letter written to the Zila Parishad was forwarded to the appellant. Since the appellant did not comply with the order of transfer, the Chairman, Zila Parishad Tribunal, served a notice upon him on August 13, 1967, to show cause as to why he should not be dismissed from service on the grounds mentioned in the notice. It is mentioned

in the notice that this action has been taken under Section 124 of the Punjab Panchayat Samitis and Zila Parishads Act, 1961 (briefly the Act.)

3. The particulars of charges described in the show cause notice are briefly as under:—

(1) You did not hand over charge of veterinary dispensary to Balwan Singh, Veterinary Compounder on 25-7-1967, in compliance with the transfer order dated 6-7-1967.

(2) You also did not hand over charge to the District Animal Husbandary Officer who was ordered to personally take over charge from you on 26-7-1967.

(3) You were again asked by letter dated 2-8-67 to hand over charge to Balwan Singh, Veterinary Compounder, but you did not hand over the charge.

(4) When Ch. Bir Singh Lamba, Secretary, Zila Parishad Tribunal, along with Balwan Singh reached Umra on 10-8-67 between 4.30 and 5.00 p.m. in order to take charge from you they found you absent and the dispensary locked.

(5) That on 15-8-67 at about 4.00 p.m. when Balwan Singh went to take charge from you along with Ch. Bir Singh Lamba, Secretary, Zila Parishad Tribunal, along with Ch. Balbir Singh, Chairman, Zila Parishad, Hissar and Kali Ram, member, Panchayat Samiti, Hissar, you refused to hand over charge to Balwan Singh Veterinary Compounder.

(6) When on 15-8-67 Bir Singh Lamba, Secretary Zila Parishad Tribunal, with the help of Balwan Singh was preparing a list of stock in the presence of the Chairman and others, you with Rattan Singh, Sarpanch, Gram Panchayat, Urma, Giani Ram of village Majahadpur and three or four other unknown villagers entered the office. Giani Ram out of your group snatched the paper from Ch. Bir Singh, Secretary, Zila Parishad Tribunal and threatened them to leave the dispensary before they manhandled him. You are thus at the root of all this incident.

4. The appellant submitted a reply on September 13, 1967, describing it as an interim explanation and reserving his right to submit a final reply after inspection of cer-

tain records and he requested for a date for inspection of the records. In this reply he admitted to have received the transfer order and pleaded that he did not hand over charge to Balwan Singh on 25-7-1967 under instruction from the Chairman, Panchayat Samiti, who, according to him, was the appointing authority and he was carrying out his orders. He particularly denied the incident of August 15, 1967, for which he was held principally responsible in the show cause notice.

5. It does not appear that the Zila Parishad Tribunal gave any opportunity to the appellant for inspection of records, nor sent any communication to him rejecting the request giving any justifiable reason. The appellant seemed to have been waiting for some communication to his interim reply in order to submit a final explanation when on December 5, 1967 he received the order of the Zila Parishad Tribunal dismissing him from service with immediate effect in pursuance of its resolution of December 1, 1967. The resolution states:

"The Tribunal has come to a conclusion that your reply is not a satisfactory one. And the allegations made against him (sic) seemed to be correct."

That led to the appellant's writ application in the High Court resulting in the impugned order.

6. The short question that arises for decision is whether the order of dismissal is in conformity with S. 124 of the Act, or, in other words, whether the same is in violation of the principles of natural justice.

7. We may, therefore, read the material provision under Section 124 (2) of the Act:

"124 (2): The tribunal may suo motu or on the move of the Panchayat Samiti or the Zila Parishad or on the application of any servant of a Panchayat Samiti or Zila Parishad other than a government servant placed at their disposal enquire into the conduct of any servant of the Panchayat Samiti or the Zila Parishad and after making such enquiry as it may deem fit pass such orders imposing any punishment including

dismissal or removal as it may deem proper:

Provided that the tribunal shall not pass any such order in respect of a servant having a right of appeal under Section 116:

Provided further that the tribunal shall before passing any order of dismissal or removal give a notice to the servant to show cause against the action proposed to be taken against him."

8. A perusal of Section 124 (2) goes to show that before any action is taken for dismissal or removal of an employee the Tribunal has to enquire into his conduct justifying such action. This enquiry must necessarily have to be made in the presence of the employee giving him an opportunity to rebut the allegations mentioned against him. It is only after affording him a reasonable opportunity to rebut the allegations in the charge and the Tribunal is satisfied that the misconduct is established the question of final punitive action either of dismissal or removal has to be considered.

9. Unlike as in Article 311 of the Constitution, Section 124 (2) does not in terms mention two stages of a departmental enquiry for misconduct against an employee. Even so, the nature of an enquiry with an object to dismiss an employee is such that a full and fair reasonable opportunity must be given to him to meet the charges. The second proviso to Section 124 (2) provides in unmistakable terms that before passing any order of dismissal or removal a notice has to be given to the employee to show cause against the proposed action. The action of dismissal or removal cannot be proposed, in all fairness, unless the Tribunal had reached a conclusion about the guilt after making a proper enquiry giving the employee a reasonable opportunity to defend.

10. In the instant case, apart from giving the show cause notice, no other communication was made to the appellant except the order of dismissal. This is a clear case where the reasonable opportunity envisaged under Section 124 (2) has not been afforded to the appellant for making an effective representation to esta-

blish his innocence. It is easy to see that the summary order of dismissal must have been influenced by the allegations appertaining to the incident of August 15, 1967 for which, we understand, even a criminal case was instituted against the appellant. That criminal case, we are told, ended in acquittal of the appellant and others on June 10, 1970. At any rate the said incident being included in the articles of charge against the appellant he did not have any opportunity whatsoever to establish his innocence when he had clearly denied the allegations even in his interim reply.

11. The principles of natural justice are clearly ingrained in the provisions of Section 124 (2). It is a clear case where the provisions of Section 124 (2), which are of a mandatory character in a departmental enquiry, have been violated vitiating the order of dismissal. The High Court, therefore, should have accepted the petition of the appellant under Article 226 of the Constitution and quashed the order of dismissal.

12. Although in the ordinary course it would have been open to the authority to institute a fresh enquiry on his reinstatement, after the order of dismissal has been set aside, we are clearly of opinion that this is not a case where that procedure should be permitted. For one reason the appellant was dismissed in December 1967 and he has been out of employment for over eight years. He has also not many years to serve. Besides, the serious allegations regarding the incident of August 15, 1967, which, according to us, must have influenced the authority to pass the order of dismissal, have not been found to be established in a judicial trial. While, therefore, quashing the impugned order of dismissal, which we hereby do, we direct that the appellant shall be reinstated in service with immediate effect and there shall be no further enquiry into the allegations forming the subject matter of the charge against him. The period of absence shall be treated as leave without pay so that the appellant will not lose continuity of his service.

13. In the result the Judgment of the High Court is set aside and the appeal is allowed with costs.
Appeal allowed.

AIR 1976 SUPREME COURT 1924

(From: Allahabad)*

Y. V. CHANDRACHUD, R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Subhash and another, Appellants v. State of U. P., Respondent.

Criminal Appeal No. 420 of 1974, D/- 6-5-1976.

(A) Criminal P. C. (1898), Sections 375 and 376 — Reference for confirmation — Duty of High Court. (Criminal Appeal No. 2646 of 1973 and Reference No. 95 of 1973, D/- 27-11-1974 (All), Reversed.)

On a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of Sections 375 and 376 of the Criminal Procedure Code. Under these sections the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. AIR 1957 SC 469; AIR 1962 SC 1239 and AIR 1968 SC 1438, Rel. on. (Para 6)

Held on facts that the High Court failed to show due regard to this position of law. It did not undertake a full and independent examination of the evidence led in the case and it mainly contented itself with finding out whether the Sessions Court had in any manner erred in reaching the conclusion that the charge of murder levelled against the appellants was established beyond a reasonable doubt. While the High Court rightly stated that the main question was whether the son and daughter of the deceased who were examined as witnesses were truthful witnesses, it did not however

subject their evidence to any minute scrutiny. Impressed overbearingly by the circumstance that the Sessions Court "had the opportunity of observing the demeanour" of the witnesses, the High Court apparently thought that such an opportunity gave to the Sessions Court's judgment a mystical weight and authority, even though the Sessions Judge had not, in his judgment or while recording the evidence, made any special reference to the demeanour of the witnesses. The High Court accepted the evidence of children of the deceased by observing that there was no material contradiction in their evidence and that certain statements in the F.I.R. afforded a guarantee that the two witnesses were present when their father was done to death. (Several significant discrepancies in evidence which either escaped the attention of the High Court or were not given due and rightful importance pointed out.) Conviction of the accused set aside. Criminal Appeal No. 2646 of 1973 and Reference No. 95 of 1973, D/- 27-11-1974 (All), Reversed. (Paras 9, 13, 14, 19)

Cases Referred: Chronological Paras

AIR 1968 SC 1438 = (1968) 3 SCR 404 6
AIR 1962 SC 1239 = 1962 Supp (1) SCR 49 6
AIR 1957 SC 469 = 1957 Cri LJ 586 6

Mr. Frank Anthony, Sr. Advocate, M/s. P. C. Agrawala and A. T. M. Sampath, Advocates with him, for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellants, Subhash and Shyam Narain, were convicted by the learned Civil and Sessions Judge, Farrukhabad under Section 302 of the Penal Code on the charge that at about 9 a.m. on June 9, 1972 they committed the murder of one Ram Sanehi. Subhash was sentenced to death and Shyam Narain to imprisonment for life. The judgment of the trial Court having been confirmed in appeal by the High Court of Allahabad, the two accused have filed this appeal by special leave of this Court.

*(Criminal Appeal No. 2646 of 1973 and Referred No. 95 of 1973, D/- 27-11-1974—(All.)).

2. The case of the prosecution is briefly as follows: On the morning of June 9, 1972 the deceased Ram Sanahi had gone to his field along with his son Bal Kishore and his daughter Kusuma Devi for eating Kharbuzas. While they were returning from the field at about 9 a.m. the appellants, who were lying in wait near a culvert, suddenly accosted Ram Sanahi. The appellant Subhash pointed the barrel of his gun towards the chest of Ram Sanahi and said that since he, Ram Sanahi, was a witness against him in a complaint filed by Pooran Lal and since he was also doing Pairvi on behalf of Pooran Lal he would not be allowed to remain alive. The appellant Shyam Narain was armed with a lathi. Bal Kishore and Kusuma Devi pleaded with the appellants to spare their father but Shyam Narain asked Subhash not to delay the matter and finish Ram Sanahi quickly. Subhash thereupon fired three shots from his double-barrelled gun, the last of which misfired. Ram Sanahi fell down, whereupon the appellants dragged him by his legs over a distance of 6 or 7 paces. Bal Kishore and Kusuma Devi then raised an alarm whereupon Brij Bhusan, Shyam Lal, Mangali Prasad and Jhabboo Singh Thakur reached the place of occurrence and challenged the appellants. Before running away, the appellant Subhash told his companion Shyam Narain that he on his own part was going to surrender before a court and that Shyam Narain should make his own arrangements. Ram Sanahi died within about 10 minutes after receiving the injuries.

3. Bal Kishore first went to his house which is at about a distance of 120 yards from the scene of offence. At about 12 O'clock at noon he went to the Kamalganj police station and lodged his First Information Report (Ex. Ka-3). S. I. Vishwanath Sharma who was posted as a 2nd Officer at the police station recorded Bal Kishore's complaint, went to the scene of occurrence, prepared the inquest report and handed over the dead body for being sent for post-mortem examination to the District Hospital at Farrukhabad which is about 10 miles away from

the village of Kandharpur where the incident took place. S. I. Sharma took samples of earth from the place of occurrence and seized a misfired cartridge which was lying concealed in the folds of the deceased's Dhoti. The Fard in that behalf is Ex. Ka-10 and the site-plan is Ex. Ka-11.

4. The appellant Subhash surrendered before the Additional District Magistrate (Judicial) at Farrukhabad at about 4 p.m. on the very day. The appellant Shyam Narain was arrested at about 2.40 p.m. on the same day under Section 122 of the Railway Act for crossing the railway lines at Fatehgarh.

5. The appellants denied the charge that they had committed the murder of Ram Sanahi and stated that they were involved in the case due to enmity. This defence has been rejected both by the Sessions Court and the High Court.

6. Before referring to the evidence in the case it has to be mentioned that the High Court had before it not only the appeal filed by the accused but also a reference made by the Sessions Court for confirmation of the capital sentence under Section 374 of the Code of Criminal Procedure. Time and again this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of Sections 375 and 376 of the Criminal Procedure Code. Under these sections the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court's appraisal and assessment of that evidence. From the long line of decisions which have taken this view it would be enough to refer to the decisions in *Jumman v. State of Punjab*, AIR 1957 SC 469, *Ram Shanker Singh v. State of West Bengal*, (1962) Supp (1) SCR 49 at page 59 = (AIR 1962 SC 1239 at page 1243) and *Bhupendra Singh v. State of Punjab*, (1968) 3 SCR 404 = (AIR 1968 SC 1438).

7. The High Court has failed to show due regard to this well esta-

blished position in law. It did not undertake a full and independent examination of the evidence led in the case and it mainly contented itself with finding out whether the Sessions Court had in any manner erred in reaching the conclusion that the charge of murder levelled against the appellants was established beyond a reasonable doubt. The High Court is right in saying that the main question in the case was whether Bal Kishore and Kusuma Devi who were examined as eye-witnesses were truthful witnesses. But then it did not subject their evidence to any minute scrutiny. Impressed overbearingly by the circumstance that the Sessions Court "had the opportunity of observing the demeanour" of the witnesses, the High Court apparently thought that such an opportunity gave to the Sessions Court's judgment a mystical weight and authority, even though the learned Sessions Judge had not, in his judgment or while recording the evidence, made any special reference to the demeanour of the witnesses. The High Court accepted the evidence of Ram Sanahi's children by observing that there was no material contradiction in their evidence and that certain statements in the F. I. R. afforded a guarantee that the two witnesses were present when their father was done to death. We will now proceed to show how several significant circumstances either escaped the attention of the High Court or were not given their due and rightful importance.

8. First as to the manner in which S. I. Sharma conducted investigation into the case. The offence took place at about 9 a.m. on June 9 and though the District Hospital at Farrukhabad was just 10 miles away, the dead body was not received at the hospital for nearly 24 hours after the incident had taken place. The excuse offered by the prosecution that the cartman was not willing to take the body at night is utterly flimsy because the Investigating Officer could have easily made some alternate arrangement for despatching the dead body for post-mortem examination expeditiously. With the dead body lying

at the scene of offence for nearly 12 hours and thereafter at the police station for another 8 or 9 hours, it was easy enough for the witnesses to mould their statements so as to accord with the nature of injuries. The Investigating Officer did not make any note at all in the General Diary as to which witnesses were examined by him on the date of the occurrence which was obligatory upon him to do under paragraph 44 of the U. P. Police Act. The time when the investigation was commenced and the time when it was concluded are not mentioned in the case diary. The time when the Investigating Officer reached the village and the time when he returned to the police station are also not noted in the case diary. S. I. Sharma stated in his evidence that several important facts concerning the investigation were being stated by him in his evidence from memory. He reached the scene of offence at about 2.30 p.m. but it was not until about 6 p.m. that he inspected the site. The dead body was not removed from the scene of offence till about 9 p.m. and even that is open to grave doubt because the Investigating Officer has admitted in his evidence that he was unable to say as to when the dead body was taken away from the spot and whether it was taken directly to the hospital or was detained somewhere on the way. He was unable to say whether it was right or wrong that the dead body remained in the village till about 4 O'clock on the morning of the 10th. Forty or fifty persons had gathered at the scene of offence when the Investigating Officer arrived but the record of the case does not show that the statement of any of those persons was ever recorded. In fact even the statement of Kusuma Devi was recorded late at night for which the reason is stated to be that her elder sister Pushpa Devi died of shock on the evening of the 9th after hearing of her father's murder. It may be that Pushpa Devi died on the 9th, but apart from the cause of her death, the statement of Kusuma Devi need not have been held up so long. We are doubtful if the Investigating Officer at all knew on the 9th that

Pushpa Devi had died. He has admitted that his knowledge in that behalf was derived from hearsay reports. The appellant Subhash had surrendered before the Additional District Magistrate, Farrukhabad on the afternoon of the 9th itself while the other appellant Shyam Narain was arrested at Fatehgarh at about 2.40 p.m. The Investigating Officer did not even know of these significant developments, though they had taken place just a few miles away from the scene of investigation. He says that he learnt of the surrender and the arrest of the appellants on the evening of the 12th. Mangali Prasad has been examined by the prosecution as an eye-witness and his name is mentioned in the F. I. R. as one of the four persons who arrived at the scene of offence even before the appellants had run away. His statement was recorded 11 days late on June 20. The F. I. R. mentions expressly that the appellants caught hold of the legs of the deceased and started dragging him. The Investigating Officer has not stated in the Panchnama of the scene of offence whether the ground was soft or hard or sandy which had great relevance on the allegation that the deceased was dragged over a certain distance. Finally, it is surprising that the Investigating Officer did not think it worthwhile to pay a visit to the field where the deceased is alleged to have gone with his children for eating Kharbuzas. Indeed, he stated that he was not in a position to say if there were Kharbuzas at all in the field, when the occurrence took place.

9. The High Court has condoned these lapses on the part of the Investigating Officer with the observation that he "appears to have been inexperienced and somewhat negligent." The Investigating Officer has stated in his evidence that he had put in 7 years of service. It is difficult to understand on what basis the High Court attributed the lapses on his part to mere inexperience. We will presently indicate the significance of the various lapses and loopholes in investigation but to say, as the High Court has done, that the Investigating Officer was "somewhat

negligent" seems to us in the circumstances a grave euphemism.

10. We will now proceed to deal with the various circumstances which, in our opinion, render it unsafe to accept the prosecution case.

11. Dr. S. C. Pandiya who performed the post-mortem examination has described in his evidence the injuries received by Ram Sanehi. In all he found 7 injuries on the dead body, out of which injuries 1, 3 and 7, injuries 2 and 4, and injuries 5 and 6 are interconnected. Injury No. 1 is described as a "shot wound" with its entry above the left nipple. Injury No. 3 is described as multiple rounded abrasions on the left side of the chest. Injury No. 7 is the wound of exit on the right scapular region, corresponding to injury No. 1. Injury No. 2 consists of 8 gun-shot wounds of entry below the right nipple while injury No. 4 consists of multiple rounded abrasions above the right nipple. Injury No. 5 is a gun-shot wound of entry on the back of the left forearm while injury No. 6 is the corresponding wound of exit near the ulnar aspect of the left forearm.

12. The evidence of Dr. Pandiya and the description of the injuries given by him in the post-mortem report tend to show that two different kinds of firearms were used by the assailants of Ram Sanehi. Injury No. 1 was caused by a bullet and that is clear not only from the description of the injury but from what Dr. Pandiya has stated in his evidence. He says: "The bullet, which had entered through injury No. 1 went out straight after emerging from injury No. 7". Injuries Nos. 2 and 5 were caused by pellets. This shows that whereas injury No. 1 was caused by a firearm in the nature of a rifle, injuries 2 and 5 were caused by an ordinary gun. The medical evidence thus falsifies the eye-witnesses' account according to which, the appellant Subhash alone was armed with a double-barrelled gun, the other appellant Shyam Narain being armed with a lathi. The objective inference arising from the nature of injuries received by the deceased has a significant impact on the case of the prosecution, which

has been overlooked by both the Sessions Court and the High Court.

13. While we are on the medical evidence it would be appropriate to mention that there was no tattooing or charring on any of the firearm injuries which, according to the doctor, shows that the firing was done from a distance of more than 4 feet. In the First Information Report Bal Kishore has stated that as soon as he, his father and sister, reached the culvert, Subhash "touching the chest" of Ram Sanehi "with the barrel of his gun" said that he shall not leave him alive. Shyam Narain thereupon exhorted Subhash not to delay and fire immediately; Subhash then fired three shots in quick succession, one of which misfired. The trend of the F. I. R. is that Subhash fired the first two shots at Ram Sanehi from a point blank range, in which event, indisputably, there would have been tattooing and charring around the injuries. Bal Kishore has attempted to offer an explanation that what he meant to say in his complaint was that Subhash trained his gun "towards" Ram Sanehi's chest and not "on" his chest. This explanation is an after-thought and in the circumstances difficult to accept. Thus in another important respect, the medical evidence falsifies the case of the prosecution.

14. There is another aspect of the medical evidence which, though, not as important as the two aspects mentioned above, may also be referred to. The case of the prosecution is that Ram Sanehi had gone to his Kharbuza field with his son and daughter for eating Kharbuzas. There is evidence that they did eat Kharbuzas and almost immediately thereafter they started back for home. Within less than 5 minutes, Ram Sanehi met with his death near the culvert. The post-mortem report shows that Ram Sanehi's stomach was empty which means that the evidence that he had eaten Kharbuzas just a little time before his death is untrue. Bal Kishore tried to wriggle out of this situation by saying that Ram Sanehi had eaten just a small slice of Kharbuza. But even there, Dr. Pandiya has stated that if the entire slice of Kharbuza was eaten by Ram Sanehi, its remains

would be found in the stomach provided there was no vomiting after the gun-shot injuries. Since Ram Sanehi had not vomited, his large intestines could not have been found to be empty if the story of his children was true.

15. This last circumstance may at first sight seem trivial but its importance consists in the fact that the visit of Ram Sanehi, along with his children, to the Kharbuza field for the purpose of eating Kharbuzas is the very genesis of the incident which happened on June 9, 1972. Coupled with the circumstance that the Investigating Officer did not even pay a visit to the Kharbuza field, leave alone making a Panchnama thereof, the conclusion is irresistible that the story that the children had accompanied their father to the Kharbuza field lacks a factual basis.

16. The other circumstances which render the prosecution case suspect are these: (1) Ram Sanehi is alleged to have been dragged over 6 or 7 paces by the appellants but not even an abrasion was found on his back or stomach which could be attributed to dragging. (2) Thirty or forty persons are alleged to have collected at the scene of occurrence but Bal Kishore was not able to mention the name of even one of them and it is common ground that the Investigating Officer did not record the statement of any of them. (3) Jhabboo Singh, Shyam Lal, Brij Bhushan and Mangali Prasad reached the scene of offence even before the appellants had fled away but none from amongst the first three was examined by the prosecution. Mangali Prasad was examined as an eye-witness but he has been concurrently disbelieved by the Sessions Court and the High Court. (4) Though the motive of the offence is alleged to be that in a complaint filed by Pooran Lal against the appellant Subhash, the deceased Ram Sanehi was cited as a witness, Mangali Prasad's evidence shows that immediately after the firing, Bal Kishore told him that Ram Sanehi was murdered because of the disputes concerning the election to the Pradhanki. What Bal Kishore told Mangali Prasad im-

mediately after the incident seems more probable because, one Virendrapal had contested that election and the appellant Subhash had defeated him. When Bal Kishore went to lodge his F. I. R. at the police station he was accompanied by Virendrapal, though an attempt was made to show that Virendrapal was only standing outside the police station and had met Bal Kishore accidentally. (5) The story of Bal Kishore that after the appellant Subhash fired 2 shots he re-loaded his gun but the re-loaded cartridge misfired makes hardly any sense. Subhash was armed with a double barrelled gun and having fired 2 fatal shots from a close range at his target, it is unlikely that he would re-load the gun and that too with only one cartridge. And if that cartridge misfired, it is impossible to understand how it could be found concealed in the folds of Ram Sanahi's dhoti.

17. There is only one other aspect of the matter which remains to be considered and since the High Court has placed great reliance thereon, it is necessary to deal with it. The F. I. R. which was lodged at about 12 O'clock at noon on the 9th itself mentions that after Ram Sanahi was murdered, the appellant Subhash told his companion Shyam Narain that he himself was going to surrender before a court and that Shyam Narain should make his own arrangement. In fact, Subhash did surrender in the court of the Additional District Magistrate, Farrukhabad, at about 4 p.m. on the 9th. What the High Court has overlooked is that Subhash did not surrender in connection with the murder of Ram Sanahi but he surrendered along with the 13 or 14 other accused against whom Pooran Lal had filed a complaint. In so far as Shyam Narain is concerned, the High Court is wrong in saying that he managed somehow to get himself arrested. The evidence of Constable Virendra Singh shows that Shyam Narain was arrested because he was crossing the railway lines and if he was not caught, he would have been run over by the two trains coming from Kanpur and Farrukhabad. This was hardly any sensible way of making an "arrangement" for himself, as

directed by Subhash. It is therefore not as if the statement attributed to Subhash in the F. I. R. is corroborated by subsequent events so as to afford a guarantee to Bal Kishore's presence at the culvert.

18. We are conscious that the Sessions Court and the High Court have both held that the appellants committed the murder of Ram Sanahi but the weight of the circumstances which we have discussed above is so preponderating that even the concurrent finding cannot be allowed to stand. In any event, it seems to us impossible to hold that the prosecution has established its case beyond a reasonable doubt.

19. We therefore allow this appeal, set aside the order of conviction and sentence recorded by the High Court and the Sessions Court and direct that the appellants shall be set at liberty.

Appeal allowed.

AIR 1976 SUPREME COURT 1929

(From: 1975 Mah. Cri. R. 227)

V. R. KRISHNA IYER AND P. K. GOSWAMI, JJ.

Murlidhar Meghraj Loya etc.,
Appellants v. State of Maharashtra
etc., Respondents.

Criminal Appeals No. 314-315 of
1976, D/- 19-7-1976.

(A) Prevention of Food Adulteration Act (1954), Ss. 16 (1) Proviso, 2 (i) (a) and (1) and 7 (v) — Prevention of Food Adulteration Rules (1955), Rr. 44 (e) and A 17.12 — Sale of khurasani oil — Sample oil mixed with 30% ground nut oil — Offence is under Ss. 2 (i) (a) and 7 (v) for breach of Rule 44 (e) — Proviso not applicable.

Judicial compassion can play upon the situation only if the offence is under sub-cl. (i) of cl. (a) of Section 16 (1) and the adulteration is one which falls under sub-cl. (1) of cl. (i) of Section 2. Secondly, the proviso also applies if the offence is under sub-cl. (ii) of cl. (a) that is to say, the offence is not one of adulteration but is made up of a

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contravention of any of the other provisions of the Act or of any rule made thereunder. Where the accused is guilty of an offence of adulteration of food under Section 2 (i) (a) the Proviso (ii) to Section 16 (1) is not applicable. Proviso (i) to that Section is also not applicable to the case because the only sensible understanding of proviso (i) is that judicial jurisdiction to soften the sentence arises if the offence of adulteration falls only under sub-cl. (1) of cl. (i) of Section 2. (Para 9)

If the miller accused crushed khurasani as well as the ground nuts in the same mill the process may result in the residue of one getting mixed up with the next. May be, innocently some groundnut oil, in the case, got into the khurasani oil by the same expeller handling both. Even so, the presence of 30% groundnut oil is, perhaps, too high an admixture to be explained away this easy way. While the Court could appreciate the situation it must adhere to the provision. Where the law lays down an absolute liability, alibis cancelling mens rea are out of bounds. (Para 16)

Further, the facts that actually groundnut oil costs more and so profit motive stands negated and that the mixture of these edible oils, though technically forbidden is in fact non-injurious are probably right but ex necessitate legis the court has to inflict the heavy minimum sentence. 1975 Mah Cri R 227, Affirmed. (Para 17)

(B) Interpretation of Statutes — Drafting of statutes — Obscurity to be avoided — (Prevention of Food Adulteration Act, 1954, Pre.)

The clumsy draftsmanship displayed in a statute which affects the common man in his daily bread has to be deplored. It is unfortunate that easy comprehensibility and simplicity for the laity are discarded sometimes through over-sophisticated scholarship in the art of drawing up legislative bills. It cannot be overstressed that a new orientation for drafting methodology adopting directness of language and avoiding involved reference and obscurity is overdue. (Para 9)

Cases Referred: Chronological Paras
(1932) 42 Yale LJ 1

M. C. Bhandare, Sr. Advocate, (Mrs. Sunanda Bhandare and M/s. M. S. Narashimhan, A. K. Mathur and A. K. Sharma, Advocates with him), for Appellants; Mr. M. N. Phadke, Sr. Advocate and Mr. M. N. Shroff, Advocates with him, for Respondents.

Judgment of the Court was delivered by

KRISHNA IYER, J.:— Judicial fluctuations in sentencing and societal seriousness in punishing have combined to persuade Parliament to prescribe inflexible, judge-proof, sentencing minima in the Food Adulteration law. This deprivatory punitive strategy sometimes inflicts harsher-than-deserved compulsory imprisonment on lighter offenders, the situation being beyond judicial discretion even if prosecution and accused consent to an ameliorative course. The two appeals, by special leave, partially illustrate this proposition. Khurasani oil is an edible oil extracted by crushing oil seeds in mills. Groundnut oil, also edible, is expressed likewise. A firm by name Balmukand Hiralal Loya and Co., in a minor town in Maharashtra, runs an oil mill where khurasani oil and groundnut oil are manufactured by the firm. Sometimes they crush oil seeds for others on hire who pay milling charges.

2. The appellants in Criminal Appeal No. 314 are the managing partner and the manager of the mill and the appellant in Criminal Appeal No. 315 is the operator of the expeller in the mill who actually sold the offending commodity. On February 16, 1972 the Food Inspector of Bhagur Municipality walked into the sales section of the Mill, asked for 375 grams of khurasani oil from accused No. 8, appellant in Criminal Appeal No. 315. The quantity required was supplied and, thereafter, the Food Inspector went through the statutory exercises preparatory to an analysis by the Public Analyst. After receiving the report of the analyst to the effect that the sample of khurasani oil sent for analysis contained 30% of ground-nut oil which amounted to a contravention of Rule 44 (e) of the Prevention of Food Adulteration Rules (for short, the Rules) a complaint was lodged for

selling adulterated food within the meaning of Section 2 (i) of the Prevention of Food Adulteration Act (hereinafter called the Act) read with Sections 7 (1) and 16 (1) (a) and Rule 44 (e). Evidence was led to make out a prima facie case. The accused were questioned under Section 342, Cr. P. C., and the appellants confidently pleaded guilty to the charge whereupon the trial Magistrate, perhaps agreeably to expectations, sentenced them each to a piffling fine of Rs. 250/-. Although the whole process in court is strongly suggestive of a tripartite consensual arrangement and reminds one of plea-bargaining procedures in the United States of America, the State Government appears to have taken a serious view of the matter, outraged as it was by the Magistrate's adroit avoidance of those penal provisions which obligate him to inflict a minimum prison sentence, viz., Section 2 (i) (a) and Section 16 (1) with a view to apply the proviso to Section 16 (1). This is, at best, a conjecture about the Magistrate and might as well be imputed to the prosecutor and the food inspector. However, the State filed a revision to the High Court against the illegal and ultra-lenient impost. The revisional Judge converted the offence into one under Section 2 (i) (a) read with Section 16 (1) and enhanced the sentence to the minimum of six months and Rs. 1,000/- by way of fine on the ground that the offence committed by the accused squarely fell within Section 16 (1) (a) and did not fall within the proviso of that provision which vests a guarded discretion in the Court to soften the sentence to special cases. The appellants, shocked by this drastic reversal of fortune at the High Court's hands, have sought restoration of the Magistrate's conviction and sentence. If this aggravated conviction is correct, the enhanced punishment is inescapable.

3. The circumstances leading up to and constituting the offence have been briefly set out already and the divergence between the trial Court and the High Court turns on the legal inference to be drawn from the factual matrix. Has there been adulteration of food, in the sense

imputed to that expression by Section 2 (i) (a)? Assuming it falls under Section 2 (i) (1) of the definition, does that factor exclude it from Section 2 (i) (a)? Even if Section 2 (i) (a) does apply, is the benignant proviso to Section 16 (1) attracted on the score that the crime in this case constitutes a violation of Rule 44 (e) prescribing minimum standards? These questions are crucial to the submission made by Shri Bhandare for the appellants, his argument being that the scheme of Section 2 is to erect separate compartments for the many types of adulteration so that if a food article is adulterated within the meaning of Section 2 (i) (1) more appropriately, it falls outside the ambit of Section 2 (i) (a). Otherwise, he argues, there is no point in itemising the various sub-divisions even though he concedes that marginally there may be overlapping among the sub-clauses. He further contends that even assuming that Section 2 (i) (a) is all-comprehensive, it must be read as the genus and thereafter sub-clauses (b) to (l) fall under two broad categories, viz., adulteration where injurious substances have been admixed and adulteration where innocent additions have been made or the substance sold merely violates a standard or degree of purity prescribed. If there were force in this submission, the culpa, according to counsel, could reasonably fall under the non-injurious type of adulteration covered by Section 2 (i) (l). The statute, says Shri Bhandare, sensibly dichotomises the sentence and invests a discretion in the court in the second category to reduce the sentence below the minimum stipulated, if special reasons exist for such clemency. Of course, counsel concedes that if the adulteration is of the injurious brand, judicial sympathy is statutorily supplanted. This, he reasons, fits into and explains the scheme of Section 16 which is a penal provision with dual limbs.

4. We will examine the validity of this interpretative dissection. Indeed, if this somewhat strained argument fails, everything fails because, otherwise, the appellants have glibly convicted themselves, out of their own mouth, by an unusually

obliging 'yes' to every material question under Section 342, Cr. P. Code. Thus, on the merits, the sole question is about the proper offence made out on the facts admitted. This, in turn, depends on the acceptability of the interpretative dexterity displayed by counsel for the appellants.

5. It is trite that the social mission of Food Laws should inform the interpretative process so that the legal blow may fall on every adulterator. Any narrow and pedantic, literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefitting accused persons and defeating criminal statutes calculated to protect the public health and the nation's wealth. This humanist approach and cute construction persuades us to reject Shri Bhandare's analysis of Section 2 (i). Sub-clause (a) of Section 2 (i) has a wide sweep and loyalty to the intentment of the statute forbids truncating its ambit. There cannot be any doubt that if the article asked for is 100% khurasani oil and the article sold is 70% khurasani oil and 30% groundnut oil the supply 'is not of the nature, substance or quality which it purports or is represented to be.' The suggestion that there is no formal evidence of representation or prejudice as stated in the section does not merit consideration being a quibble over a trifle.

6. If we read Section 2 (i) (a) spaciouly and if the facts alleged are accommodated by the definition of 'adulteration' under that sub-clause, Section 16 (1) is attracted. The first proviso to Section 16 (1) will be attracted if and only if Section 2 (i) (1) applies. In the present case the facts disclose that the offence is both under Section 2 (i) (a) and under Section 7 (v) for breach of Rule 44 (e). Section 2 (i) (1) is repelled on the facts and it is obvious that this is not a case where either Sec. 2 (i) (1) or Rule A 17.12 urged by Shri Bhandare applies. In this view it is not possible to invoke the amelioratory proviso to Section 16 (1) and

the High Court is legally right in its conversion of the provision for conviction and enhancement of the sentence.

7. We unhesitatingly hold that if Section 2 (i) (a) adequately fits in, adulteration under that provision must be found.

8. Once this position is made plain, the penalty that the appellants must suffer is fool-proof. Section 16 lays down the penalties and classifies them. We are particularly concerned with Section 16 (1) of the Act which itself clubs together many categories out of which we have to pick out only two for the purposes of this case, viz., (i) sale of any article of food which is adulterated; and (ii) sale of any article of food other than one which is adulterated — 'in contravention of any of the provisions of this Act or of any rule made thereunder.' Ordinarily, both these classes of offences are punishable with the minimum prescribed 'of not less than six months' imprisonment, together with fine which shall not be less than Rs. 1,000/-.' However, there is a kindly proviso which confers on the court a power to be exercised for any adequate and special reasons to be mentioned in the judgment whereby a sentence of imprisonment for a lesser term than six months or of fine smaller than Rs. 1,000/- or of both may be imposed, but this more moderate punitive net is conditioned by the proviso itself. We may read the proviso:

"Provided that—

(i) if the offence is under sub-clause (i) of clause (a) and is with respect to an article of food which is adulterated under sub-clause (1) of clause (i) of Section 2 or mis-branded under sub-clause (k) of clause (ix) of that section; or

(ii) if the offence is under sub-clause (ii) of clause (a) the court may for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or of fine of less than one thousand rupees or of both imprisonment for a term of less than six months and fine of less than one thousand rupees."

9. Judicial compassion can play upon the situation only if the

offence is under sub-cl. (i) of cl. (a) of Section 16 (1) and the adulteration is one which falls under sub-cl. (1) of cl. (i) of Section 2. Secondly, the proviso also applies if the offence is under sub-cl. (ii) of cl. (a), that is to say, the offence is not one of adulteration but is made up of a contravention of any of the other provisions of the Act or of any rule made thereunder. In the present case we have already found that the accused is guilty of an offence of adulteration of food under Section 2 (i) (a). Therefore, proviso (ii) is out. Proviso (i) will be attracted, according to Shri Bhandare, if Section 2 (i) (1) applies to the species of adulteration committed. In our view, the only sensible understanding of Proviso (i) is that judicial jurisdiction to soften the sentence arises if the offence of adulteration falls only under sub-cl. (1) of cl. (i) of Section 2 and we have held that it does not. We cannot but deplore the clumsy draftsmanship displayed in a statute which affects the common man in his daily bread. It is unfortunate that easy comprehensibility and simplicity for the laity are discarded sometimes through over-sophisticated scholarship in the art of drawing up legislative bills. It cannot be overstressed that a new orientation for drafting methodology adopting directness of language and avoiding involved reference and obscurity is overdue. Be that as it may, in the present case Section 2 (i) (a) applies and Section 16 (1) (a) has been breached. Therefore the proviso cannot be applied in extenuation and the conviction of the High Court has to be upheld.

10. The possibility of long argument in a case where the accused has pleaded guilty arises because the provision lends itself to adroit exercises. The court has to look at the interpretative problem in the social setting of the statute, visualising the rough and tumble of the market place, the finesse with which clever victuallers fob off adulterated edibles and gullible buyers goofily fall victim. Viewed this way, chasing recondite semantics or niceties of classification or chopping of logic has no scope for play.

11. The appeals must fail, without more. But we have to take note of a few circumstances of significance brought to our notice by counsel for the appellant with which the State's counsel could not express serious disagreement, although he made no concessions.

12. We now proceed to refer to these factors which do not deflect us from confirming the conviction. The curtain has been drawn thereon.

13. To begin with, we are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of nolo contendere stance. Many economic offenders resort to practices the Americans call 'plea bargaining', 'plea negotiation', 'trading out' and 'compromise in criminal cases' and the trial Magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail.' These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The jurists across the Atlan-

tic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a sentence concession to a defendant who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him':

"In civil cases we find compromises actually encouraged as a more satisfactory method of settling disputes between individuals than an actual trial. However, if the dispute finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must "enforce the law." Therefore open methods of compromise are impossible."

(Arnold, *Law Enforcement — An Attempt at Social Dissection*, (1932) 42 Yale LJ 1, 19).

14. We have no sanction, except surreptitious practice in some courts, for 'trading out' of punitive severity although this aspect of the criminal system deserves Indian jurists' consideration. The sole relevance of this digression in this judgment is to highlight the fact that the appellants perhaps acted on an expectation which came to pass at the trial level but was reversed at the appellate level and this touch of 'immorality' in the harsh morality of the punishment is a factor counsel wants us to take note of. But we can do nothing about it when the minimum is set by the statute, except to state that the State must do its duty by justice to the citizen and relieve overworked courts by more judicial agencies and streamlined procedures instead of leaving the uninformed public blindly to censure delayed disposals.

15. One real reason for long litigation is inaction or ineffective action of the Legislature. All knowledgeable law-man may concede that the procedures in municipal and higher courts are ossified to the point, priced to the level, and slow to the degree where they cannot flexibly assist disputants in early resolution of their everyday disputes. This, we hope, will change and the source of the evil eliminated.

16. The next draft on the court's commiseration, made by counsel, is based on the milling operation realities surrounding the commission of the crime. It is asserted by the appellant's advocate — and not seriously controverted by his opponent — that the small town milling practice is multi-purpose, in the sense that whoever brings any edible oil-seed for extraction of oil gets it done so that ground-nut crushing may be followed by khurasani seed or some other oil seed may chance to take turns by rotation. Even the miller's own oil seeds may be sometimes khurasani, at other times, some other. This process may result in the residue of one getting mixed up with the next. Maybe, innocently some groundnut oil, in the present case, got into the khurasani oil by the same expeller handling both. Even so, the presence of 30% groundnut oil is, perhaps, too high an admixture to be explained away this easy way. While we appreciate the situation we must adhere to the provision. Where the law lays down an absolute liability, alibis cancelling mens rea are out of bounds.

17. The last plea, urged ex mesericordium, ameliorative in appeal and unavailing against conviction, is that actually groundnut oil costs more and so profit motive stands negatived, that the mixture of these edible oils, though technically forbidden, is in fact non-injurious and a terrifying term of six months' rigorous imprisonment is unjust. The facts are probably right but ex necessitae legis the court has to inflict the heavy minimum sentence. While in stray cases a jail term even in a trivial food offence may look harsh, Parliament, in its wider wisdom, and having regard to social defence in a sensitive area, standardised the sentence by insisting on a minimum, ignoring exceptional cases where leniency is needed. Individual hardships deserving of lighter sentence are sometimes exploited by counsel's persuasion and judicial horror to secure for deliberate offenders milder punishments. It is worthy of note though that in the present case the mixing of the two oils is a motiveless act. Maybe. And the circumstances above-mentioned add up

to a plea for paring down the sentence and Shri Bhandare, for the appellants, sought to wheedle us into lending credence to these circumstances and bring down the offence to a lesser one. Logically and sociologically and, above all, legally, such a course is impermissible. Nevertheless, there is one circumstance which has impressed us not to the extent of undoing the sentence imposed by the High Court but of drawing the attention of the top executive to what may justly be done by way of remission of sentence. The appellants have sworn an affidavit in this court stating that khurasani oil is the same as nigar-seed oil. This is backed by a certificate from the Maharashtra Chamber of Commerce and is evidently correct. What is more important is that the appellants, when surprised by a modification of their sentence to a heavier one for what they thought was underserving, moved in the matter of cases generally of adulteration of khurasani oil with groundnut oil. They drew the attention of the authorities to punishment of innocents and it appears that the State government was satisfied about this grievance and has since withdrawn a substantial number of cases against dealers of khurasani oil whose sales were contaminated with presence of groundnut oil. The affidavit on behalf of the appellants states:

"I further say that various cases filed by the respondents against the dealers of khurasani oil are now being withdrawn as invariably groundnut oil is observed in khurasani oil. I crave leave to refer to and rely on the Journal of Maharashtra Chamber Patrika dated 21st September, 1975, when produced." Probably, had the present case survived till the government took action, it might have been withdrawn. Moreover, there are circumstances suggesting of innocent admixture although it is beyond us to pronounce definitely on this aspect and it is not for us to enquire into the matter when Section 16 (1) is clear and the sentence is legal. Nevertheless, it may be appropriate for government to consider whether in the circumstances of this case — and in the

light of the observations made by us in this judgment — it is not a matter for exercise of commutation powers. Sentencing policy has a punitive and a correctional role and we are sure that what is the need of the appellants will be meted out to them if they deserve any activist administrative sympathy at all.

18. We accordingly dismiss the appeals.

Appeals dismissed.

AIR 1976 SUPREME COURT 1935

(From: (1) (1969) 74 ITR 353 (Guj),
(2) (1973) 88 ITR 96 (Mad))

H. R. KHANNA, V. R. KRISHNA
IYER AND P. K. GOSWAMI, JJ

Civil Appeal No. 1095 of 1970:
(1) The Controller of Estate Duty,
Gujarat, Appellant v. Shri Kantilal
Trikamlal, Respondent.

Civil Appeal No. 1677 of 1973: (2)
R. Ranganayaki Ammal and others,
Appellants v. The Controller of Estate
Duty, Madras, Respondent.

Civil Appeal No. 1095 of 1970,
Civil Appeal No. 1677 of 1973, D/-
19-7-1976.

(A) Estate Duty Act (1953), S. 2
(15) Explanation 2 and Sections 9
(1) and 27 — 'Property' — 'Disposition'
— Hindu Joint family property
— Partition by deceased within 2
years before his death — Deceased
taking lesser share than his entitlement
— Whether disposition in favour of
relatives — Difference between value of
deceased's share and what he actually
received — Whether a 'gift' — Difference
in value whether chargeable to estate duty.
(1969) 74 ITR 353 (Guj), Reversed.

The deceased person, being a member of a joint Hindu family, within two years before his death, entered into a partition of family properties whereby he received towards his share an allotment substantially lower in value than would be his legal entitlement.

Held that there was a disposition by the deceased of his interest

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in the family properties in favour of his relatives. It was by reason of Section 27 (1) liable to be treated as a gift under Section 9 (1). The difference between the value of the deceased's share and what was actually received by him was includible in the principal value of the estate of the deceased and was liable to be taxed as disposition of property under the Act. (Case law discussed). (1969) 74 ITR 353 (Guj), Reversed. (1973) 88 ITR 96 (Mad), Affirmed; (1969) 73 ITR 806 (Mad), Approved.

(Paras 20, 23)

The definition of 'property' in Section 2 (15) has to inform and must be read along with Section 9 and Section 27 and cannot be functional in isolation. It is not a substantive rule of law operative by itself. The expression 'disposition' in Section 9 must be read with the definition in Explanation 2 to Section 2 (15) since that is the whole purpose of a 'deeming provision' in the shape of a definition. (Para 17)

The proposition is trite that in an undivided Hindu family coparceners have no predictable or defined shares but each has an antecedent title in every parcel of property and is jointly the owner and in enjoyment with the others. But at the very moment members decide upon a partition eo instanti, a division in status takes place whereupon the share of the demanding member gets crystallised into a definite fraction and if there is division by metes and bounds the allotment of properties vivifies and specifies such shares in separate ownership. These two processes or stages may often get telescoped when by consensus the coparceners jointly divide the properties. Unequal divisions of properties knowingly made may not spell invalidity and mathematical equality may not be maintained always in a partition while, ordinarily, substantial fairness in division is shown.

(Paras 17, 18)

In a taxing statute one has to look merely at what is clearly said. There is no room for any intentment. There is no equity about a tax. The framers of the Estate Duty Act desired by a deeming provision regarding 'disposition' to cover ex-

tinguishments of debts and all other rights at the expense of and made by the deceased in favour of the beneficiary. The substantive definition of 'property' in Section 2 (15) is not exhaustive but only inclusive and the supplementary operation of Explanation 2 takes in what is not conventionally regarded as 'disposition'.

(Para 20)

The peculiar definition of 'disposition' injecting a triple hypothesis and fictional expansion covers the diminution in the share taken by the coparcener and augmentation of the share taken by the other and impresses the stamp of property on this process by the 'deeming' provision. Sections 9 and 27 strengthen this conclusion. Section 9, dealing with gifts, takes in property under a disposition made by a deceased, throwing up the question 'what is a gift?' Section 27 supplies the answer: 'any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of this Act as a gift', unless, of course, it is made for full consideration.

(Paras 25, 26)

So far as dispositions made within two years of the death of the deceased are concerned, there is no question of mala fides or bona fides. All such transactions are caught within the coils of Section 5 read with Sections 9 and 27. The requirement of 'bona fides' in Section 9 has nothing to do with dispositions within 2 years and has much to do with those beyond 2 years. The marginal obscurity in Section 9 is due perhaps to compressed draftsmanship.

(Para 28)

Cases Referred: Chronological Paras

AIR 1974 SC 923 = (1974) 4 SCC	30
710	
AIR 1973 SC 2484 = 89 ITR	261
	14, 26
AIR 1971 SC 2410 = (1971) 82 ITR	
599 = 1971 Tax LR 1743	14, 22,
	26
(1969) 73 ITR 806 (Mad)	23
(1958) 34 ITR (ED) 47	24, 25
(1949) 78 CLR 199	27

Mr. S. C. Manchanda, Sr. Advocate and Mr. R. N. Sachthey, Advocate with him, for Appellant (In CA No. 1095 of 1970); Mr. K. H.

Kaji, Sr. Advocate and Mr. I. N. Shroff, Advocate with him, for Respondent (In C. A. No. 1095 of 1970); Mr. S. T. Desai, Sr. Advocate and Mr. J. Ramamurthi, Advocate with him for Intervener.

Mr. S. T. Desai, Sr. Advocate and Mr. J. Ramamurthi, Advocate with him, for Appellant (In C. A. No. 1677 of 1973); Mr. S. P. Nayar Advocate, for Respondent (In C. A. No. 1677 of 1973).

Judgment of the Court was delivered by

KRISHNA IYER, J.— Is it permissible for judges to speculate on the philosophical edge of a human problem hidden by the litigative screen before settling down to examine its forensic facet? If it is, we may make an observation about the question posed in this case without pejorative implications. For many men in advancing age arrives a stage in life when 'to be or not to be' stampedes them into doing things dubious before God and evasive before Caesar — and we have a hunch both the appeals before us smack of such a disposition as will be evident when the narration of facts and discussion of law unfold the story.

2. A brief statement of the circumstances leading to the single critical legal issue, proliferating into a plurality of points, may now be made. We begin with the facts in the Gujarat Appeal (Kantilal Trikamlal, (1969) 74 ITR 353 (Gui)) since the Madras Appeal (Ranganayaki Ammal: (1973) 88 ITR 96 (Mad)) raises virtually the same question, is plainer on the facts and may conveniently be narrated immediately after. To appreciate the complex of facts we choose to enunciate the principal proposition of law canvassed before us by the Revenue in the two appeals. Does a relinquishment by a decedent of a slice of a share on a partition of joint property in such manner that he takes less than his due effected within two years of his death with a view to relieve himself of a part of his wealth and pro tanto to benefit the accountable person, a near relation, have to suffer estate duty under the Estate Duty Act, 1953 (for brevity, the Act)?

3. One Trikamlal Vadilal (hereinafter referred to as the deceased) and his son Kantilal (referred to later as the accountable person) constituted a Hindu undivided family. They continued as members of a joint and undivided Hindu family until November 16, 1953 when an instrument styled 'release deed' was executed by and between the deceased and Kantilal. Considerable controversy between the parties turns on the interpretation of this instrument and it will therefore be necessary for us to refer to its terms briefly later. Suffice it to state for the present that, under this instrument, a sum of rupees one lakh out of the joint family properties was taken by the deceased in lieu of his share in the joint family properties and he relinquished his interest in the remaining properties of the joint family which were declared to belong to Kantilal as his sole and absolute properties and Kantilal also, in his turn, relinquished his interest in the amount of rupees one lakh given to the deceased and declared that the deceased was the sole and absolute owner of the said amount. Within two years from the date of this instrument, on June 3, 1955 the deceased died and on his death the question arose as to what was the estate duty chargeable on his estate. Kantilal, who is the accountable person before us, filed a return showing the status of the deceased as individual and the principal value of the estate as Rs. 1,06,724. The Assistant Controller was, however, of the view that the instrument dated November 16, 1953 operated as relinquishment by the deceased of his interest in the joint properties in favour of Kantilal and that the consideration of rupees on lakh for the one-half share of the deceased in the joint family properties at the date of the said instrument was Rs. 3,44,058 and there was, therefore, a disposition by the deceased in favour of a relative for partial consideration and it was, accordingly, by reason of Section 27, sub-section (1), liable to be treated as a gift for the purpose of Section 9, sub-section (1), and its value, viz., Rs. 3,44,058 after deducting Rupees 1,06,724 (being the amount received by the deceased together with

interest) was includible in the principal value of the estate of the deceased. The Assistant Controller, accordingly, included a sum of Rupees 2,37,334/- being the difference between Rs. 3,44,058/- and Rs. 1,06,724/- in the principal value of the estate of the deceased.

4. On appeal by the accountable person, the assessment made by the Assistant Controller was confirmed by the Central Board of Revenue. Though the main ground on which the Central Board based its decision was the same as that which found favour with the Assistant Controller, viz., that under the instrument there was a disposition by the deceased of his interest in the joint family properties in favour of Kantilal for partial consideration and it was therefore by reason of Section 27, sub-section (1), liable to be treated as a gift for the purpose of Section 9, sub-section (1). Another argument also appealed to the Central Board and that was one based on Section 2 (15), Explanation 2. The Board held that, in any event, under the instrument there was extinguishment at the expense of the deceased of his interest in the joint family properties and there was therefore a deemed disposition by the deceased of the benefit which accrued to Kantilal as a result of such extinguishment and the charge to estate duty was accordingly attracted under Section 9, sub-section (1), read with Section 27, sub-section (1).

5. On reference, the High Court held in favour of the assessee and the Revenue has appealed hopefully, relying on a ruling of the Madras High Court which itself is the subject-matter of the sister appeal. Here the tables were turned but the assessee has contested the argument of the High Court as contrary to the ratio of this Court's pronouncements. Were it so, it were bad; but judgments, even of the summit court, are not scriptural absolutes but relative reasonings and there is in them, read as a human whole, more than meets the legal eye which looks at helpful lines here and there. We will examine them closely, especially because several High Courts are split on the construction of 'disposition' in the Act,

and seek to resolve the conflict of views and values. Behind everyone's attitude to tax is an unspoken value judgment.

6. Before we move into the arena of argument we may silhouette the facts of the Madras case. The deceased, Bheema Naidu, and his predeceased son's widow and children constituted a Hindu undivided family. A little within the two-year pre-mortem line drawn by the Act he effected a partition and turning abnegator took a smaller share instead of his legal half, benefiting the others to the extent of the difference. This difference was taxed as disposition of property under the Act and fiscal hierarchy was upheld by the High Court. The assessee's assailed that decision before us.

7. The forensic focus has been rightly turned on the interpretation of the critical provisions in the Act bearing on this controversy. The social design, the legislative intent and the grammar of statutory construction vis a vis the Act may have to be briefly surveyed while studying the language of the text and the impact of the context.

8. The scheme and spirit of the Act need to be understood first, for every social legislation has a personality and taxing statute a fiscal philosophy without a feel of which a correct perspective to gather the intent and effect of the separate clauses cannot be gained. Over four centuries ago Plowden said: "Each law consists of two parts viz., of body and soul; the letter of the law is the body of the law and the sense and reason of the law is the soul of the law." It is well known that death duties imposed on richer estates have a socialistic savour being motivated by the State's policy of paring of unearned accumulation of inheritances and of diminishing glaring disparities of wealth. This comprehensive but slow egalitarian purpose fulfils itself fully only when it operates on property at death and near death; nor is there any rational ground to save some types of disposition or subtle transference of wealth from exigibility, having due regard to the plain language of estate duty measures. The broad object also includes inhibition of dis-

positions, unsupported by reasonable consideration, made on the eve of death or within the pragmatic line of nearness to death; such transactions or manoeuvres, though sincere, being manifestly likely to defeat death duties posthumously flowing from properties covered thereby. The fiscal policy is dual: (i) the collection of revenue; and (ii) reduction of the quantum of inheritance on a progressive basis directed towards a gentle process of equalisation. The draftsman's efforts have been exerted to use words of the widest import and, where the traditional use of words is likely to limit, to use legal fictions, by deeming devices, to expand the semantics thereof and to rope in all kinds of dealings with property for inadequate or no consideration within the statutory proximity of death. The sweep of the sections which will be presently set out must therefore be informed by the language actually used by the legislature. Of course, if the words cannot apply to any recondite species of property, courts cannot supply new *logos* or invent unnatural sense to words to fulfil the unexpressed and unsatisfied wishes of the legislature. Law, to a large extent, lives in the language even if it expands with the spirit of the statute.

9. It is good to remember that the Indian Act has some English genetic touch, being largely based on the English Finance Acts of 1854 onwards. This historical factor has current relevance for one reason. We may usefully refer to, although we may not be blindly bound by, English authorities under the corresponding statute and both sides have sought trans-Atlantic light on this footing.

10. A skeletal projection of the Act to the extent that concerns us here may now be made. This Act exacts estate duty. The charging Section (S. 5) authorizes the levy of a duty upon all property which passes on the death of a person dying after the commencement of the Act. Two questions immediately arise. What is property as envisaged in the charging section? When does property pass on the death of a person? The answer to the first question is fur-

nished in an inclusive definition of 'property' in Section 2 (15). It is a wide-ranging definition supplemented by two expansive definitions. Of immediate moment is Explanation 2 which reads:

"Explanation 2.— The extinguishment at the expense of the deceased of a debt or other rights shall be deemed to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression 'property' shall include the benefit conferred by the extinguishment of a debt or right." What property passes on the death of a person is indicated in an inclusive definition set out in Section 2 (15). It covers property passing either immediately on the death or after an interval and 'on the death' includes 'at a period ascertainable only by reference to the death'. A glance at Sections 9 and 27 gives more comprehension. Section 9, among other provisions, introduces a legal fiction and since the meaning and implication of this section has been the subject of some disputation we had better allow the provision, in the first instance, to speak for itself:

"9. Gifts within a certain period before death:—

(1) Property taken under a disposition made by the deceased purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, settlement upon persons in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death."

Both the appeals deal with deceased persons who are members of joint Hindu families and the subject-matter of the disposition was linked up with their share in the HUF (acronymically speaking). For this reason our attention has to be rivetted to Sections 7 and 39 which resolve a likely difficulty in ascertaining the interest in property which passes on the death of a deceased coparcener in the joint family property the pristine rule of Hindu law being his

share lapses in favour of the survivors and is not a descendible estate or a predicable fraction. Sections 7 and 39, by a deeming process, circumvent this contretemps and crystallize a clear share in the coparcener at the point immediately before death. Had the properties of the coparcener been partitioned immediately before the death what share in the joint family property would have been allowed to the deceased represents the principal value of such share for the purposes of computation of death duty. Section 27 is a strategic provision which deems as a gift all dispositions made by the deceased person in favour of his relations unless such disposition was made for full consideration or the deceased was concerned in a fiduciary capacity with the property. 'Relative' means, in this context, near relations set out in Section 27 (2) and it is sufficient, for our purpose, to know that in both the appeals the accounting persons are relatives falling within the statutory compass. One more provision is pertinent to our enquiry and that deals with gifts within a certain period before death. While there are other provisions dealing with gifts before death, we are directly concerned with Section 9 only. It has already been read and will later be explained.

11. Now to the boxing ring. The bout has been fought over the import and amplitude of 'property' as widened by Section 2 (15), especially Explanation 2 thereto. Sri S. T. Desai, appearing for the accountable person in the Madras case, and Shri Manchanda, arguing for the Exchequer in the Gujarat case, have levelled multi-pointed attacks, but the crucial issue which is decisive of both cases is the same. What is 'property' for the purpose of this fiscal law?

12. Is it a misfortune for any legal system that a battle of semantics, where able judges and erudite advocates fundamentally disagree on meanings of words pivotal to the very levy, should be a bonanza of the draftsman? Simplicity and certainty is basic to the rule of law but is a consummation devoutly to be wished in our corpus juris. Here we

find ranged on both sides more than one High Court taking contrary but scholarly views. A radically new legislative art is the urgent contemporary need if comprehensibility to the laity is to be a democratic virtue of law.

13. We will first unlock Explanation 2 to Section 2 (15), discover the signification of 'property' expanded by the deeming clause and then read it in that wider sense along with the comprehensive provisions of Sections 9, 27 and 5. The key concept that underlies this fasciculus of sections is property, the tax being charged on property passing on death. Considerable controversy has raged not only on the boundaries of the notion of 'disposition' as specially defined, by importing a legal fiction, but on the slightly ticklish and tricky placement in Section 9 of the expression 'bona fide made two years or more before the death of the deceased'. If we surmount these constructional difficulties, the answer to the core question arising in these appeals follows without much ado.

14. In fairness to counsel we must, at the threshold, set out the seven propositions formulated by Shri Desai for pin-pointing the discussion. They are:

"1. Partition is merely a process in and by which joint enjoyment is transferred into an enjoyment in severalty. Since in such a case each one of the coparceners had an antecedent title which extended to the whole of the joint family properties and had therefore full interest in the specific property which ultimately went to his share, no creation of right or interest in such specific property takes place in his favour nor does any extinguishment of any right or interest in the other property take place to his detriment.

2. Sections 9 (1) and 27 (1) form part of a single scheme. The word 'disposition' in Section 27 (1) cannot be treated in isolation and must take its colour and meaning from the sense in which the word has been used in Section 9 (1).

3. 'Disposition' means 'giving away or giving up by a person of something which was his own 82 ITR 599, 606 = (AIR 1971 SC 2410

at page 2413)). No meaning howsoever wide and comprehensive of the expression 'disposition' can possibly take in its ambit or coverage, partition 89 ITR 261 = (AIR 1973 SC 2484).

4. The mere fact that on a partition a coparcener takes a lesser share than he could have demanded does not mean that there is 'disposition' as contemplated in Explanation 2 to S. 2 (15) which defines 'property'. In such a partition, there is no extinguishment, at the expense of such coparcener of any 'debt' or 'other right'. In a partition whether equal or unequal, there is no disposition by a coparcener in favour of any relative nor can it be said that there is any purported gift nor can it be treated as a gift. Of course, the partition must be bona fide and not to evade duty.

5. The scope and ambit of Explanation 2 to Section 2 (15) becomes more clear when it is read in juxtaposition with Explanation 1. The 'extinguishment' contemplated in Explanation 2 can be only in respect of any debt or other right which could have been created by the deceased and could have been enforced against him. In a partition, no such thing takes place.

6. A definition is not a substantive rule of law operative by itself. The definition of 'property' in Section 2 (15) has to be read along with Secs. 9 and 27 and not in isolation.

7. Disposition, in Section 9, even if read along with Explanation 2 to Section 2 (15), can only be of something the disponent had as his own at the time of the alleged extinguishment. If it is of any interest in property it must be of an interest which was already vested in the disponent at the time of the disposition. If of any other right, it must be of a right which had vested in him even when he gives it up."

15. This 7-point programme of submissions really brings out all the issues and sub-issues, legal and factual, and the last two, overlapping in some respects, deserve first attention. Before that, we must state, in precis form, the facts with reference to which the statute must

speak. The life of the law is not idle abstraction or transcendental meditation but fitment to concrete facts to yield jural results—a synergetic action, not isolated operation. Our discussion will therefore be conditioned by the material facts found in the two cases. They are, tersely, though simplistically put, that the deceased person, being a member of a joint Hindu family, within two years before his death, entered into a partition of family properties bona fide, not as colourable or sham transaction, whereby he received towards his share an allotment substantially lower in value than would be his legal entitlement thus gladly suffering a diminution which would to that extent benefit the accountable person by giving him a larger slice of the joint cake than was his due.

16. We assume, for the purpose of argument, that the division in status and the partition made by metes and bounds have taken place simultaneously on the execution of the deed in question. We also take it that the release, relinquishment or division in the cases on hand has been bona fide made in the sense that one sharer has not over-reached the other or played fraud or together the sharers have not gone through mere simulacrum of a partition or exercise in colourable division. We proceed on the further footing — and that is law well-established now — that 'partition is really a process in and by which a joint enjoyment is transformed into an enjoyment in severalty. Each one of the sharers had an antecedent title and, therefore, no conveyance is involved in the process, as a conferment of a new title is not necessary.'

17. Now to the 7 points of Shri Desai. The 6th point is a shade platitudinous and the other side does not dispute its soundness. Certainly the definition of 'property' in Section 2(15) has to inform and must be read along with Section 9 and Section 27 and cannot be functional in isolation. It is not a substantive rule of law operative by itself. Similarly, point No. 7, stated the way it has been, may not be and has not been disputed before us, for the expres-

sion 'disposition' in Section 9 must be read with the definition in Explanation 2 to Section 2 (15) since that is the whole purpose of a 'deeming provision' in the shape of a definition. Granting that, the disponent cannot extinguish or part with what is not his — rather a trite statement though — since A can give or give up only what he has at the time of alienation or abnegation. Shri Desai contends, and rightly, that the deceased could not dispose of any interest in property which did not earlier vest in him or at least at the time of the disposition. No right can be given up without its being vested in him when he gives up. This hypothesis in law turns the searchlight on the existence, at the time of the release or partition, of what has been disposed of under that deed. What then was disposed of? And did the deceased own at the time of disposition what he thus made over or extinguished? An answer to these twin questions may be readily given, once we clear the confusion that has crept in at certain stages of the argument by a process of inept importation and imperfect understanding of the rule of Hindu law regarding coparcenary.

18. The proposition is trite that in an undivided Hindu family coparceners have no predictable or defined shares but each has an antecedent title in every parcel of property and is jointly the owner and in enjoyment with the others. But surely it is well-established that at the very moment members decide upon a partition *eo instanti*, a division in status takes place whereupon the share of the demanding member gets crystallised into a definite fraction and if there is division by metes and bounds the allotment of properties vivifies and specifies such shares in separate ownership. These two processes or stages may often get telescoped when by consensus the coparceners jointly divide the properties. Unequal divisions of properties knowingly made may not spell invalidity and mathematical equality may not be maintained always in a partition while, ordinarily, substantial fairness in division is shown. Granting these legal posi-

tions, the more serious question which has been agitated before us is as to whether a willing, albeit bona fide, arrangement whereby a substantially reduced share is taken by the decedent consequentially vesting a proportionately larger estate in the recipient is a disposition falling within Expln. 2 to S. 2 (15) and therefore 'property' within the substantive definition. In this context we may have to read Ss. 9 and 27 for property taken under a disposition made by the deceased may be deemed to be a gift in favour of the accounting person in the circumstances mentioned in Section 9. Similarly, Section 27 also tracks down certain dispositions made by deceased persons in favour of relatives by treating them as 'gifts'. The basic concept of disposition looms important in such circumstances.

19. This introductory statement of the law takes us to the other points of Shri Desai which we will tackle together, guided by the text of the sections aforesaid read in the light of the citations aplenty, of cases — Indian and English. We may compendiously state, forgetting for a moment the complication in the Gujarat case of the release deed executed by the decedent being either a relinquishment or a partition that in both the appeals, the decedents and the recipients were members of an undivided Hindu family and within the two year proximity of death the partition arrangement was effected whereunder a lesser share then due was allotted to the latter. And indeed, it is this difference between what was due to the right of the deceased and what was actually taken that was treated as a 'gift' by the Revenue based on the definition in Section 2 (15), Explanation 2, plus Sections 9 and 27. The cornerstone of the whole case of the Revenue is thus the concept of 'disposition' which we may point out, right at the outset, is not a term of art nor legalese but plain English with wide import. What is more, this word has acquired, beyond its normal ambit, an abnormal semantic expansion on account of a special definition with an Explanation super-added. In short, 'disposition' in the Estate Duty law

of India enjoys an extended meaning. Even so, does it go so far as to cover a mere taking of a less-than-equal share by the deceased, the benefit on account of which has gone to the accountable person?

20. Before we enter the thicket of judicial conflict regarding the meaning of 'property' as extended by Explanation 2 to Section 2 (15), we may remind ourselves as courts that in a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. While the rulings on the point in the Act and in the allied Gift Tax Act will be adverted to presently, we may begin an incisive understanding of the Explanation 2 aforesaid. The spirit thereof is obvious. The framers of the Act desired by a deeming provision regarding 'disposition' to cover extinguishments of debts and all other rights at the expense of and made by the deceased in favour of the beneficiary. The substantive definition of 'property' in Section 2 (15) is not exhaustive but only inclusive and the supplementary operation of Explanation 2 takes in what is not conventionally regarded as 'disposition'. Indeed, 'disposition', even according to law dictionaries, embraces 'the parting with, alienation of, or giving up property a destruction of property' (Black's Legal Dictionary). The short question before us is whether the dispositive fact of giving up by a coparcener of a good part of what is due to him at the time of division to his own detriment and to the benefit of another coparcener, can be called 'disposition' in law. Undoubtedly this operation, to use a neutral expression, is made up of simple jural facts that modify and extinguish jural relations and create in their place new rights whereby one gives or gives up and another gains. This legal result, produced by voluntary action, is 'disposition' within the scope of Explanation 2 to Section 2 (15).

21. The assessee's contention, effectively presented by counsel, takes a legalistic course, ignoring the purpose, language and amplitude of Explanation 2. Argues Shri Desai, in

a partition, equal or unequal, there is no element whatsoever of consideration, partial or full, since in a partition there is only an adjustment of rights and substitution of joint enjoyment by enjoyment in severalty. In his view it is a confusion to mix up unequal partition with inadequate consideration and it is a worse confusion to talk in terms of bona fide and mala fide partition where the shares are merely unequal by choice. What is forgotten in this chain of reasoning is the office of Explanation 2 which is deliberately designed to take into its embrace what otherwise may not be 'disposition'. Once we reconcile ourselves to the enlargement of sense imported by the Explanation, we part company with the traditional concept. We have also to stress the expression 'other right' in the Explanation which is of the widest import and cannot be constricted by reading it ejusdem generis with 'debt'. 'Other right', in the context, is expressly meant considerably to widen the concept and therefore suggests a somewhat contrary intention to the application of the ejusdem generis rule. We may derive instruction from Green's construction of the identical expression in the English Act (Sec. 45 (2)). The learned author writes:

"A disclaimer is an extinguishment of a right for this purpose. Although in the event the person disclaiming never has any right in the property, he has the right to obtain it; this inchoate right is a 'right' for the purposes of Section 45 (2). The ejusdem generis rule does not apply to the words 'a debt or other right' and the word 'right' is a word of the widest import. Moreover, the expression 'at the expense of the deceased' is used in an ordinary and natural manner; and is apt to cover not only cases where the extinguishment involves a loss to the deceased of a benefit he already enjoyed, but also those where it prevents him from acquiring the benefit.

The words 'the person for whose benefit the debt or other right was extinguished' do not necessitate a conscious intention to benefit some person; it is sufficient that some person was in fact benefited. 'The motive or purpose of the deceased ap-

pears to me to be immaterial, provided the transaction was gratuitous and did in fact benefit the other person concerned.

The extinguishment of a right may also cover the release of his interest by one joint tenant in favour of another."

(Green's Death Duties, 7th Ed., Butterworths, page 149)

22. Shri Desai and also Shri Kazi, appearing for the 'accounting person' in the respective cases, urged that this expansive interpretation, taking liberties with traditional jural concepts is contrary to this Court's pronouncement in Getti Chettiar, (1971) 82 ITR 599 = (AIR 1971 SC 2410). That was a case under the Gift Tax Act, 1958 and the construction of Section 2 (xxiv) fell for decision. Certainly, many of the observations there, read de hors the particular statute, might reinforce the assessee's stand. This Court interpreted the expression 'transfer of property' in Section 2 (xxiv) and held that the expression 'disposition' used in that provision should be read in the context and setting of the given statute. The very fact that 'disposition' is treated as a mode of transfer takes the legal concept along a different street, if one may use such a phrase, from the one along which that word in the Estate Duty Act is travelling. Mr. Justice Hegde rightly observed, if we may say so with respect, that

"Words in the section of a statute are not to be interpreted by having these words in one hand and the dictionary in the other. In spelling out the meaning of the words in a section, one must take into consideration the setting in which these terms are used and the purpose that they are intended to serve." (pages 605-606 (of ITR) = (at p. 2413 of AIR)).

The word 'transaction' in Section 2 (24) of the Gift Tax Act takes its colour from the main clause, that is, it must be a 'transfer' of property in some way. Since a partition is not a 'transfer' in the ordinary sense of law, the Court reached the conclusion that a mere partition with unequal allotments not being a transfer, cannot be covered by Sec. 2 (xxiv). A close reading of that provision and the judgment will dissolve the mist

of misunderstanding and discloses the danger of reading observations from that case for application in the instant case. The language of Section 2 (15), Explanation 2, is different and wider and the reasoning of Getti Chettiar, (AIR 1971 SC 2410) cannot therefore control its amplitude. It is perfectly true that in ordinary Hindu law a partition involves no conveyance and no question of transfer arises when all that happens is a severance in status and the common holding of property by the coparcener is converted into separate title of each coparcener as tenant-in-common. Nor does subsequent partition by metes and bounds amount to a transfer. The controlling distinction consists in the difference in definition between the Gift Tax Act (Sec. 2 (xxiv)) and the Estate Duty Act (Section 2 (15)).

23. The Madras High Court in Valliammai Achi, (1969) 73 ITR 806, 808 (Mad) took the correct view when it said on similar facts:

"The facts of this case, in our opinion, seem to square with the second Explanation to section 2 (15). That, no doubt, is an Explanation to the inclusive definition of property. But the language of it seems to go further and coins a deemed disposition in the nature of a transfer. The mechanics of the transfer for the purposes of Explanation 2 consist in the extinguishment at the expense of the deceased of a right and the accrual of a benefit in the form of the right so given up in favour of the person benefited. Transfer in a normal sense and as understood with reference to the Transfer of Property Act connotes a movement of property or interest or right therein or therefrom from one person to another in praesenti. But in the kind of disposition contemplated by the second Explanation, one can hardly trace such a transfer because of the mere fact of extinction of a certain right of the deceased which does not involve a movement, a benefit is created in favour of the person benefited thereby. In the present case the son who was a quondam coparcener had a pre-existing right to every part of the coparcenary property, and if by a partition or a relinquishment on the part of one or more of the co-

parceners, the joint ownership is severed in favour of severalty, the process, having regard to the peculiar conception of a coparcenary, involves no transfer..... But Explanation 2 is concerned not with that kind of situation, but an extinguishment of a right and creation of a benefit thereby and this process is statutorily deemed to be a disposition which is in the nature of a transfer."

This line of reasoning has our general approval.

24. From what we have said, the bold lines of opposing views emerge and they hinge on the connotation of 'disposition.' The High Courts, in their divergent stands, have lined up before both strands of reasoning. Madras, a Full Bench of the Punjab High Court, and the classic observations in *In re Stratton's Disclaimer*, (1958) 34 ITR (ED) 47 support the point of view championed in *Ranganayaki Ammal*, (1973) 88 ITR 96 (Mad). The contrary thinking finds support in *Andhra Pradesh* and *Punjab* as well as in *Gujarat (Kantilal)*, (1969) 74 ITR 353 (Guj). The sense of our statutes modelled as they are on a series of English Acts, is best expressed so far as the concept of 'disposition' is concerned, by *Jenkins L. J.*, in *In re Stratton's Disclaimer* relating to S. 45 of the Finance Act, 1940 (which runs similar in strain to S. 2 (15)). Noting the strength of the sweeping and unparticularized reference to 'a debt or other right', *Jenkins L.J.*, repelled the application of the *ejusdem generis* rule and imparted to the word 'right' the widest import;

"Mr. Russel did not seek to limit the effect of the words 'debt or other right' by an application of the *ejusdem generis* rule, and, in my view, it would not be possible to do so. In the absence of any such restriction on its meaning the word 'right' is a word of the widest import, and if, in accordance with my view, *Mrs. Stratton* can properly be held to have had a right in respect of the specific bequest and devise pending disclaimer, I see no ground for holding that it was not a right within the meaning of Section 45 (2)."

x x x x x

"I confess that I am disposed to deprecate recourse in revenue legislation to sweeping generalities of this kind, but the mere fact that an enactment is couched in general and comprehensive terms affords no ground for excluding from its operation transactions falling fairly within its provisions, general though they may be."

Roxburgh J., emphasized the impact of the legal fiction and observed:

"A certain state of facts is to be deemed to be a different state of facts, and the line between fact and hypothesis seems to me to be drawn by the word 'deemed'. If this be so, only three actual facts are expressed to be necessary in order to involve the hypothetical situation, (1) the existence of a right, (2) its extinguishment (3) its extinguishment at the expense of the deceased. When those three facts concur, the hypothesis goes into action, and the hypothesis is that these facts are equivalent to a disposition made by the deceased in favour of the person for whose benefit the right was extinguished. These words, in my opinion, all form part of the hypothesis and the concluding words are necessary to define the hypothetical donee."

The conventional construction of 'disposition' has to submit to the larger sweep of the hypothetical extension by definition.

25. The Gujarat High Court has gravitated towards the narrower construction of 'disposition' and 'or right'. It makes no specific reference to *Stratton's Disclaimer*, (1958) 34 ITR (ED) 47 and the learned judges have insisted on transfer of interest as a necessary indicium of every disposition. Partition does not involve a transfer and therefore, cannot be a disposition, runs the logic of the Gujarat judgment. Likewise, 'other right', in Explanation (2), it is argued, cannot cover the case of partition as in the learned Judges' view a transfer is a *sine qua non*. We cannot agree, for reasons already stated, with this approach which defeats the intentment of the Act and the express object of Explanation 2 to Section 2 (15). The peculiar definition of 'disposition' injecting a triple hypothesis and fic-

tional expansion covers the diminution in the share taken by the coparcener and augmentation of the share taken by the other and impresses the stamp of property on this process by the 'deeming' provision. Sections 9 and 27 strengthen this conclusion.

26. We were confronted by Shri Desai with Kancharla Kesava Rao, (1973) 89 ITR 261 = (AIR 1973 SC 2484) for contending that giving away or giving up could not in all cases be disposition where the transaction is a partition. This Court, in the above ruling, held that a partition in a coparcenary was just an adjustment of rights, not a transfer in the strict sense. Shri Justice Hegde, speaking for the Court, placed on Section 24 of the Act more or less the same interpretation as was put in Getti Chettiar, (AIR 1971 SC 2410) by this Court. Whatever might be the interpretation of 'disposition' in Section 24 of the Act, we are satisfied that the only straightforward construction of that expression in Section 27 is as we have explained at length above. Section 9, dealing with gifts, takes in property under a disposition made by a deceased, throwing up the question 'What is a gift?'. Section 27 supplies the answer: 'any disposition made by the deceased in favour of a relative of his shall be treated for the purposes of this Act as a gift', unless, of course, it is made for full consideration. There is no limitation, environmental or by the society of words, warranting the whittling down of the unusually wide range of Explanation 2 to Section 2 (15). Kesava Rao, (AIR 1973 SC 2484) cannot cut back on the liberality of Section 27. In the realm of legal fiction, law cannot be confined within traditional concepts. It is pertinent that as between the Gift Tax Act and the Estate Duty Act there is basic difference in that the tax effect in the first is on transaction inter vivos and in the second on the generating source of transmission by death. Comparisons in construction cannot therefore be pushed too far.

27. Before winding up this part of the discussion, we may refer to *Grimwade v. Federal Commr. of Taxation*, (1949) 78 CLR 199 where

Williams J., dealing with the expression 'disposition of property' defined somewhat in similar lines as in our Act, observed:

"The whole emphasis of paragraph (f) is upon a transaction entered into by one person, which seems to me to mean that where there is an act done by one person with the requisite intent, and as a result there is a transfer of value from any property of that person to the property of another person, the conditions of liability are satisfied." Each statute has its own mint and the coinage of words bears a special stamp. That is our only comment when we depart semantically from other judicial annotations of the expression 'disposition'. If A is entitled to a moiety in property worth rupees five lakhs (or let us assume that much of cash in the till belongs jointly to A and B) and by a partition, relinquishment, disclaimer or otherwise, A accepts something substantially less than his due, say rupees one lakh as against rupees two-and-a-half lakhs and the remainder goes to the benefit of B who gets four lakhs as against two-and-a-half lakhs, commonsense, concurrently with Explanation 2, draws the inference that A has made over at his expense and to the benefit of B a sum of rupees one-and-a-half lakhs which may be designated a 'disposition' by him in favour of B.

28. Shri Desai rightly stressed in construing Section 9 we should not confuse between a mala fide transaction and unequal partition. He is right. But the simple scheme of Section 9 may be stated to erase misapprehension. What the provision declares is that if the disposition made by the deceased is more than two years before death, the property covered thereby shall not pass on the death unless it shall not have been bona fide. That is to say, even if the transaction were more than two years before the death, if it were entered into in bad faith, estate duty may still attach to that property. So far as dispositions made within two years of the death of the deceased are concerned, there is no question of mala fides or bona fides. All such transactions are caught within the coils of Section 5 read with Secs. 9 and 27. The re-

quirement of 'bona fides' has nothing to do with dispositions within 2 years and has much to do with those beyond 2 years. The marginal obscurity in Section 9 is due perhaps to compressed draftsmanship.

29. Now to costs. We have already indicated how serious arguments have appealed in contrary ways to several judges of the High Courts and certain observations of this Court have themselves been capable of different shade of sense from what we have read into them. Indeed the point involved in the case is of general public importance which, on account of the conflict in the High Courts, needs to be decided by the Supreme Court. One of the major functions of this Court is to declare the law for the country under Art. 141 of the Constitution, although under our adversary system it is only when litigation spirals up the Court acts and declares the law.

30. While dealing with a similar situation, this Court in Trustees of Port, Bombay, (1974) 4 SCC 710 at page 738 = (AIR 1973 SC 923 at page 943) observed.

"Is it fair in these circumstances that one party, albeit the vanquished one, should bear the burden of costs throughout for providing the occasion — not provocation — for laying down the correct law in a controversial situation? Faced with a similar moral-legal issue, Lord Reid observed:

"I think we must consider separately costs in this House and costs in the Court of Appeal. Cases can only come before this House with leave, and leave is generally given because some general question of law is involved. In this case it enabled the whole vexed matter of non est factum to be re-examined. This seems to be a typical case where the costs of the successful respondent should come out of public funds.

The Evershed Committee on Supreme Court Practice and Procedure had suggested in England that the Attorney-General should be empowered to issue a certificate for the use of public funds in appeals to the House of Lords where issues of outstanding public importance are involved."

Maybe, a scheme for a suitors' fund to indemnify for costs as recommended by a Sub-Committee of Justice is the answer, but these are matters for the consideration of the Legislature and the Executive. We mention them to show that the law in this branch cannot be rigid. We have to make a compromise between pragmatism and equity and modify the loser-pays-all doctrine by exercise of a flexible discretion. The respondent in this case need not be a martyr for the cause of the certainty of law under Section 87 of the Act, particularly when the appellant wins on a point of limitation. (The trial Court had even held the appellant guilty of negligence). In these circumstances we direct that the parties to bear their costs throughout." We adopt the same course and while allowing Civil Appeal No. 1095 of 1970 and dismissing Civil Appeal No. 1677 of 1973 the parties in both the appeals are directed to bear their respective costs throughout.

Order accordingly.

AIR 1976 SUPREME COURT 1947

(From: Karnataka)*

A. C. GUPTA AND S. MURTAZA
FAZL ALI, JJ.

Smt. Nagawwa, Appellant v. Veeranna Shivalingappa Konjalgi and others, Respondents.

Criminal Appeal No. 99 of 1976, D/- 23-4-1976.

(A) Criminal P. C. (1974), Sections 401, 204 and 202 — Revision — Powers of High Court — Inquiry under Section 202 — Scope of — Issue of process under Section 204 — Considerations by Magistrate — Order issuing process, when can be set aside in revision — Cri. Petns. Nos. 50 and 51 of 1975 D/- 16-12-1975 (Karnataka), Reversed.

At the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether

*(Criminal Petns. Nos. 50 and 51 of 1975, D/- 16-12-1975 — (Kant)).

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there are sufficient grounds for proceeding against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one. (Para 2)

The scope of the inquiry under Section 202 is extremely limited — only to the ascertainment of the truth or falsehood of the allegations made in the complaint — (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact, in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. (Para 4)

It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even the Supreme Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations are totally foreign to the scope and ambit of an inquiry under Section 202 which culminates into an order under Section 204. Thus in the following cases an order of the Magistrate issuing

process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like. (Para 5)

In the instant case the order of the Magistrate issuing process against the accused persons is a very well reasoned one which took into consideration the allegations in the complaint as also the evidence adduced in support of it. On a consideration of the evidence the Magistrate was satisfied that a prima facie case against the accused persons was made out and he accordingly issued process against them. The High Court went into the whole history of the case, examined the merits of the evidence, the contradictions and what it called the improbabilities and after a detailed discussion not only of the materials produced before the Magistrate but also of the documents which had been filed by the defence and which should not have been looked into at the stage when the matter was pending under Sec. 202, has held that the order of the Magistrate was illegal and was fit to be quashed. This was an entirely wrong approach. Cri. Petns. Nos. 50 and 51 of 1975, D/- 16-12-1975 (Kant), Reversed. (Paras 6 and 7)

Cases Referred: Chronological Paras
 AIR 1963 SC 1430 = (1964) 1 SCR 639 = 1963 (2) Cri LJ 391 3
 AIR 1960 SC 1113 = (1961) 1 SCR 1 = 1960 Cri LJ 1499 3

Mr. H. B. Datar, Sr. Advocate and Mr. R. B. Datar, Advocate with him, for Appellant; Mr. M. C. Bhandare, Sr. Advocate, (Mrs. S. Bhandare and M/s. M. S. Narasimhan, A. K. Sharma and A. K. Mathur, Advocates with him), (for Nos. 1 and 2) and Mr. Narayan Mettar, Advocate (for No. 3), for Respondents.

Judgment of the Court was delivered by

FAZL ALI, J.— This appeal by special leave is directed against the judgment of the Karnataka High Court by which it set aside the order of the Additional Judicial Magistrate, First Class, Gokak issuing process against respondents 1 and 2 in exercise of his discretion under Sec. 204 of the Code of Criminal Procedure. The facts of the case lie within a very narrow compass and although the High Court has taken great pains to write a laboured judgment the point involved is short and simple and does not merit a detailed discussion. The police of Gokak Police Station submitted a charge-sheet against Nagappa Giddennavar and seven others under Sections 302, 114, 148, 147 and other sections on the allegations that on July 19, 1973 the accused persons had waylaid and murdered one Nagappa son of the appellant in this Court. The appellant, who had filed the report before the police does not appear to have been satisfied with the investigation by the police which according to her was tainted and had suppressed some important materials, filed a complaint before the Magistrate at Gokak on October 4, 1973 alleging that respondents 1 and 2 had in fact abetted the offence of murder committed by the other accused but as they were influential persons their names were deliberately left out in the report as also in the dying declaration. On receiving the complaint on October 4, 1973 the Magistrate decided to hold an inquiry into the complaint himself and in pursuance of his decision he recorded some evidence on October 8, 1973. Thereafter the case was

posted for October 10, 1973 for arguments and further evidence, if any. On October 10, 1973 the Magistrate observed that six witnesses had been examined and the evidence recorded so far was sufficient for the Court to determine the question as to whether or not process should be issued to respondents 1 and 2. He then adjourned the case for argument for October 12, 1973. On that day arguments were heard but before any order could be passed the Magistrate who had recorded the evidence was transferred and therefore the case had to be adjourned. The new Magistrate took up the matter on November 26, 1973 and after hearing the complainant he adjourned the case to December 3, 1973 and on this day he directed that further inquiry may be made by Superintendent of Police, Belgaum and he accordingly referred the matter for inquiry and report to the Superintendent of Police, Belgaum asking him to submit his report within six weeks. It seems to us that in view of the change of the Magistrate the successor Magistrate was not able to grasp the implications of the proceedings which had been taken by his predecessor who had in fact first decided to hold an inquiry himself and after recording the evidence had decided to pass an order under Section 204 of the Code of Criminal Procedure. Before however he could pass any order he was succeeded by the present Magistrate. The appellant filed an application in revision to the High Court on December 11, 1973 against the order of the Magistrate dated December 3, 1973 referring the matter to the Superintendent of Police for inquiry and report. While the application was pending before the High Court, respondents 1 and 2 filed a petition before the High Court praying for an early hearing of the revision and for vacation of the stay order. Along with this petition the respondents filed a number of documents including the copies of the petition sent by the appellant to the Chief Minister and the Speaker. We might indicate here that there was absolutely no occasion for the respondents to have filed the documents before the High Court in a miscellaneous petition nor did they obtain any

permission of the Court for filing those documents. The High Court, after hearing the revision application filed by the appellant, allowed the same mainly on the ground that as the Magistrate had ultimately decided to hold an inquiry into the truth or falsehood of the complaint himself he had no jurisdiction to stop that inquiry and then make a reference to the police afresh. The High Court accordingly quashed the order of the Magistrate and directed him to decide the case in accordance with the law after recording further evidence, if any. It appears that the High Court did not give any directions to the Magistrate for considering the documents which had been filed by the respondents before it but by a subsequent order merely forwarded the documents to the Magistrate. The papers were sent back to the Magistrate on January 7, 1975 and by his order dated January 27, 1975 the Magistrate was informed that the appellant did not want to adduce any further evidence. The matter was accordingly posted for argument on February 7, 1975 and after hearing the arguments and considering the evidence recorded by the Magistrate he by his order dated February 11, 1975 directed process to be issued against respondents 1 and 2 under Section 204 (1)(b) of the Code of Criminal Procedure. Respondents 1 and 2 then preferred a revision against this order to the High Court under Section 482 of the Code of Criminal Procedure praying that the order of the Magistrate may be quashed. This revision was allowed by the High Court by the impugned order against which special leave was granted by this Court at the instance of the appellant.

2. In support of the appeal Mr. H. B. Datar submitted that the Magistrate had given cogent reasons for holding that there were sufficient grounds for proceeding against respondents 1 and 2 and the High Court was in error in interfering with the order of the Magistrate by examining the merits of the case after taking into consideration the documents filed by the respondents which could not be looked into by the Magistrate as they did not form part of the

complaint or the evidence recorded in support thereof. In our opinion the contention raised by the learned counsel for the appellant is well founded and must prevail. Mr. H. C. Bhandare sought to repel the argument of the appellant on the ground that the order of the Magistrate was perverse and as the case was full of patent absurdities and was politically motivated the prosecution of respondents 1 and 2 would amount to unnecessary harassment resulting in abuse of the process of the Court. In the view we take in the instant case it is not necessary for us to enter into the merits of the case at this stage. It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceedings against the accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one.

3. In *Chandra Deo Singh v. Prokash Chandra Bose*, (1964) 1 SCR 639 = (AIR 1963 SC 1430) this Court had after fully considering the matter observed as follows:

"The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in subsection (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean

the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant."

Indicating the scope, ambit of Section 202 of the Code of Criminal Procedure this Court in *Vadilal Panchel v. Dattatrya Dulaji*, (1961) 1 SCR 1 = (AIR 1960 SC 1113) observed as follows:

"Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

4. It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited — limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint — (i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no *locus standi*

and is not entitled to be heard on the question whether the process should be issued against him or not.

5. Mr. Bhandare laid great stress on the words "the truth or falsehood of the complaint" and contended that in determining whether the complaint is false the Court can go into the question of the broad probabilities of the case or intrinsic infirmities appearing in the evidence. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and established of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court, or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are potently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient

ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings.

6. Applying these principles to the facts of the present case it seems to us that the present case is not one in which the High Court should have quashed the proceedings. To begin with, the order of the Magistrate dated February 11, 1975 issuing process against respondents 1 and 2 is a very well reasoned one which takes into consideration the allegations in the complaint as also the evidence adduced in support of it. The Magistrate clearly applied his mind and has analysed the evidence into three categories — (i) those witnesses who have deposed as eye-witnesses regarding the actual occurrence and the part attributed to respondents 1 and 2. The Magistrate then refers to other witnesses who corroborated the evidence of the complainant; and thirdly the Magistrate relied on the evidence of witnesses who were admittedly signatories to the dying declaration and had clearly stated on oath that the names of respondents 1 and 2 were mentioned in their presence by the deceased but were not recorded by the Police Patel in the dying declaration and in spite of the protest by the witnesses they were made to sign the dying declaration as attesting witnesses under threat and duress. On a consideration of this evidence the Magistrate was satisfied that a prima facie case against respondents 1 and 2 was made out and he accordingly issued process against them. It was not a case where the Magistrate had passed an order issuing process in a mechanical manner or just by way of routine. The High Court ap-

pears to have gone into the whole history of the case, examined the merits of the evidence, the contradictions and what it called the improbabilities and after a detailed discussion not only of the materials produced before the Magistrate but also of the documents which had been filed by the defence and which should not have been looked into at the stage when the matter was pending under Section 202, has held that the order of the Magistrate was illegal and was fit to be quashed. In the first place the High Court ought not to have considered the documents filed by respondents 1 and 2 in the previous revision without obtaining the permission of the Court and particularly when the High Court itself gave no directions whatsoever to the Magistrate to consider these documents. In fact the Magistrate considering the question as to whether process should be issued against the accused or not cannot go into the materials placed by the accused and therefore the High Court could not have given any such directions while disposing of the previous revision. The impugned order of the High Court proceeds on the basis that it was incumbent on the Magistrate to have considered the documents and their effect on the truth or falsehood of the allegations made by the complainant. This was an entirely wrong approach. As we are clearly of the opinion that the Magistrate was fully justified in completely excluding the documents from consideration, we refrain from making any observation regarding the effect of those documents. In fact the documents filed by the respondents were mere copies and they were, therefore, not admissible. At any rate, at the stage of Section 202 or Section 204 of the Code of Criminal Procedure as the accused had no locus standi the Magistrate had absolutely no jurisdiction to go into any materials or evidence which may be produced by the accused who could be present only to watch the proceedings and not to participate in them. Indeed if the documents or the evidence produced by the accused is allowed to be taken by the Magistrate then an inquiry under Section 202 would have to be converted into a full-dress trial

defeating the very object for which this section has been engrafted. The High Court in quashing the order of the Magistrate completely failed to consider the limited scope of an inquiry under Section 202. Having gone through the order of the Magistrate we do not find any error of law committed by him. The Magistrate has exercised his discretion and has given cogent reasons for his conclusion. Whether the reasons were good or bad, sufficient or insufficient, is not a matter which could have been examined by the High Court in revision. We are constrained to observe that the High Court went out of its way to write a laboured judgment highlighting certain aspects of the case of the accused as appearing from the documents filed by them which they were not entitled to file and which were not entitled in law to be considered.

7. For these reasons, therefore, we are satisfied that the order of the High Court suffers from a serious legal infirmity and the High Court has exceeded its jurisdiction in interfering in revision by quashing the order of the Magistrate. We, therefore, allow the appeal, set aside the order of the High Court dated December 16, 1975 and restore the order of the Magistrate issuing process against respondents 1 and 2.

8. At the time of granting the special leave, we had directed the Sessions Judge who was trying the original case resulting from the F.I.R. lodged before the police to stay proceedings to the extent that the judgment was not to be pronounced until this appeal was disposed of. We understand that the Sessions case is now concluded before the learned Sessions Judge and arguments have also been heard. In view of the order of the Magistrate issuing process against respondents 1 and 2 which has been confirmed by us, the respondents will have to face a supplementary trial and it is not conducive in the interests of justice to allow the other trial to be stayed any further. The Sessions Judge is therefore directed to dispose of the Sessions case and the stay granted by this Court earlier is vacated.

Appeal allowed.

AIR 1976 SUPREME COURT 1953

(From: Gujarat)*

H. R. KHANNA, V. R. KRISHNA IYER AND N. L. UNTWALIA, JJ.

Narendrakumar J. Modi, Appellant v. Commissioner of Income Tax, Gujarat II, Ahmedabad, Respondent.

Civil Appeal No. 156 of 1971, D/- 4-8-1976.

(A) Income-tax Act (1922), Section 25-A (3) — Proceedings under Section 25-A — Claim for partition disallowed by I. T. O. — Subsequently partition preliminary decree passed by Civil Court — Appeal under the Act filed against the order also dismissed — No reference taken under the Act challenging order of tribunal dismissing appeal — Held, that the Income Tax Authorities were not bound by the partition preliminary decree which was passed by the Civil Court much later after the order of I. T. O. (Para 9)

(B) Hindu Law — Joint Hindu Family — Right of management — A senior member may give up his right and a junior member of the family can act as the Karta with consent of all the other members.

(Para 10)

Mr. B. R. L. Iyengar, Sr. Advocate, (M/s. S. K. Dholakia and R. C. Bhatta, Advocates with him), for Appellant; Mr. B. Ahuja, Advocate, for Respondent No. 1.

Judgment of the Court was delivered by

UNTWALIA, J.:— The appellant's writ petition filed in the High Court of Gujarat was dismissed in limine by a Bench of the High Court on October 19, 1970. The Commissioner of Income tax, Gujarat II, respondent no. 1 was the authority against whom several reliefs had been claimed in the writ petition. Subsequently were added the other members of the family of the appellant as respondents to the writ petition. The appellant obtained a certificate from the High Court for appeal to this Court under sub-clause (b) of clause (1) of Article 133 of the Constitution of India as it stood before the 30th Constitution

*(Spl. Civil Appln. No. 1177 of 1970, D/- 19-10-1970—(Guj)).

HT/HT/C538/76/CWM

Amendment Act. Hence this appeal to this Court.

2. Having heard Mr. B. R. L. Iyengar, Senior Advocate for the appellant at some length we found that the appellant was ill-advised to file the writ petition and to pursue the matter upto this Court. The appeal being devoid of any substance must fail. We proceed to state the facts and discuss the points urged before us very briefly.

3. One Bapalal Purshottamdas Modi was the head of a Hindu undivided family. The joint family possessed many immovable properties and carried on business of various types such as money-lending etc. Bapalal had five sons namely Vadilal, Ramanlal, Jayantilal, Gulabchand and Kantilal. Ramanlal died long ago in or about the year 1933. Jayantilal died in 1956. The appellant is one of the sons of Jayantilal.

4. The appellant's case in the writ petition was that Bapalal was the karta of the Hindu undivided family. He executed a general power of attorney on October 5, 1948 in favour of his third son Gulabchand to manage his (Bapalal's) separate property. On October 22, 1954 Bapalal relinquished his right, title and interest in the joint family properties on taking a sum of Rs. 75,000/- leaving the corpus and management of the joint family properties to his four surviving sons and Rajnikant, son of late Ramanlal. These five members also executed a memo of partition on October 24, 1954 disrupting the erstwhile Hindu undivided family and partitioning the properties.

5. In course of the proceedings for assessment of the income tax for the assessment year 1955-56 against the Hindu undivided family of Bapalal Purshottamlal Modi, an application under Section 25A of the Income-tax Act, 1922 was made claiming partition w.e.f. October 24, 1954. Notices of the enquiry under Section 25A were served on all the members of the family. At the enquiry the statements of various persons including the appellant were recorded by the Income Tax Officer. He, by his order, dated January 28, 1960 disallowed the claim under Section

25A of the Income Tax Act, 1922. It is asserted that in the year 1961 a suit for partition had also been filed and the City Civil Court Ahmedabad passed a decree for partition on June 30, 1965. In an appeal filed before the Appellate Assistant Commissioner from the order of the Income Tax Officer dated January 28, 1960 reliance was placed on the Civil Court partition decree also. The Appellate Assistant Commissioner, however, dismissed the appeal by his order dated September 30, 1965. A second appeal to the Income Tax Appellate Tribunal was dismissed on March 28, 1969. Income tax assessment was made against the Hindu undivided family for the year 1955-56. Assessments were also made against the Hindu undivided family, sometimes treating it as Association of Persons or Unregistered Partnership Firm as per returns filed from time to time; for the subsequent years upto the assessment year 1965-66. Copies of all the assessment orders were enclosed with the writ petition as Annexure 'I' collectively. Appeals taken to the Tribunal from some of the assessment orders were also dismissed. Notices were being issued and served under Sections 22 and 23 of the Income-tax Act, 1922 for the assessment years which were governed by the said Act. In respect of the assessment years 1962-63 onwards notices were issued and served under Sections 142 and 143 of the Income-tax Act, 1961. A large sum of tax and penalty became due as the demands from time to time were partly paid. The Income-tax authorities took steps for realization of the income tax dues against the appellant's family and got attached various properties. In Civil Suit No. 806 of 1961 in which the preliminary partition decree was passed on June 30, 1965, respondent Kantilal had been appointed as a Receiver. Later on one Mr. Bhatt was appointed Receiver. A Savings Bank Account No. 412002 was being operated by the Receiver. The Income-tax Officer attached the entire amount of Rs. 56,294.43 in the said account by his orders dated May 12, 1970. Thereupon, the appellant filed the writ petition challenging the various orders passed in the proceeding under

Section 25A of the Income-tax Act, 1922; the assessments made for the years 1955-56 to 1965-66 and the attachment orders on various grounds. In a single writ petition rambling allegations were made challenging the multifarious proceedings and the orders on various grounds and the following prayers were made:

"(a) declaring void and illegal and quashing the proceedings of the income tax authorities making assessments on Hindu Undivided Family, Association of persons and unregistered partnership firm aforesaid for the years beginning from the assessment year 1955-56 and also the proceedings for the recovery of the taxes so assessed, and

(b) quashing the orders of the income-tax authorities refusing to record partition and directing the respondent and his subordinates to record under Section 25A of the Act that the erstwhile joint family property has been divided or partitioned in definite portions, each member getting an equal share, on October, 1954;

(c) directing the respondent and his subordinates to cancel or withdraw the impugned orders and all steps taken for the recovery of the amounts so assessed;

(d) directing the respondent and his subordinates not to take any further steps for the recovery of the tax so assessed;

(e) quashing all the penalty orders and such other orders passed in pursuance of the assessment proceedings aforesaid;

(f) quashing all the orders of attachment or in the nature of attachment passed by the Income-tax Authorities in these proceedings for the assessment year 1955-56 onwards, and

(g) to pass such other and further orders as your Lordships deem just and expedient in the circumstances of the case."

6. It seems to us that the High Court rightly dismissed the appellant's petition in limine. Since the valuation under Art. 133 (1) (b) was beyond Rs. 20,000/-, the appellant was granted a certificate as a matter of course.

7. It was pointed out to the appellant's counsel that so many pro-

ceedings and orders could not be challenged in one writ petition and he was asked to make his submissions in the appeal confining the writ petition to one matter only. Counsel chose to confine it to the attack on the attachment order of the Income tax Officer in respect of the money lying in the Savings Bank Account. While doing so, he traversed the entire allegations in the petition by adopting an ingenious method. Counsel submitted that the attachment had been made for realization of the income tax dues based upon various orders which were void and ultra vires. All those orders could be attacked collaterally while attacking the attachment order.

8. Mr. Iyengar urged the following points in support of the appeal.

(1) That the orders of the various authorities rejecting the claim of the partition under S. 25A of the Income-tax Act, 1922 were without jurisdiction and on their face suffered from many infirmities of law.

(2) That after Bapalal relinquished his interest in the joint family properties and ceased to be the karta, there was no karta of the family. Gulabchand — a junior member of the family could not act as a karta. Other members of the family did not accept him to be the karta.

(3) That even after the death of Bapalal in the year 1958 various notices under the Income-tax Act were issued and served in the name of Bapalal Purshottamdas Modi — a dead person — and hence the entire proceedings and assessment orders were nullities.

(4) That the appellant had no opportunity of taking any part in the income tax proceedings and his property cannot be made liable for realization of the dues determined in such proceedings.

9. None of the points urged on behalf of the appellant merits any detailed discussion. We were taken through the power of attorney executed by Bapalal in favour of Gulabchand, the deed of relinquishment executed by him on October 22, 1954 and the alleged memorandum of partition of October 24, 1954,

the orders of the Income-tax Officer, the Appellate Commissioner and the Tribunal in the proceedings under Section 25A of the Income-tax Act, 1922. In our opinion the orders do not suffer from any infirmity of law or any such defect which will make them void. Notice of the enquiry had been given to all the members as admitted by the appellant himself. He had been examined in the proceedings. Sub-section (3) of Section 25A provides that where an order accepting partition had not been passed in respect of a Hindu family assessed as undivided such family shall be deemed for the purposes of the Act to continue to be Hindu undivided family. A partition preliminary decree came much later. The income tax authorities had their own view to take. They were not bound by the decree. No reference was taken under the Income-tax Act challenging the order of the Tribunal dismissing the appeal.

10. It was clear from some of the assessment orders that Gulabchand was acting as a karta even during the lifetime of Bapalal as he had retired to live in Brindaban. At the relevant time nobody disputed his authority to act as karta. His eldest brother Vadilal was an old man of about 70 years of age. His elder brother Jayantilal — father of the appellant died in the year 1956. In these circumstances he appears to have acted as the karta with consent of all the other members. A junior member of the family could do so. See Mulla's Hindu Law page 296, fourteenth edn, where occurs the following passage:

"So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family properties, including even charitable properties (q); and is presumed to be the manager until the contrary is shown (r). But the senior member may give up his right of management, and a junior member may be appointed manager (s)."

11. Notices were being issued in the name of the family which was carrying on the business in the assumed name of Bapalal Purshottamdas Modi. They were neither issued

to nor served on Bapalal — the dead person. In response to the notices returns were being filed by the managing member of the family. At no stage before the income tax authorities a contention was raised that the notice was served on a dead person. There is no substance in the third point. Coming to the fourth and the last point urged on behalf of the appellant we find that the appellant is bound by the assessment made in respect of the income of his family which continued in the eye of law to be joint. The share of the appellant's properties received by him from the joint family or the income thereof is liable for the income tax dues in question. The appellant, as we have said above, was ill-advised to file a misconceived petition on wholly untenable grounds.

12. In the result the appeal fails and is dismissed with costs to respondent No. 1.

Appeal dismissed.

AIR 1976 SUPREME COURT 1956

(From: 1969, BLJR 721)

H. R. KHANNA, N. L. UNTWALIA
AND JASWANT SINGH, JJ.

Damodar Valley Corporation,
Appellant v. State of Bihar and
others, Respondents.

Civil Appeal No. 104 of 1970,
D/- 5-8-1976.

(A) Constitution of India, Article 288 — Bihar Electricity Duty Act (36 of 1948), Section 3 (as amended in 1963) — Damodar Valley Corporation — Liability to pay electricity duty — Claim of immunity from payment by virtue of Art. 288 (1) — Effect of amendment of Section 3 — Assent of President when necessary.

The Damodar Valley Corporation which is an industrial undertaking was not liable to pay electricity duty under the Bihar Act of 1948 by virtue of Art. 288 (1) of the Constitution. But the bar to the levy of the said duty was removed by the Amending Act of 1963 which received the assent of the President. Thus after the amendment the Damodar Valley Corporation became liable to

HT/HT/C600/76/MVJ

pay duty under Section 3 of the Act. 1969 BLJR 721, Affirmed.

(Paras 5, 6)

Under Proviso (v) to Section 3 (1) of the principal Act, mines and industrial undertakings were exempt from levy of duty. This exemption stood withdrawn as a result of substitution of new Section 3 for the old section by the amending Act. The new charging Section 3 (1) roped in all industrial undertakings, including the Damodar Valley Corporation, for the purpose of levy of duty. Clause (e) of sub-section (2) of new Section 3 expressly granted exemption from levy of electricity duty on units of energy consumed by the Corporation for the generation, transmission or distribution of electricity by that Corporation. This provision, containing express reference to the Corporation, clearly warrants the inference that in respect of units of energy not covered by clause (e) of sub-section (2) of Section 3 the exemption would not be available to the Corporation. Therefore, it could not be contended that the amending Act did not contemplate or contain indication regarding the imposition of electricity duty upon the Corporation. Otherwise it would have the effect of rendering clause (e) of sub-section (2) of Section 3 to be wholly redundant. The courts, it is well settled, should be loath to accept an argument which would have the effect of rendering redundant the provision of a statute. (Para 7)

Further, S. 3 of the Act is the charging section and Section 4 merely provides for the manner and mode of payment. It is not the requirement of Art. 288 (2) that the provisions which merely deal with the mode and manner of payment should also receive assent of President. Therefore liability for payment of duty can be fastened on the Corporation notwithstanding that Section 4 is not re-enacted with the assent of the President. (Paras 8, 9)

Dr. L. M. Singhvi, Sr. Advocate, (M/s. U. P. Singh and S. N. Jha, Advocates with him), for Appellant; Mr. Sarjee Prasad, Sr. Advocate and U. S. Prasad, Advocate with him, for Respondents.

Judgment of the Court was delivered by

KHANNA, J.— The short question which arises for determination in this appeal on certificate by Damodar Valley Corporation against the judgment of Patna High Court dismissing the writ petition filed by the appellant is whether the appellant is liable to pay electricity duty under Bihar Electricity Duty Act, 1948 as amended by Bihar Electricity Duty (Amendment) Act, 1963. The High Court answered the question in the affirmative against the appellant.

2. The appellant is a corporation established under the Damodar Valley Corporation Act, 1948 for the development of the Damodar valley in the States of Bihar and West Bengal. One of the functions of the appellant is the promotion and operation of schemes for the generation, transmission and distribution of hydro-electric and thermal electrical energy. Bihar Electricity Duty Act, 1948 (Bihar Act 36 of 1948) (hereinafter referred to as the principal Act) was published in the Bihar gazette on October 1, 1948. It was an Act for the levy of duty on the sales and consumption of electrical energy in the province of Bihar. Material part of Sections 3 and 4, as they stood before the amendment made in 1963, read as under:

"3. Incidence of duty.— (1) There shall be levied and paid to the State Government on the units of energy consumed or sold, excluding losses of energy in the transmission and transformation, a duty at the rates specified in the First Schedule:

Provided that no duty shall be leviable on units of energy:—

(i)
(ii)
(iii)
(iv)
(v) consumed by, or in respect of, or sold for consumption in any—
(a) mine, as defined in the Indian Mines Act, 1923;
(b) industrial undertaking;
except to the extent specified in the Second Schedule;

(vi)
(2)
4. Payment of duty.— (1) Every licensee shall pay every month to

the State Government at the time and in the manner prescribed the proper duty payable under Section 3 on the units of energy consumed by him or sold by him to the consumer.

(2) Every licensee may recover from the amount which falls to be paid by the licensee as duty in respect of energy sold to the consumer.

(3) "

(4) "

(4a) "

(5) "

The principal Act was amended by Bihar Electricity Duty (Amendment) Act, 1963 (Bihar Act. 20 of 1963) (hereinafter referred to as the amending Act). The amending Act received the assent of the President on December 4, 1963 and was published on December 17, 1963. By Section 2 of the amending Act, new Section 3 was substituted for the old Section 3. Material part of new Section 3 read as under:

(Contd. on, Col. 2)

"3. Incidence of duty.— (1) Subject to the provision of sub-section (2), there shall be levied and paid to the State Government on the units of energy consumed or sold, excluding losses of energy in transmission and transformation, a duty at the rate or rates specified in the Schedule.

(2) No duty shall be leviable on units of energy—

(a) "

(b) "

(c) "

(d) "

(e) consumed by the Damodar Valley Corporation for the generation, transmission or distribution of electricity by that Corporation;

(f) "

(3) "

Amendment was also made in the First Schedule of the principal Act. The relevant part of the schedule read as under:

"THE SCHEDULE

(See section 3.)

RATES OF DUTY.

A. For a mine or an industrial undertaking, save in respect of its premises used for residential or office purposes.

Such rate or rates not exceeding 2 naye paise per unit of energy as may, from time to time, be fixed by the State Government with the previous consent of the President, by order in this behalf."

3. In the writ petition the appellant prayed for quashing three notices dated February 10, 1965 issued by the Superintendent of Commercial Taxes Giridih as also his orders dated March 24 and 29, 1966. By the impugned notices the Superintendent of Commercial Taxes called upon the appellant to show cause as to why penal action under the principal Act, as amended, should not be taken against the appellant for having failed to get itself registered under that Act. The appellant was also called upon to apply for registration. By the impugned orders the Superintendent of Commercial Taxes directed the appellant to pay electricity duty under the Act as amended. The case of the appellant was that it enjoyed immunity from payment of tax under clause (1) of Article 288 of the Constitution. No law satisfying the requirement of clause (2) of Article

288, it was contended, had been made warranting the levy of such a duty. The High Court repelled this contention, and we find no sufficient ground to take a different view.

4. Article 288 of the Constitution reads as under:

"288. (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation.— The expression 'law of a State in force' in this clause shall include a law of a State pass-

ed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order."

5. Article 288 grants exemption from tax under any law of a State in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley, except in certain cases. According to clause (1) of the article, this exemption would not be available in respect of such tax imposed under any law of a State in force immediately before the commencement of the Constitution if the President by order so provides. Although the principal Act is a pre-Constitution law, being an Act of 1948, no order was admittedly made by the President withdrawing the exemption in respect of the appellant from levy of such tax under the principal Act. Indeed, there was no question of issue of any such order because the principal Act did not provide for the imposition of electricity duty upon a corporation like the appellant. Clause (v) of the proviso to sub-section (1) of Section 3 of the principal Act expressly stated that no duty shall be leviable on units of energy consumed by, or in respect of, or sold for consumption in any mine, as defined in the Indian Mines Act, or industrial undertakings, except to the extent specified in the Second Schedule. The appellant is admittedly an industrial undertaking, and as such, was not

liable to pay electricity duty under the principal Act.

6. The case of the respondents is that the bar to the levy of the said duty was removed and the levy of the duty on the appellant was put on a sound legal basis as a result of the amendment made in the principal Act by the amending Act of 1963. The amending Act, we find, satisfies the requirements of clause (2) of Article 288. According to that clause, the legislature of a State may by law impose, or authorise the imposition of, any tax mentioned in clause (1) of that article, but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order. The amending Act of 1963, as already mentioned, received the assent of the President before its publication. The exemption which was granted to mines and industrial undertakings from payment of electricity duty under the principal Act was withdrawn under the amending Act, except to some extent with which we are not concerned. The new schedule, substituted for the old schedule by the amending Act, prescribed the rates of duty for mines and industrial undertakings, and it was provided that the rate of duty shall be such rate or rates not exceeding 2 naye paise per unit of energy as may, from time to time, be fixed by the State Government with the previous consent of the President, by order in this behalf.

7. It has been argued by Dr. Singhvi on behalf of the appellant that the scheme of Article 288 is to grant general exemption from the levy of tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley. If any law made by a State

legislature, according to the submission, seeks the imposition of any such tax, such law should contain clear indication to that effect before it receives the assent of the President. The amending Act of 1963, according to the learned counsel, did not contain any such indication. This contention, in our opinion, is wholly devoid of force. Under proviso (v) to Section 3 (1) of the principal Act, mines and industrial undertakings were exempt from levy of duty. This exemption stood withdrawn as a result of substitution of new Section 3 for the old section by the amending Act. The new charging section 3 (1) roped in all industrial undertakings, including the Damodar Valley Corporation, for the purpose of levy of duty. Clause (e) of sub-section (2) of new Section 3 which was introduced by the amending Act of 1963, expressly granted exemption from levy of electricity duty on units of energy consumed by the appellant corporation for the generation, transmission or distribution of electricity by that corporation. This provision, containing express reference to the appellant corporation, clearly warrants the inference that in respect of units of energy not covered by clause (e) of sub-section (2) of Section 3 the exemption would not be available to the appellant. The contention advanced on behalf of the appellant that the amending Act did not contemplate or contain indication regarding the imposition of electricity duty upon the appellant is plainly untenable, for it would have the effect of rendering clause (e) of sub-section (2) of Section 3 to be wholly redundant. The courts, it is well settled, should be loath to accept an argument which would have the effect of rendering redundant the provision of a statute.

8. Lastly, it has been argued that though there has been an amendment of Section 3 of the principal Act by its substitution by a new section under the amending Act of 1963, there has been no amendment of Section 4 with the assent of the President. As such, no liability to pay electricity duty can be fastened upon the appellant. This submission too is bereft of force. Section 3, as inserted by the amending Act of

1963, is the charging section. According to clause (1) of that section, subject to the provision of sub-section (2), there shall be levied and paid to the State Government on the units of energy consumed or sold, excluding losses of energy in transmission and transformation, a duty at the rate or rates specified in the Schedule. The section thus deals with the incidence of duty, and makes it clear that such duty has to be paid on the units of energy consumed or sold and at the rate or rates specified in the schedule. It is further made clear by the section that the duty is to be levied and paid to the State Government. As the duty is to be levied on the units of energy consumed or sold, it would follow that the duty would have to be paid by the consumer or seller, as the case may be. Section 4 of the principal Act merely provides for the manner and mode of payment of the duty, and we find no substance in the contention that unless Section 4 of the principal Act was also re-enacted with the assent of the President, the liability for payment of duty cannot be fastened upon the appellant.

9. What is required by clause (2) of Article 288 is that the law made by the State legislature for imposing, or authorising the imposition of tax mentioned in clause (1) shall have effect only if after having been reserved for the consideration of the President it receives his assent. Another requirement of that clause is that if such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order. It is, however, not the effect of that clause that even if the above mentioned two requirements are satisfied, the provisions which merely deal with the mode and manner of the payment of the aforesaid tax should also receive the assent of the President and that in the absence of such assent, the provisions dealing with the incidence of tax, which have received the assent of the President, would remain unenforceable.

10. Some other aspects were also dealt with by the High Court. but in the light of the view we have taken in the matter, it is not necessary to deal with those aspects.

11. The appeal consequently fails and is dismissed but in the circumstances without costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1961

(From: Delhi)*

Y. V. CHANDRACHUD, P. K. GOSWAMI
AND P. N. SHINGHAL, JJ.

Kewal Krishan Bagga, Appellant v.
Chairman, Railway Board and others,
Respondents.

Civil Appeal No. 1065 of 1971, D/-
3-8-1976.

(A) Constitution of India, Articles 14 and 16 — Fixing equation between posts in old and new establishments — Amritsar Workshop taken over by Government of India — Employees of Workshop transferred to Northern Railway on agreed terms and conditions — Fixation of equation between employees — Whether there was breach of conditions and discrimination.

The Amritsar Workshop was taken over by the Government of India with effect from June 1, 1956, whereupon, the services of the existing employees of the Workshop were transferred to the Northern Railway on terms and conditions agreed to by the Railway Board. The seniormost 8 out of the 38 godown keepers who were working under the Government of Punjab were given letters of appointment by the Northern Railway as Wardkeepers in the grade of Rs. 80-160. The remaining 30 godown keepers, amongst whom was the appellant, were offered appointments as clerks in the grade of Rs. 55-130 effective from June 1, 1956. Thus, as a result of the transfer of employment from one employer to another, the appellant came to be placed in the scale of Rs. 55-130 instead of Rs. 50-125 and he became under his new employer, the Government of India, a clerk instead

of a godown keeper that he was under the Government of Punjab. (Para 2)

Held (i) that the appointment of the appellant as a clerk in the Northern Railway was not contrary to the terms and conditions. On May 31, 1956 the appellant was working under the Punjab Government as a godown keeper in the grade of Rs. 50-125. On June 1, 1956 his services were taken over by the Government of India and he was placed in the grade of Rs. 55-130. Thus, his existing pay and grade were duly protected. As regards the second condition, the Northern Railway had to fix the equation between the post of a godown keeper held by the appellant and one of the posts in their own establishment. That power was exercised by them by appointing the appellant as a clerk on the basis that the post of a godown keeper would have correspondence with that of a clerk in the new establishment. There was no substance in the appellant's grievance that the decision to equate godown keepers with clerks was unfair and that godown keepers should have been equated with wardkeepers. Pay-wise there was greater correspondence between godown keepers and clerks than between godown keepers and wardkeepers. In the absence of discrimination courts of law do not embark upon the exercise of fixing equation between posts in the old and the new establishments. (Paras 6 and 7)

(ii) that 8 out of 38 godown keepers were appointed as wardkeepers by way of promotion and not by the test of equivalence. They had each a much longer experience than the appellant. It cannot therefore be said that any discriminatory treatment was accorded to the appellant in relation to the 8 godown keepers who were absorbed as wardkeepers. (Para 8)

(iii) that the decision to treat clerks in the old establishment as senior to godown keepers in the cadre of clerks in the Northern Railway in which both clerks and godown keepers were assimilated was not arbitrary or irrational.

(Para 9)

Cases Referred: Chronological Paras

AIR 1974 SC 555 = (1974) 2 SCR 348 8

M/s. S. K. Mehta, A. K. Jain and S. K. Dhingra, Advocates for Appellant; Mr. G. L. Sanghi, Sr. Advocate (Mr. Girish Chandra for R. N. Sachthey Advocate with him), for Respondents.

* (L. P. A. No. 179 of 1970, D/- 27-10-1970 (Delhi).)

The Judgment of the Court was delivered by

CHANDRACHUD, J.:— The appellant, Kewal Krishan Bagga, joined the Central Workshop at Amritsar as a godown keeper in the year 1953 against a permanent post in the scale of Rs. 50-125. The said Workshop was run by the Irrigation Department of the State of Punjab. There were 38 godown keepers in the Amritsar Workshop and they all had a separate seniority list, distinct from that of clerks whose scale of pay was Rupees 60-175.

2. The Amritsar Workshop was taken over by the Government of India with effect from June 1, 1956, whereupon, the services of the existing employees of the Workshop were transferred to the Northern Railway on terms and conditions agreed to by the Railway Board. The seniormost 8 out of the 38 godown keepers who were working under the Government of Punjab were given letters of appointment by the Northern Railway as Wardkeepers in the grade of Rs. 80-160. The remaining 30 godown keepers, amongst whom was the appellant were offered appointments as clerks in the grade of Rs. 55-130 effective from June 1, 1956. Thus, as a result of the transfer of employment from one employer to another, the appellant came to be placed in the scale of Rs. 55-130 instead of Rs. 50-125 and he became under his new employer, the Government of India, a clerk instead of a godown keeper that he was under the Government of Punjab.

3. Since 30 godown keepers and all those working in the clerical cadre in the Amritsar Workshop under the Government of Punjab were taken over as clerks by the Government of India, a question arose in course of time as regards the fixation of their inter se seniority. That question, as in all similar cases of equation and equivalence, presented a ticklish problem for solution because persons who were working as clerks in the Amritsar Workshop under the Government of Punjab were working in a higher grade than godown keepers and after the Government of India took over the Workshop, the 30 godown keepers and all clerks were integrated into a common cadre of clerks in the scale of Rs. 55-130. On December 20, 1957, the Government of India decided that the inter se seniority of godown keepers and clerks who, after the transfer of employment, were assimilated in a common

cadre of clerks should be fixed on the basis of their respective length of service. In pursuance of this directive the appellant was placed at Serial No. 176 in the common seniority list. Later, the Government revised its decision and resolved that persons who were working as clerks under the Government of Punjab should all be treated as senior to godown keepers since the former were placed in a higher scale of pay. As a result of this decision, the appellant moved down to Serial No. 225 in the list of seniority.

4. In January, 1968, the appellant filed a writ petition in the Delhi High Court to challenge the decision of the Government of India creating a common seniority list for godown keepers and clerks, and treating all clerks as senior to godown keepers. The petition having been rejected by the High Court the appellant has filed this appeal by special leave.

5. On April 27/28, 1956, the General Manager of the Northern Railway wrote to the Secretary, the Government of Punjab, asking that persons working in the Amritsar godown should be informed that consequent on the transfer of the Workshop to the Government of India from June 1, 1956, the non-gazetted staff of the Workshop will be offered appointments by transfer to the Northern Rly. in accordance with the terms and conditions which were set forth in the Annexure to the letter. These terms and conditions, in so far as relevant, are as follows: (1) The existing pay and grade of the staff transferred to the Government of India was to be protected; (2) For each existing post/category in the Amritsar Workshop, the Northern Railway Administration would indicate an appropriate scale of pay applicable to the corresponding post/category in the Railway Workshops; and (3) The staff of the Amritsar Workshop would be given an option individually to be governed either by the new scale of pay or by the scale which was applicable to them while they were serving under the Government of Punjab. Those opting for the new scales of pay would have their pay fixed at the stage above their existing pay as on May 31, 1956.

6. The first contention of learned counsel appearing for the appellant is that the appointment of the appellant as a clerk in the Northern Railway is contrary to the terms and conditions set out above. We find it impossible to accept this contention. On May 31, 1956, the

appellant was working under the Punjab Government as a godown keeper in the grade of Rs. 50-125. On June 1, 1956, his services were taken over by the Government of India and he was placed in the grade of Rs. 55-130. Thus, his existing pay and grade were duly protected. As regards the second condition, the Northern Railway had to fix the equation between the post of a godown keeper held by the appellant and one of the posts in their own establishment. This they did by equating the post of a godown keeper under the Punjab Government with that of a clerk in their own establishment. Under the terms and conditions on which the non-gazetted staff of the Amritsar Workshop was taken over by the Government of India, the power to fix the equation was vested in the Northern Railway Administration. That power was exercised by them by appointing the appellant as a clerk on the basis that the post of a godown keeper would have correspondence with that of a clerk in the new establishment.

7. There is no substance in the appellant's grievance that the decision to equate godown keepers with clerks was unfair and that godown keepers should have been equated with wardkeepers. Whereas the scale of pay of godown keepers in the Government of Punjab was Rs. 50-125, that of wardkeepers in the Northern Railway Administration was Rs. 80-160. The scale of pay of wardkeepers was revised in November, 1957 to 150-225 with retrospective effect from 1-4-1956. Thus, pay-wise there was greater correspondence between godown keepers and clerks than between godown keepers and wardkeepers. Godown keepers in the Government of Punjab were working in the grade of Rs. 50-125 and correspondingly, clerks in the Northern Railway were in the grade of Rs. 55-130. The grade of clerks in the Northern Railway Administration was revised on August 1, 1956 to Rs. 60-130 which means that godown keepers like the appellant were placed in the grade of 60-130. We see no unfairness in the equation fixed by the Northern Railway, apart from the fact that in the absence of discrimination courts of law do not embark upon the exercise of fixing equation between posts in the old and the new establishments.

8. The appellant did urge that he was discriminated against, the contention being that 8 out of 38 godown keepers were appointed as wardkeepers and the

remaining 30 including the appellant were wrongly denied an equal treatment with them. The very assumption of this argument is fallacious because the senior-most 8 godown keepers, apart from the 2 whose record was unsatisfactory, were appointed as wardkeepers by way of promotion and not by the test of equivalence. The counter-affidavit filed on behalf of the Government says, which we have no reason to doubt, that 8 godown keepers who were senior-most and who were found suitable were promoted to the post of wardkeepers on the basis of seniority-cum-suitability. It is necessary in this behalf to bear in mind that whereas the appellant was recruited in 1953 his seniors who were taken by the Northern Railway as wardkeepers had joined the service of the Punjab Government at least 5 years before him. They had each a much longer experience than the appellant. It cannot therefore be said that any discriminatory treatment was accorded by the Government of India to the appellant in relation to the 8 godown keepers who were absorbed as wardkeepers. The absorption was by way of promotion and not by equation. The decision in *E. P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348, 389 = (AIR 1974 SC 555 at pp. 585-586), on which the appellant's counsel relies for the proposition that for fixing equivalence the pay drawn by an employee is not a conclusive consideration, has therefore no application.

9. It was finally urged that clerks in the old establishment were wrongly accorded seniority over godown keepers in the cadre of clerks in the Northern Railway in which both clerks and godown keepers were assimilated. This argument overlooks the basic consideration that clerks in the Amritsar godown while working under the Punjab Government were placed in a higher scale of pay than godown keepers. The decision to treat clerks as senior to godown keepers was therefore not arbitrary or irrational. In fact, some injustice done earlier to clerks by fixing their inter se seniority with godown keepers in the new establishment on the basis of their length of service in the respective cadres was later rectified by providing that clerks will be considered as senior to godown keepers.

10. Since we have considered the matter on merits, we do not propose to deal with the objection of the Government that the appellant was guilty of laches and should have been declined relief on that ground.

11. Accordingly, the appeal is dismissed but there will be no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1964

(From:— Andhra Pradesh)*

A. N. RAY, C. J. AND M. H. BEG AND JASWANT SINGH, JJ.

State of Andhra Pradesh, Appellant
v. S. N. Nizamuddin Ali Khan, Respondent.

Civil Appeal No. 1863 of 1968, D/- 5-8-1976.

(A) Constitution of India, Art. 311 (2) — Compulsory retirement as punishment — Case governed by Hyderabad Civil Services (Classification, Control and Appeal) Rules, Rr. 9 (b), 12 and 17 (e) — Order based partly on extraneous matter — Absence of opportunity to be heard and make representation at enquiry and penalty stages respectively — Order set aside as violative of Art. 311 (2).

The Administrative Bench of the High Court, consisting of the Chief Justice and another Judge, deputed a third Judge to conduct the enquiry into charges of misconduct against the respondent, in accordance with the Hyderabad Civil Services (Classification, Control and Appeal) Rules. The Enquiry Officer submitted a report finding the respondent guilty of some of charges and recommended a warning to the respondent as a punishment. The report of the Chief Justice on his own examination of the evidence, confirmed the findings of the Enquiry Officer. The Chief Justice took extraneous matters into consideration, including secret information against the respondent, and recommended compulsory retirement. The Administrative Bench of the High Court sent both the reports to the Government, which, accepting the report of the Chief Justice, both with regard to the guilt and punishment, took action on it by issuing show cause notice to respondent against his proposed compulsory retirement. The report of the Enquiry Officer alone was enclosed; report of the Chief Justice was not given to the respondent. The respondent was compulsorily retired after the Public Service Commission had approved it.

*(C. C. C. A. No. 4 of 1962, D/- 3-4-1967 (Andh. Pra.).)

HT/HT/C602/76/VBB

Held that the report submitted by the Chief Justice was not the report of the Administrative Bench. The Hyderabad High Court Act did not authorise the Chief Justice to send a supplementary report with his own findings. The report of the Chief Justice was based to a large extent on secret information which the respondent had no opportunity of meeting. The respondent was denied the opportunity of being heard at the stage of enquiry as well as of making a representation against the penalty proposed by the Government. For those reasons the impugned order violated Art. 311 (2) and was set aside: C. C. C. A. No. 4 of 1962, D/- 3-4-1967 (Andh. Pra.), Affirmed.

(Para 19)

Mr. P. Ram Reddy, Senior Advocate (M/s. K. Jayaram & A. V. V. Nair, Advocates with him), for Appellant; Mr. T. C. Raghavan, Senior Advocate (M/s. B. Parthasarathi and S. Shaikat Hussain, Advocates with him), for Respondent.

Judgment of the Court was delivered by

RAY, C. J.:— This appeal by special leave is against the judgment dated 3rd April, 1967 of the High Court of Andhra Pradesh.

2. The respondent filed this suit to set aside the order of compulsory retirement on the ground that it was illegal, wrongful, ultra vires and inoperative. The respondent alleged that the departmental enquiry was initiated by the Chief Justice and not by the Administrative Bench of the High Court which alone could do so under the Hyderabad High Court Act. The respondent alleged that he was not given a reasonable opportunity inasmuch as the report of the Enquiry Officer was submitted to the Chief Justice and not to the Administrative Bench and that the Public Service Commission was not consulted. The respondent further alleged that the Chief Justice added his own findings to the report of the Enquiry Officer while sending it to the Government and in doing so he took extraneous matters which had not been the subject-matter of the enquiry. The respondent alleged that he had no opportunity to defend himself with reference to the findings of the Chief Justice.

3. The High Court held that the report of the High Court took into consideration extraneous matters and thus deprived the respondent from giving a reasonable opportunity (sic). The High Court therefore, held that Article 311 (2) was

violated. The High Court confirmed the decree of the trial Court but modified the order to the extent that the respondent was entitled to arrears of salary.

4. The Hyderabad Civil Services (Classification, Control and Appeal) Rules referred to as the Rules contain in Part III the following relevant provisions. Rule 9 (b) states that compulsory retirement before completion of 30 years or 25 years of qualifying service is one of the penalties. Rule 12 provides that the Government may impose any of the penalties mentioned in items (ii) to (viii) of Rule 9 on members of the State Services after consultation with the Public Service Commission where such consultation is necessary. Rule 17 (b) provides that in every case where it is proposed to impose on a member of a Service any of the penalties mentioned in items (iv), (vi), (vii), and (viii) of Rule 9, the grounds shall be communicated. The charges are to be communicated together with the statement of the allegations on which each charge is based. A written statement is required to be filed by the officer and an enquiry shall be held. After the enquiry has been completed, the person charged shall be entitled to put in, if he so desires, any further written statement in his defence. After the enquiry has been completed and after the authority competent to impose the penalty mentioned in that clause has arrived at provisional conclusions, the person charged shall be supplied with the copy of the report of the enquiring authority and be called upon to show cause within a reasonable time against the particular penalty proposed to be inflicted.

5. Rule 14 states that after completing the oral enquiry, if any, and giving the person charged an opportunity of making a written statement, the inquiry officer should record his findings on each charge, the reason for such findings and recommendations as regards the penalty on each of the charges. Rule 16 states that on receipt of the report of the enquiry officer the punishing authority should arrive at a provisional conclusion in regard to the penalty to be imposed and the person charged shall be supplied with a copy of the report of the enquiry officer and be called upon to show cause within a reasonable time why the particular penalty or penalties should not be inflicted upon him. Any representation submitted by the person charged in this behalf shall be duly taken into consideration by the punishing authority before final orders are passed.

6. The Rules further provide that in a case in which it is necessary to consult the Public Service Commission according to the provisions of the Public Service Commission Regulations, the complete papers of the case should be sent to the Commission for their advice as regards the action to be taken without any observation on the merits of the case. On receipt of the advice of the Commission, if it be found that the Commission have agreed with the provisional conclusion reached by the punishing authority as regards the penalty to be inflicted, final orders should be issued to the person charged. If, however, it be found that there has been disagreement on this point and if the punishing authority has no objection to accept the advice of the Commission, final orders should be issued to the person charged. If, however, the punishing authority does not consider it feasible to accept the advice of the Commission, another reference on this point should be made to the Commission and if they still adhere to their views the case should be submitted through the Services Branch of the General Administrative Department for the orders of the Chief Minister showing reason for the proposal and such orders as may be passed by the Chief Minister shall be communicated to the person charged.

7. Under the Hyderabad High Court Act 3 of 1937 Fasli corresponding to the year 1937 Section 12 provides for the Administrative Bench consisting of at least two Judges appointed by the Chief Justice. The Chief Justice may constitute more than one Administrative Bench. Every question before the Administrative Bench shall be decided either by a consensus or by majority of opinion. But where a disagreement does not produce a majority of opinion, action shall be taken in accordance with the view with which the Chief Justice might concur. If the Chief Justice does not join the Bench and there is no majority of opinion all opinions shall be placed before the Chief Justice and the opinion concurred by him shall be given effect to. Section 13 of the Hyderabad Court Act deals with powers of Administrative Bench of the High Court. The Administrative Bench shall have power inter alia to sanction suspension, fines, dismissal.

8. The respondent was appointed as Munsiff Magistrate in the year 1948. Sometime in 1951 and 1952 a preliminary enquiry by the District and Sessions

Judge was made. The Administrative Bench consisting of the Chief Justice of the High Court and another learned Judge deputed Justice Manohar Prasad to conduct the enquiry in accordance with the Rules. On 16th April, 1953 the respondent was suspended. A charge-sheet was served on the respondent along with the statements of four persons. On the following charges it was proposed to remove the respondent from service namely (1) Communal bias in deciding case, (2) disregarding judicial orders, (3) suggesting names of Muslim lawyers to Muslim parties and (4) inefficiency.

9. On 3rd August, 1953 the Enquiry Officer Justice Manohar Prasad submitted a report finding the respondent guilty of charges numbered 1 and 3 and he recommended a warning. On 25th August, 1953 the report of the Chief Justice on his own examination of the evidence confirmed the findings of the enquiry officer and he recommended compulsory retirement. On 5th September, 1953 the Administrative Bench of the High Court sent both the reports to the Government.

10. On 14th October, 1953 a show cause notice was issued from the Government for compulsory retirement of the respondent. The Government show cause notice enclosed the report of Justice Manohar Prasad. The respondent answered the findings of the enquiry report and also protested against the report of the Chief Justice saying that the Chief Justice had no authority to add his own remarks and his findings were arrived at without hearing the respondent.

11. On 22nd December, 1953 the matter was referred to the Public Service Commission. On 27th February, 1954 the Public Service Commission approved compulsory retirement. On 8th April, 1954 the respondent was compulsorily retired.

12. On 28th June, 1954 the respondent preferred an appeal to the Rajpramukh. On 4th November, 1954 the Rajpramukh dismissed the appeal. In 1957 the respondent filed this suit.

13. The City Civil Court found that the respondent did not have a chance to meet some of the allegations referred to by the Chief Justice. The City Civil Court also found that the report of the Chief Justice weighed with the Government. The City Civil Court also found that the respondent had no reasonable opportunity for defending himself against the imposition of penalty of compulsory retirement.

14. The High Court held that the findings of the Chief Justice were based to a considerable extent on material which was not produced before the High Court (sic) (enquiry officer?). The High Court also held that the Government had accepted the report of the Chief Justice both with regard to the guilt and punishment. The High Court held that since the report of the Chief Justice formed an integral part of the enquiry, the respondent was denied reasonable opportunity at both the stages of enquiry and punishment and, therefore, the compulsory retirement was bad.

15. On behalf of the appellant it was contended that assuming the report of the Chief Justice was taken into consideration by the Government the findings of the Chief Justice were based on evidence let in before the Enquiry Officer and not on any extraneous circumstances. It was also submitted that it was open to the Government to accept or reject the recommendation of the Chief Justice on the question of punishment. The further submission was that the respondent was given a reasonable opportunity at both the stages of the enquiry and punishment, and, therefore, the order of compulsory retirement is good.

16. In the alternative it was submitted on behalf of the appellant that the Government of its own came to the conclusion that compulsory retirement was the proper punishment, and, therefore, the Government did not act on the recommendation of the Chief Justice.

17. The report of the Chief Justice referred to the report of the Enquiring Judge. The Enquiring Judge held that charges relating to the communal bias of the respondent and charges relating to unbecoming conduct of the respondent in relation to engagement of counsel in pending cases were proved. The Chief Justice in his report said that he was flooded with complaints from lawyers, litigants and from all sides which emanated not only from the members of the Bar but also from responsible officers. The Chief Justice said in his report that on consideration of all the facts he had not the slightest doubt that in this case leniency would be misplaced and in the interest of purity of services such practices, when proved, as they have been proved, must be dealt with firmly. He, therefore, expressed the opinion that the respondent should be compulsorily retired and he concluded with the observation

"let the Government be moved accordingly."

18. Under the Rules the Government has power under Rule 12 to impose, inter alia, the penalty of compulsory retirement after consultation with the Public Service Commission where such consultation is necessary. The Chief Justice recommended compulsory retirement. He took note of complaints received by him from lawyers and other persons. The Chief Justice took note of insubordination which charge was rejected by the Enquiry Officer. Rule 17 (e) of the Rules requires that all orders of punishment shall state the grounds on which they are based and shall be communicated to the person against whom they are passed. The report of the Chief Justice was not given to the respondent. The High Court Act did not authorise the Chief Justice to send a supplementary report with his own findings. The respondent had no reasonable opportunity of making any representation against the report of the Chief Justice of the proposed punishment of compulsory retirement.

19. The High Court rightly held that the report of the Chief Justice took into consideration extraneous matters, and he was not authorised to do so under the Rules or the High Court Act. The report submitted by the Chief Justice is not the report of the Administrative Bench. The High Court rightly held that the Government accepted the Chief Justice's report and took action on it. The High Court was right in holding that the report of the Chief Justice was based to a large extent on secret information which the respondent had no opportunity of meeting. The respondent was denied the opportunity of being heard at that stage of enquiry. The respondent was denied a reasonable opportunity of making a representation against the penalty proposed by the Government.

20. For these reasons the appeal is dismissed. The respondent is entitled to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1967

(From Madhya Pradesh: 1975 Cri LJ 1766)

A. N. RAY, C. J., M. H. BEG AND
JASWANT SINGH, JJ.

Arun Kshetrapal, Appellant v. Registrar, High Court, Jabalpur and another, Respondents.

Criminal Appeal No. 21 of 1976, D/- 4-8-1976.

(A) Contempt of Courts Act (1971), Sections 12 (1) and 19 (1) (b) — Conviction for contempt of High Court — Acceptance of apology only for remitting punishment — Appeal to Supreme Court — Interference. 1975 Cri LJ 1766 (M. P.), Reversed.

In this case the contemner District Magistrate who had been directed by the High Court to produce a detenu before the High Court on a certain date in connection with the hearing of a habeas corpus petition had moved in the matter promptly and got the detenu produced before the High Court on the due date. Two days prior thereto the District Magistrate had sent a wireless message to the Advocate-General requesting him to request the Court not to insist on the production of the detenu as there was possibility of disturbance of public order, in the light of the State Government order D/- 1-8-1975. A copy of it was also sent to the Registrar of the High Court. The High Court, taking the view that the sending of a copy of the wireless message to the Registrar of the High Court for information amounted to an attempt to interfere with the order of the High Court, convicted the Dist. Magistrate of Contempt of High Court and sentenced him to imprisonment till the rising of the Court and a fine of Rs. 100; the apology tendered by him was however accepted for the limited purpose of remitting the punishment under the proviso to Section 12 (1). On appeal to the Supreme Court under Section 19 (1) (b),

Held that on the facts and circumstances of the case the appellant at no stage interfered with the order of the High Court but on the other hand acted in obedience to it. In view of the tender of apology with grace and the production of the detenu on the date fixed, the order of the High Court could not be sustained. 1975 Cri LJ 1766 (M. P.), Reversed.

(Paras 19, 20)

Mr. B. Sen, Sr. Advocate (Mrs. A. K. Verma, M/s. J. B. Dadachanji, O. C. Mathur R. Narain, Advocates with him), for Appellant.

The Judgment of the Court was delivered by

RAY, C. J.:— This is an appeal under Section 19 (1) (b) of the Contempt of Courts Act, 1971, referred to as the Act against the order dated 20th August, 1975, of the High Court at Jabalpur convicting the appellant and sentencing him to suffer imprisonment till the rising of the Court under Section 4 (sic — S. 12(?)) of the Act and to pay a fine of Rs. 100/-. The High Court however accepted the apology of the appellant for the purpose of remitting the punishment under the proviso to Section 12 (1) of the Act and remitted the sentence and ordered the appellant to pay the paper book costs and to bear his own costs.

2. The appellant is a District Magistrate of District Rajnandgaon in Madhya Pradesh.

3. A detenu Vidya Bhushan Thakur challenged in the High Court by way of a habeas corpus petition the validity of his detention order passed by the appellant under Section 3 (1) (a) of the Maintenance of Internal Security Act, 1971.

4. On 1st August, 1975, the High Court directed the production of the detenu in court on 8th August, 1975.

5. On 5th August, 1975, the appellant received a telegram from the office of the Advocate-General, Madhya Pradesh intimating the appellant the order of the High Court to produce the detenu Vidya Bhushan Thakur before the High Court on 8th August, 1975, in connection with the habeas corpus petition.

6. Immediately on the receipt of the telegram from the office of the Advocate-General the appellant communicated the same to the Superintendent, Central Jail, Raipur directing him to send the detenu to Jabalpur under strong guard for his production before the High Court on 8th August, 1975. The order was communicated to the Superintendent, Central Jail, Raipur, on the same day and accordingly the Superintendent, sent the detenu on 6th August, 1975, at 5.35 p.m. to Jabalpur and thereafter the detenu was duly produced in Court on 8th August, 1975.

7. The State Government had passed an order under Section 268 of the Criminal Procedure Code which was pub-

lished in the Official Gazette on 1st August, 1975. The appellant referred the matter to the Home Secretary for clarification of the notification vide a wireless message dated 6th August, 1975, as to whether the detenus under the Maintenance of Internal Security Act are to be produced before the High Court in connection with the habeas corpus petitions. The appellant also spoke to the Government Advocate on 6th August, 1975, and brought to his notice the above notification of the State Government. The Government Advocate informed the appellant on telephone that neither the Advocate-General nor the High Court had so far received a copy of the said notification. The appellant then informed the Government Advocate that he would be sending a copy of the said notification by wireless for information. The appellant despatched the wireless message to the Government Advocate at Advocate-General's address quoting the notification as received from the Government.

8. The wireless message quoted the notification and the request of the appellant to the Advocate-General was as follows:—

"In the light of above Government Notification he was requested to request the Court not to insist on the production of Vidya Bhushan Thakur as there is strong possibility of disturbance of public order if Vidya Bhushan Thakur is taken out from jail. Kindly inform the Government regarding the action taken."

9. On 6th August, 1975, after the telephonic conversation with the Government Advocate, the appellant again directed the Superintendent, Central Jail, Raipur, to produce the detenu before the High Court on the date of hearing and informed the Advocate-General that the detenu would be produced before the High Court and the detenu was in fact produced before the Court.

10. The High Court took the view that the wireless message dated 6th August, 1975, addressed to the Advocate-General with a copy to the Registrar of the High Court amounted to an expression by the appellant of his inability to obey the order of the Court on account of the notification issued by the State Government published in the Official Gazette on 1st August, 1975. The High Court ordered the appellant to show cause why he should not be committed for contempt in exercise of the powers of the Court under Article 215 of the Constitution read with Section 10 of the Act.

11. The appellant appeared before the High Court on 13th August, 1975. The case was adjourned to 14th August, 1975, to enable the filing of a reply which was submitted in the form of an affidavit together with some enclosures. The appellant pleaded for the discharge of Rule Nisi on the ground that no contempt of Court was committed and that the wireless message to the Advocate General did not constitute a contempt of Court.

12. The High Court by order dated 20th August, 1975 found the appellant guilty of contempt by holding that the appellant had sent the wireless message dated 6th August, 1975, without waiting for reply from the State Government regarding the clarification of its Notification.

13. The appellant on 6th August, 1975, referred to the Home Secretary for clarification of the notification dated 1st August, 1975. The appellant sent a copy of the notification to the Advocate-General. The appellant also directed the Superintendent, Central Jail, Raipur to produce the detenu before the Court. The detenu in fact was produced before the High Court. All these features indicate that the appellant throughout acted in a careful and responsible manner.

14. The reply of the Government to the clarification asked for by the appellant on 6th August, 1975, was received on 8th August, 1975, that is to say two days after the wireless message had been sent to the Advocate-General. The clarification message of the Government reached the appellant in the afternoon of 8th August, 1975, viz., the date on which the detenu was to have been produced in court. The State Government in the note clarifying the position informed the appellant that in case the appellant was advised to produce the detenu before the High Court and if the High Court insisted on such production the High Court should be informed well before the date on which the detenu is to be produced by an affidavit sworn by an officer in charge that there is danger to public order if the detenu is produced. It appears that the appellant had acted just as the Government clarification suggested.

15. The appellant gave the notification to the Advocate-General because the latter did not have it and asked for it. The appellant asked for clarification from the State Government as to the notification because of the situation in which he was placed. The appellant sent instructions to the Superintendent, Cen-

tral Jail, Raipur to produce the detenu. The detenu was produced before the High Court. The appellant took all steps in good faith. The appellant from the beginning gave directions for production of the detenu.

16. The High Court held that the affidavit of the appellant contained no reference to the telephonic talk with the Advocate-General pursuant to which a telegram had been sent and therefore it was a false affidavit. The High Court also held that sending a copy of the wireless message addressed to the Advocate-General to the Registrar of the High Court for information amounted to an attempt to interfere with the order of the High Court.

17. The appellant sent a copy of the wireless message addressed to the Advocate-General to the Registrar for information only. The appellant took all steps to produce the detenu even before the receipt of the clarification or advice by the State Government for production of the detenu before the High Court. The appellant sent the wireless message to the Advocate-General only to apprise him of the notification sent by the State Government. The appellant sent that information inasmuch as the Government Advocate had informed the appellant that neither the Advocate-General nor the High Court was aware of the said notification issued by the State Government. The appellant requested the Advocate-General to request the Court not to insist on the production having regard to the public order which request was consistent with the direction of the State Government.

18. The absence of reference to the telephonic talk in the affidavit does not mean that no such talk in fact took place. The appellant produced the telephone bill as well as the letter of the Advocate-General to show that there was in fact a telephonic conversation. The appellant communicated to the Advocate-General in the discharge of his official duties the notification issued by the Government. The appellant requested the Advocate-General to request the High Court not to insist on the production. The wireless message was not addressed to the Court. The original addressee was the Advocate-General. A copy was sent to the Registrar for information that such a telegram had been sent to the Advocate-General.

1970 S.C. [Prs. 1-3] Salveraj v. State of Tamil Nadu (Bhagwati J.) A.I.R.

19. The appellant tendered apology with grace and not as a coward. The appellant produced the detenu. The appellant at no stage interfered with any order of the High Court. The appellant never showed any disobedience. On the contrary the appellant acted in obedience to the order of the High Court.

20. The High Court accepted the apology for the limited purpose of remitting the punishment. The order of the High Court cannot be sustained in view of the tender of apology by the appellant as well as the production of the detenu. The appeal is accepted. The judgment and order of the High Court are set aside.

Appeal allowed.

AIR 1976 SUPREME COURT 1970

(From: Madras)*

P. N. BHAGWATI, A. C. GUPTA
AND S. MURTAZA FAZL ALI, JJ.

Salveraj, Appellant v. The State
of Tamil Nadu, Respondent.

Criminal Appeal No. 92 of 1976
D/- 12-8-1976.

(A) Penal Code (1860), S. 300 —
Murder trial — Evidence, appreciation
of — Inherent improbabilities in
story put forward by alleged eye-
witnesses — Their testimony also not
corroborated — Evidence regarding
recovery of knife from accused also
found to be unreliable — Held, con-
viction was not sustainable as prose-
cution evidence was wholly unsatis-
factory. Criminal Appeal No. 744 of
1974 and Referred Trial No. 45 of
1974, D/- 25-11-1974 (Mad), Reversed.
(i) Evidence Act (1872), Sec. 3,
(ii) Constitution of India Art. 136).

(Paras 4 to 8)

M/s. S. C. Agarwala, V. J. Francis
and Mr. R. K. Garg, Advocates
of M/s. Ramamurthi and Co., for Ap-
pellant; Mr. A. P. Rangan and Miss
A. Subhashini, Advocates, for Res-
pondent.

Judgment of the Court was de-
livered by

BHAGWATI, J.:— This is an
appeal by special leave against the

*(Criminal Appeal No. 744 of 1974
and Referred Trial No. 45 of 1974,
D/- 25-11-1974—(Mad.))

HT/HT/C608/76/CWM

conviction and sentence of death
imposed by the Additional Sessions
Judge, Salem and confirmed by the
High Court of Madras.

2. One Natesan and his wife
Ranganayaki, to whom we shall, for
the sake of convenience, refer as the
deceased, were living together in a
house situate at Mutthu Undal Lane
in Nammakkal. Natesan was a tailor
by profession and he had his tailoring
shop in Sannadhi Street about a
furlong away from his house. He
had also a small petty shop adjoining
his House on the western side which
was looked after by the deceased.
The appellant, who is the son of the
maternal uncle of Natesan was reg-
ularly taking his meals with
Natesan since some time before the
date of the incident, as he was un-
married and had no employment at
the relevant time. According to the
prosecution, about three months
prior to the date of the occurrence,
the appellant made advances to the
deceased and wanted to satisfy his
lust by sexual intercourse with her,
but she spurned him and drove him
out of the house. Natesan was not
then in the house and when he came
back at night, the deceased com-
plained to him about the improper
conduct of the appellant, on which
Natesan chastised the appellant on
the next day.

3. On 11th March, 1974 at
about 8.15 p.m. Natesan was in his
tailoring shop. He had an appren-
tice by the name of Manisekaran. He
sent Manisekaran to his house with
some edibles for his children. Mani-
sekaran went to the house of Natesan
and finding the deceased in the
petty shop, he handed over the edi-
bles to her and she took the edibles
and went into the house. Natesan
left his tailoring shop at about 8.30
p.m. and reached the house at about
9 p.m. Manisekaran was at that time
standing in front of the petty shop
and Natesan also stopped there and
started talking to Manisekaran. When
Natesan was talking to Manisekaran,
he heard a noise from inside the
house and he immediately rushed
into the house. On entering the
house, he saw the appellant standing
with a knife in his right hand and
asking the deceased to have sexual

intercourse with her and threatening her that if she refused, he would kill her. The deceased defiantly stated that she would refuse to submit to him even if she were to die. Natesan, on seeing this shouted to the appellant "chandal: this is an atrocity." The appellant thereupon threatened that he would stab Natesan also, if he came near him. The appellant then tried to stab the deceased with the knife and in her effort to ward off the attack, she received three stab wounds on her left hand forearm. Natesan did not take any steps to save the deceased, but, to use his own words "stood a little bit away." The appellant then stabbed the deceased twice on the left side and she fell down crying 'ayyo Amma' with her face downwards. Even after she fell down, the appellant again stabbed her thrice on her back and then left the house. In the mean time, Manisekaran had also come inside the house on hearing the noise and he also witnessed the stabbing of the deceased by the appellant. When the appellant was running away after stabbing the deceased, he was seen by three persons, namely, Angamuthu, Madhavan and Sunderarajan, who were sitting at Mariamman Temple situate in the same street on which the petty shop was situate. When they saw the appellant running with a knife in his hand, they questioned him and he replied stating that he had stabbed the wife of Natesan tailor and wreaked vengeance. Angamuthu, Madhavan and Sunderarajan thereupon proceeded to the house of Natesan and saw the deceased lying with her legs inside the house and her head and body in the verandah. They asked Natesan as to why he was standing quietly when the appellant was running away stating that he had stabbed Natesan's wife. Natesan narrated to them the details of the incident and then a taxi was brought and Natesan, Manisekaran and Angamuthu placed the deceased in the taxi for taking her to the hospital. However, on the way, the deceased died and so Natesan asked Manisekaran and Angamuthu to take the deceased to the hospital and he proceeded to the police station to lodge the first infor-

mation report. Soon after the lodging of the first information report, the appellant, according to the prosecution, presented himself at the police station with the knife and the police arrested him and seized the knife as also the shirt and pant which he was wearing. The knife was seized under Mazahar Ex. P-10 and the pant and shirt under Mazahar Ex. P-11. These two Mazahars were attested by A. Saleem and Rajarathnam. The appellant was thereafter chargesheeted for the offence of murdering the deceased and he was convicted and sentenced to death by the learned Additional Sessions Judge, Salem. The appellant preferred an appeal to the High Court of Madras and the case was also referred to the High Court for confirmation of the death sentence. The High Court confirmed the conviction and sentence of death passed on the appellant. Hence the present appeal by special leave obtained from this Court.

4. The conviction of the appellant rests on the oral testimony of Natesan and Manisekaran who claimed to be eye-witnesses to the murder of the deceased. Both the learned Additional Sessions Judge as well as the High Court have believed the evidence of these two witnesses and ordinarily we would be loath to disturb the concurrent view taken by both these courts as regards the appreciation of their evidence, but we find that there are inherent improbabilities in the story put forward by these two witnesses and we do not think it would be safe to act upon their uncorroborated testimony. In the first place, it is difficult to believe that the appellant was so inflamed with passion as to demand sexual intercourse with the deceased who happened to be the wife of his cousin, and that too, not while she was alone, but in the presence of her husband. Even if he was mad with lust, he would not have chosen to come at this particular time, namely, 9 p.m. for making advances to the deceased, when he must have known that her husband Natesan would in all probability be at home. In any event, when Natesan came into the house, the appel-

lant would have run away and not continued to insist that the deceased should submit to sexual intercourse with him. The entire story appears to be highly improbable and inconsistent with the ordinary course of human nature. Then again, look at the conduct of Natesan on seeing this highly explosive situation. He finds that the appellant is demanding sexual intercourse with his wife and is threatening her with a knife in his hand. And yet, he does not step out of the house and shout for help. He does not even try to go to the rescue of the deceased. He silently and shamefacedly watches his wife being murdered by the appellant. He is not alone in the house. Manisekaran has come in the meantime, with the result that there are two persons on his side and yet, both of them quietly watch the proceedings without making any attempt to save the deceased. This conduct is highly unnatural and we find it difficult to accept it.

5. It may be noted that Manisekaran's presence at the time of the incident is rather unusual. Manisekaran was, according to his evidence, working as an apprentice in the tailoring shop of Natesan, and it is difficult to believe that he should have been at the house of Natesan at 9 p.m. after the tailoring shop was closed. Manisekaran was admittedly not staying with Natesan. He was living in a house which was a little distance away from the house of Natesan. He would ordinarily go back to his house after the tailoring shop was closed. But, in order to make Manisekaran an eye-witness, the prosecution came forward with the story that he was sent by Natesan with edibles for his children at 8.15 p.m. This is a tall story which is difficult to believe. There is no reason why at 8.15 p.m. Manisekaran should have been asked by Natesan to purchase edibles from the market and carry them to the house for the children. In all probability the children would have finished their meals. Even if Manisekaran carried edibles to the house of Natesan, there is no reason why he should have waited there for half an hour from 8.30 p.m. to 9 p.m. in

order to be able to witness the incident. It is again strange and unusual that though Manisekaran saw the appellant stabbing the deceased, he did not utter any shout or attempt to run out of the house for the purpose of seeking help for the deceased. We are not at all satisfied that Manisekaran was an eye-witness to incident and his testimony cannot be relied upon for the purpose of supporting the conviction of the appellant.

6. The oral testimony of Natesan and Manisekaran was sought to be supported by the evidence of Angamuthu. But we do not think that the evidence of Angamuthu is of such a nature as to inspire any confidence. In the first place, out of three persons, namely, Angamuthu, Madhavan and Sunderarajan, who were supposed to have come to the house of Natesan after the stabbing of the deceased, Angamuthu alone was examined as a witness. Secondly, the story narrated by Angamuthu is inherently improbable. What Angamuthu said was that when he and others were sitting at the Mariamman Temple, they saw the appellant running away with a knife in his hand and when questioned, the appellant said that he had stabbed the wife of Natesan tailor and wreaked vengeance. Now, it is difficult to believe that after committing the murder of the deceased, the appellant would be running in the open street holding in his hand, for every one to see, the knife with which he had stabbed the deceased. Moreover, when he is questioned as to why he is running away, he would hardly stop for the purpose of answering the question and boastfully proclaim that he had killed Natesan tailor's wife and wreaked vengeance. The entire evidence of Angamuthu in this regard sounds highly improbable and we find ourselves unable to accept it.

7. The prosecution relied strongly on the evidence of recovery of the knife from the appellant. But this evidence is also far from satisfactory. The recovery of the knife was made under Mazahar Ex. P-10 which was attested by A. Saleem and Rajarathnam. Now, out of these two witnesses only one came to give

evidence, namely, A. Saleem. He stated that at the time of the incident he was in his shed carrying out repairs to the lorry of Rajarathnam and when they heard, about the incident, they proceeded towards the hospital, but on the way they learnt that Natesan had gone to the police station and so they also went to the police station. Whilst they were at the police station, the appellant came running to the police station with the knife in his hand and gave a statement and then the Head Constable seized the knife under Mazahar Ex. P-10 which was signed by both of them. Now it is difficult to accept this evidence at its face value. In the first place, it is difficult to see why A. Saleem and Rajarathnam should have gone to the police station of their own, merely on learning about the incident. It is not stated by A. Saleem that he was in any way friendly with Natesan so that on hearing about the occurrence, he would be induced to go to the police station in order to help Natesan. It is a well known fact that ordinarily people do not willingly go to the police station unless there is some compelling reason to do so. And even if A. Saleem had some reason to go to the police station, why should Rajarathnam also have accompanied him? It is also rather significant that the Head Constable, who prepared the Mazahar Ex. P-10, did not even bother to take down father's name and address of Saleem and Rajarathnam. He did not know these two witnesses before and if he did not take down their addresses, it is difficult to understand how he would hope to be able to secure their presence at the time of the trial. Then again, if we look at the Mazahar Ex. P-10, it appears to be a suspicious document. The words "blood stained" seem to have been added subsequently on the back side of the Mazahar Ex. P-10 and it does appear from the way in which the last paragraph has been compressed in order to accommodate it within the space above the signature of Saleem that the signature of Saleem and Rajarathnam were first taken on a blank sheet of paper and then the contents of the Mazahar Ex. P-10 were written out. The

learned Additional Sessions Judge also doubted the genuineness of the Mazahar Ex. P-10 and declined to place any reliance on the recovery of the knife. The High Court unfortunately did not refer to this infirmity in the prosecution evidence. We are afraid it is not possible to place any reliance on the recovery of the knife from the appellant and if the evidence in regard to the recovery of the knife is suspect, it would equally be unsafe to place reliance on the evidence in regard to the recovery of the shirt and the pant.

8. It would thus be seen that the evidence led on behalf of the prosecution is wholly unsatisfactory and it cannot be regarded as sufficient to found the conviction of the appellant for the murder of the deceased. The appellant, must, therefore, be acquitted of the offence charged against him.

9. We accordingly allow the appeal, set aside the order of conviction and sentence recorded against the appellant and acquit the appellant of the offence of murder of the deceased. We direct that the appellant be set at liberty forthwith unless he is required in connection with some other offence.

Appeal allowed.

AIR 1976 SUPREME COURT 1973

(From: Calcutta)*

A. C. GUPTA AND
JASWANT SINGH, JJ.

The Performing Right Society Ltd. and another, Appellants v. The Commissioner of Income-tax and others, Respondents.

Civil Appeal No. 488 of 1975, D/- 10-8-1976.

(A) Income-tax Act (1961), Ss. 5 (2)

(b), 9 — Non-resident assessee — Income in fact accruing in India — Question as to source of income, if relevant — Section 9, if attracted — Rule of diversion — Applicability.

A Society registered under English Companies Act with its registered office at London was an association of com-

*(A. F. O. O. No. 335 of 1973, D/- 24-9-1973 (Cal)).

posers, authors and publishers of copyright musical works established to grant permission for the performing right in such works. The Society collected royalties for the issue of licences granting such permission and distributed the royalties to the members of the Society. Article 43 of the Articles of Association of the Society provided that the business and operations of the Society shall be conducted and managed by a General Council, and Article 48 authorised the General Council to apply the receipts also for certain other purposes. On 13-12-1953 the Society entered into an agreement in England with the President of India owning and controlling broadcasting stations in India and organizing and conducting the same under the name of All India Radio. The agreement provided that for the rights granted, the licensee would pay to the Society annually a sum calculated at the rate of £ 2 (Two pounds) per hour of broadcasting western music and that such annual payments must be made to the Society in London. N (Indian Company) was the Society's lawful attorney. As agent in India for the Society, N realised on its behalf royalties from cinema houses and other sources where music over which the Society had copyright was played in India. The Society had been paying tax on its income in India including income from royalties received from the licensee without objection until the assessment year 1967-68 for which the accounting year ended 31-12-1966. The Income-tax Officer assessed the total income of the Society treating the income arising out of the agreement with the licensee as chargeable. The Additional Commissioner dismissed the revision petition against the same. The Society's writ petition and appeal were dismissed by High Court. On appeal to the Supreme Court:

Held (1) that the Society was a non-resident company, and though it received the income out of the agreement executed not in India but in England, the income undoubtedly accrued or arose in India. The question as to the source of the income was not relevant. When the income had in fact accrued in India, no question arose whether under Section 9 it should be "deemed" to accrue or arise in India. Thus, the income derived from broadcast of copyright music from the stations of All India Radio arose in India. (1937) 5 ITR 216 (Cal) and A. F. O. O. No. 335 of 1973, D/- 24-9-1973 (Cal), Affirmed. (Para 3)

(2) that in view of Article 48 of the Society's Articles of Association the royalties payable by the licensee under the agreement were realised by the Society as its income. Out of the receipts were deducted the expenses and also such other sums as in the discretion of the General Council. This was a case where the assessee having received the income applied it in a particular way; it was not a case of diversion of income by an overriding charge. AIR 1961 SC 728, Followed. Case law discussed. (Para 5)

Cases Referred: Chronological Paras
 AIR 1961 SC 728 = 41 ITR 367 4
 AIR 1938 PC 118 = 6 ITR 206 4
 (1937) 5 ITR 216 = ILR (1937) 2 Cal 327 4
 AIR 1933 PC 145 = 1 ITR 135 4

Mr. Hardayal Hardy, Sr. Advocate, for Appellant No. 1; Mr. A. K. Sen, Sr. Advocate (M/s. S. K. Mehta, M. Qamaruddin and P. N. Puri, Advocates with them), for Respondent No. 2; Mr. S. C. Manchanda Sr. Advocate (M/s. P. L. Juneja and S. P. Nayar, Advocates with him), for Respondents.

Judgment of the Court was delivered by

A. C. GUPTA, J.:—The first appellant, Performing Right Society Limited, (hereinafter called the Society) is a company incorporated under the (English) Companies Acts, 1908 and 1913, having its registered office at Copyright House, 33, Margaret Street, Cavendish Square, London—a company limited by guarantee and having no share capital. The Society is an association of composers, authors and publishers of copyright musical works established to grant permission for the performing right in such works. 'Performing right' means the right of performing in public, broadcasting and causing to be transmitted to subscribers to a diffusion service, in all parts of the world. The members of the Society are required to assign to the Society the performing right in their works, and the Society exercises and enforces on their behalf all rights and remedies in respect of any exploitation of such works. The Society collects royalties for the issue of licences granting such permission and distributes the royalties to the members of the Society, namely, the composers, authors, music publishers and other persons having an interest in the copyright in proportion to the extent to which a member's work is publicly performed or broadcast after a pro-rata deduction of the expenses. Article 43 of the Articles of Association

of the Society provides that the business and operations of the Society shall be conducted and managed by a General Council, and Article 48 authorises the General Council to apply the receipts also for certain other purposes. Article 48 reads as follows:

"48. The General Council may, before making any distribution among the Members:

(a) Apply out of the receipts such sums as it thinks proper or has agreed to contribute as:—

(i) Gratuities, donations, pensions and emoluments to any Member or ex-Member of the Society or any person at any time in the employment of the Society, or engaged in any business acquired by the Society, and the wives, widows, families and dependants of any such person;

(ii) Contributions to any benevolent, pension or similar fund which may be established for the benefit of Members, ex-Members or employees of the Society or their wives, widows, families or dependants.

(b) Set aside out of the receipts such sums as it thinks proper as subscriptions, donations, loans, gifts or other payments for any of the purposes for which power is given by paragraphs (iii) and (iv) of Clause 3 (f) of the Memorandum of Association, provided that without the assent of the Society in General Meeting the aggregate of all such payments shall not in any one year exceed the sum of one thousand pounds and four thousand pounds under the provisions of those paragraphs respectively.

(c) Set aside out of the receipts such sums as it thinks proper as a reserve fund to meet contingencies, or for future distribution, or for repairing, improving and maintaining any of the property or premises of the Society, and for such other purposes as the General Council shall in its absolute discretion think necessary or conducive to the interests of the Society, and may invest for the several sums so set aside in such investments as it may think fit, and from time to time deal with or vary such investments and dispose of all or any part thereof for the benefit of the Society, and may divide the reserve fund into such special funds as it thinks fit, and employ the reserve fund or any part thereof for the general purposes of the Society, and that without being bound to keep the same separate from the other assets."

2. On December 13, 1953 the Society entered into an agreement with the

President of India owning and controlling broadcasting stations in India and organizing and conducting the same under the name of All India Radio (hereinafter referred to as the licensee) whereby the Society granted to the licensee the authority, (a) to broadcast from the licensee's sound broadcasting stations in India all musical works included in the repertoire of the Society, and (b) to utilize, solely, for the purpose of sound broadcasting as aforesaid, any originating performance of the such musical works, irrespective of the source of such performance and the means whereby the such performance is conveyed to the point of broadcast transmission from the licensee's stations. The agreement was executed in England. It may be stated here that previous to this agreement the parties had entered into a similar agreement in the year 1940. The agreement of 1953 states that the licence granted thereby "shall be deemed to have come into force on April 1, 1949 and shall continue from year to year until determined by either party giving to the other three calendar months' notice in writing to expire on March 31 in any year". The agreement provides that the licensee shall send to the Society at its registered office in London, the lists of all musical works broadcast in each week during the term of the licence from each of the licensee's main stations (Delhi, Bombay, Calcutta and Madras) and the external services, and requires the licensee to furnish a return after the first day of April every year during the period of licence, stating the aggregate number of hours occupied during the period ended on the previous 31st March in broadcasting Western music from each of the licensee's main and external Service Stations. The agreement further provides that for the rights granted, the licensee will pay to the Society annually a sum calculated at the rate of £ 2 (Two pounds) per hour of broadcasting Western music from each of the licensee's main and external service Stations and that such annual payments must be made to the Society in London.

3. The second appellant, M/s. Natsin India Private Limited is a private limited company incorporated under the (Indian) Companies Act having its office at 26, Chowringhee Road, Calcutta. The second appellant was appointed by the Society to be its lawful attorney in India by virtue of a power of attorney granted by the Society to the second appellant in July, 1967. As agent in India for the Society, the second appellant realises on its

behalf royalties from cinema houses and other sources where music over which the Society has copyright is played in this country and has, inter alia, the power to commence and prosecute suits and other proceedings, engage lawyers, and sign plaints, petitions etc. Prior to July, 1967 the Society, a non-resident company, used to file its returns of income before the Income-tax Officer, Madras, through its former agent in India, M/s. Vernon and Company of Madras. The royalties or fees realised from the licensee were not included in its returns for the assessment years 1947-48 to 1950-51. Later, the Income-tax Officer, Madras, issued notices under Section 34(1) of the Income-tax Act, 1922 and assessed the said income after deducting the proportionate administrative expenses. The appeals taken by Vernon and Company against the supplementary assessment orders for the aforesaid years were dismissed by the Appellate Assistant Commissioner, Madras. The matter rested there and the Society had been paying tax on its income in India including the income from royalties received from the licensee without objection until the assessment year 1967-68 for which the accounting year ended December 31, 1966. In the said assessment year also the Income-tax Officer, Companies Circle I (II), Madras, by his order dated October 23, 1968, assessed the total income of the Society treating the income arising out of the agreement with the licensee as chargeable as was being done all these years. Against this order of assessment, the Society through the second appellant made a revisional application under Section 264 of the Income-tax Act, 1961 (hereinafter referred to as the Act), to the Commissioner of Income-tax, West Bengal, where the Society's income-tax file had been transferred in the meantime. The Additional Commissioner of Income-tax who dealt with the application dismissed the same by his order dated July 18, 1970. The Society then moved a writ petition before the Calcutta High Court challenging the order of the Additional Commissioner of Income-tax. A rule nisi was issued on the petition by a learned Judge of the High Court but ultimately the rule was discharged and the petition was dismissed. On appeal by the Society, a Division Bench of the High Court affirmed the view taken by the learned single Judge and dismissed the appeal on September 24, 1973. In this appeal by special leave the appellants question the correctness of that decision

and challenge the order of assessment on two grounds:

(1) the agreement between the Society and the Licensee having been executed in England and the royalties being also payable in England, the income out of this agreement is not liable to be taxed in India;

(2) the Society being under an obligation to distribute the income to its members, the royalties realised are not really the income of the Society.

The first point seems to be covered by the provisions of Section 5(2)(b) of the Act. Section 5(2) reads as follows:

"5. Scope of total income:

(1) x x x

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India."

The Society is a non-resident company, and though it receives the income out of the agreement executed not in India but in England, the income undoubtedly accrues or arises in India. On behalf of the appellants it was contended that the source of income was really the agreement which was entered into in England. We do not think that the question as to the source of the income is relevant because sub-section (2) of Section 5 provides that all income "from whatever source derived" is to be included in the total income of the non-resident assessee if the income accrues or arises in India during the relevant year. Reference was also made to Section 9 of the Act which enumerates the incomes that shall be "deem-

ed to accrue or arise in India" though actually accruing elsewhere, to establish that the income in question could not be deemed to accrue or arise in India. But the income in this case has in fact accrued in India and no question arises whether it should be "deemed" to accrue or arise in India. Whether a certain income accrued or arose in India within the meaning of Section 5 (2) is a question of fact "which should be looked at and decided in the light of commonsense and plain thinking" as the Calcutta High Court considering a similar question under Section 4 (1) of the Income-tax Act, 1922 observed.* In the case before us the High Court and the income-tax authorities considered it a hard matter of fact that the income derived from broadcast of copyright music from the stations of All India Radio arose in India. In our opinion this was the correct view to take and we find no reason to differ from it.

4. The next question is whether the income from the royalties was the Society's own income. It was contended on the authority of *Bejoy Singh Dudhuria v. Commissioner of Income-tax, Bengal*, 1 ITR 135 = (AIR 1933 PC 145) that the obligation to disburse the sum among its members diverted the income from the Society to the members, and it could not be called the income of the Society. In *Bejoy Singh Dudhuria's* case there was a decree of the Court charging the appellant's whole resources with a specific payment to his step mother; the Privy Council held that the decree had to that extent diverted his income from him and directed it to his step mother, and that to that extent what he received for her was not his income. But where payments are made by the assessee after he has received the income as his, the position is different. This was pointed out by the Judicial Committee in a later case, *P. C. Mullick v. Commissioner of Income-tax, Bengal*, 6 ITR 206 = (AIR 1938 PC 118) where the executors in accordance with the directions in the will had paid Rs. 5,537/- to the person who performed the testator's addya Sradh, and another sum of Rs. 1,25,000/- for probate duty out of the income of the estate. It was held that this was not a case in which a portion of the income was by an overriding title diverted from the person who would otherwise have received it as in *Bejoy Singh Dudhuria's* case but it was 'simply a case in which the executors having re-

ceived the whole income of the estate apply a portion in a particular way pursuant to the directions of their testator, in whose shoes they stand". The true test for the application of the rule of diversion of income by an overriding title has been explained by this Court in *Commissioner of Income-tax, Bombay City v. Sitaldas Tirathdas*, 41 ITR 367 at pp. 374-375 = (AIR 1961 SC 728 at p. 732):

"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

5. On the facts of the present case it is clear that the royalties payable by the licensee under the agreement are realised by the Society as its income. Article 48 of the Society's Articles of Association puts the matter beyond doubt. Out of the receipts are deducted the expenses and also such other sums as in the discretion of the General Council should be set aside for the purposes mentioned in Article 48. This is a case where the assessee having received the income applies it in a particular way; it is not a case of diversion of income by an overriding charge.

6. The appeal is accordingly dismissed. There will be no order as to costs.

Appeal dismissed.

* In the matter of *V. G. Every*, (1937) 5 ITR 216 (Cal) (Constello, J.).

AIR 1976 SUPREME COURT 1978

(From: Patna)*

**A. N. RAY, C. J., M. H. BEG AND
JASWANT SINGH, JJ.**

State of Bihar and another, Appellants v. Khas Karanpura Collieries Ltd. etc., Respondents.

Civil Appeals Nos. 705-724 of 1971.
D/- 6-8-1976.

**(A) Mineral Concession Rules (1949),
Rule 41 — Applicability — Statutory
leases arising by reason of S. 10 of Bihar
Land Reforms Act (30 of 1950) — Rule 41
not attracted. (Bihar Land Reforms Act
(30 of 1950), Section 10).**

The demand for royalty at 5% of F. O. R. price of coal for the period prior to June 1, 1958 — the date on which Mines and Minerals (Regulation and Development) Act came into force is not justified in view of the fact that Rule 41 of the Mineral Concession Rules, 1949 applied only to contractual leases envisaged by Chapter IV of the said Rules (which were made inter alia for regulating the grant of mining leases in respect of any mineral) and, not to the statutory leases which came into existence as a result of the deeming provision embodied in Section 10 of the Bihar Land Reforms Act. AIR 1969 SC 177, Rel. on. C. W. J. C. Nos. 992, 1042, etc. of 1968 and 146 of 1969, D/- 3-9-1970 (Pat), Affirmed.

(Para 33)

(B) Mines and Minerals (Regulation and Development) Act (1957), S. 30-A — Interpretation and Scope — Provision covers statutory leases arising by reason of Section 10 of Bihar Land Reforms Act (30 of 1950) as well. (Bihar Land Reforms Act (30 of 1950)).

The statutory mining leases in respect of coal which sprang up under Section 10 (1) of the Bihar Land Reforms Act also acquired a temporary immunity from the applicability of Ss. 9 (1) and 14 (1) of the Act of 1957 until the Central Government came out with a notification making the said provisions applicable with or without modification to these leases. C. W. J. C. Nos. 992, 1042, etc. of 1968 and 146 of 1969, D/- 3-9-1970 (Pat), Affirmed.

(Para 35)

Section 30-A which, as is evident from its opening words, has an over-riding effect on the other provisions of the Act affords a temporary protection from

* (C. W. J. C. Nos. 992, 1042 etc. of 1968 and 146 of 1969, D/- 3-9-1970 (Pat)).

applicability of Section 9 (1) and Section 16 (1) of the Act not only to the leases granted before October 25, 1949, but also to the statutory leases which came into existence as a result of the operation of Section 10 (1) of the Bihar Land Reforms Act and replaced the former category of leases subsisting immediately before the date of vesting in the State of the estates or tenures on the publication of the notifications under Sections 3 and 3-A of the Bihar Land Reforms Act. This conclusion irresistibly flows from the words "or in relation to" occurring in Section 30-A of the 1957 Act after the words "shall not apply to" and before the words "mining leases granted before the 25th day of October, 1949". (Para 34)

Cases Referred: Chronological Paras

AIR 1972 SC 614 = (1972) 2 SCR 609 16
AIR 1969 SC 177 = (1968) 2 SCR 881

9, 24, 33
AIR 1967 SC 887 = (1967) 1 SCR 707

9, 10
(1967) C. J. C. No. 653 of 1965, D/- 22-12-1967 (Pat) 25, 26, 29

Mr. D. P. Singh Senior Advocate (M/s. S. C. Agarwal and Mr. V. J. Francis, Advocates with him), for Appellants; Mr. Sachin Chaudhary, Senior Advocate (in C. A. 705/71), for Respondent No. 1, Mr. B. Sen, Senior Adv. (in CA. 709/71), In CAs. 705-713 and 718 and Respondents in 714/71, Mr. S. J. Sorabjee Sr. Adv. (in CA. 706/71), M/s. S. B. Sanyal, Mr. S. C. Banerjee Sr. Adv. (M/s. D. N. Mukherjee and A. K. Neg Advocates with them), for Respondents.

The Judgment of the Court was delivered by

JASWANT SINGH, J.:— This batch of 20 Civil Appeals Nos. 705 to 724 of 1971 by certificate under Article 133 (1) (a) of the Constitution which are directed against the common judgment dated September 3, 1970, of the High Court of Judicature at Patna and raise important questions relating mainly to interpretation and scope of Section 30-A of the Mines and Minerals (Regulation and Development) Act, 1957 (Act 67 of 1957) (hereinafter referred to as 'the 1957 Act'), shall be disposed of by this judgment.

2. Circumstances leading to these appeals in so far as they would be helpful in appreciating the points involved are: Prior to October 25, 1949, proprietors of big estates like Rajas of Ramgarh and Jharis granted, in exercise of their untrammelled discretion, mining leases of

huge tracts of land in the districts of Hazaribagh, Dhanbad, and Singhbhum to various persons for winning and extracting coal for a period of 999 years in lieu of payment of premiums and fixed annual rental. There was in these leases either no stipulation for payment of royalty or the royalty stipulated for was very low. Except in a few cases, the lessees of these mining leases did not work the mines themselves and granted sub-leases thereof of more or less on similar terms.

3. On September 8, 1948, the Central Legislature passed the Mines and Minerals (Regulation and Development) Act, 1948 (Act No. 53 of 1948) (hereinafter referred to as 'the 1948 Act') under Entry 36 of List I of Seventh Schedule to the Government of India Act, 1935. The Act, as declared in its Preamble, was enacted as it was considered expedient in public interest to provide inter alia for the regulation of mines and for the development of minerals. Sub-section (1) of Section 4 of the Act prohibited the grant after the commencement of the Act of any mining lease otherwise than in accordance with the rules made under the Act. Sub-section (2) of Section 4 of the Act provided that any mining lease granted contrary to sub-section (1) would be void and of no effect. Section 5 of the Act empowered the Central Government to make rules for regulating the grant of mining leases or for prohibiting the grant of such leases in respect of any mineral or in any area. Section 7 of the Act empowered the Central Government to make rules for the purpose of modifying or altering the terms and conditions of any existing mining lease i.e. any mining lease granted prior to the commencement of the Act, so as to bring such lease into conformity with the rules made under Section 5. In exercise of the powers conferred on it by Section 5 of the Act, the Central Government made the Mineral Concession Rules, 1949. Both the 1948 Act and the Mineral Concession Rules, 1949, came into force on October 25, 1949.

4. Rule 41 of the Mineral Concession Rules which related to the conditions of mining leases made it compulsory for every mining lease to include a condition enjoining the lessee to pay royalty on the minerals at the rate specified in the First Schedule to the Rules which in case of coal was 5% of the F. O. R. price,

5. The 1948 Act was extended to Chhota Nagpur by a notification dated

January 16, 1950, issued under Section 92 of the Government of India Act, 1935.

6. The provisions of the Mineral Concession Rules, 1949, did not apply to leases or sub-leases granted anterior to October 25, 1949.

7. The Constitution of India came into force on January 26, 1950. Articles 246 and 254 of the Constitution which relate to the distribution of legislative powers and Entry 54 of List I (Union List) and Entry 23 of List II (State List) of the Seventh Schedule to the Constitution read thus:—

"Article 246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule.

(2) Notwithstanding anything in Clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule.

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule.

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

"Article 254: (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the

consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

"Entry 54 of List I (Union List). Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."

"Entry 23 of List II (State List). Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

8. The Constitution was followed by the Bihar Land Reforms Act, 1950 (Act XXX of 1950) (hereinafter referred to as 'the Bihar Land Reforms Act') which though passed on September 11, 1950, came into force on September 25, 1950. This legislation, as evident from its preamble, was enacted as it was considered expedient to provide for transference to the State of the interests of proprietors and tenure-holders in land and of mortgagees and lessees of such interests including interest in mines and minerals. On the publication of notifications under Sections 3 and 3-A of the Bihar Land Reforms Act, the estates or tenures of proprietors or tenure-holders as also the intermediary interests of all intermediaries passed to and became vested in the State. Section 4 of the Bihar Land Reforms Act declared the consequences flowing from the vesting of the estate or tenure in the State. Clause (a) of Section 4 (1) provided that on publication of the aforesaid notifications, such estate or tenure, including the interests of the proprietor or tenure-holder in any building etc., in trees etc., as also his interest in all sub-soil including any rights in mines and minerals, whether discovered, or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals comprised in such estate or tenure other than the interests of raiyats or under raiyats shall, with effect from the date of vesting, vest absolutely in the State free from all encumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure other than the interests expressly saved by or under the provisions

of the Act. Thus the interest of the proprietor or tenure-holder including his rights in mines and minerals, inclusive of rights of a lessee of mines and minerals came to an end and vested absolutely in the State. Having once so vested, certain rights were conferred by statute on the proprietors and tenure-holders and the lessees. Section 9 of the Bihar Land Reforms Act provided that mines which were in operation at the commencement of the Act and were being worked directly by the intermediary shall be deemed to have been leased by the State Government to the intermediary and he would be entitled to retain possession of those mines as a lessee thereof. The lease by the State Government to the intermediary, according to sub-section (2) of Section 9 was to have such terms and conditions as might be agreed upon between the State Government and the intermediary or in the absence of such agreement, as might be settled by the Mines Tribunal appointed under Section 12 of the Act provided that all such terms and conditions had to be in accordance with the provisions of any Central Act for the time being in force regulating the grant of new mining leases. According to the proviso, such terms and conditions were to be in accordance with the provisions of the 1948 Act which was in force at the time the estate vested in the State of Bihar. The mines in the present cases, it may be mentioned, were not worked by the intermediary lessees. Section 10 of the Bihar Land Reforms Act which dealt with leases of mines and minerals which subsisted on the date immediately preceding the date of vesting of the estate or tenure provided:

"10. Subsisting leases of mines and minerals—(1) Notwithstanding anything contained in this Act, where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure comprised in such lease shall, with effect from the date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease, and such holder shall be entitled to retain possession of the leasehold property.

(2) The terms and conditions of the said lease by the State Government shall mutatis mutandis be the same as the terms and conditions of the subsisting

lease referred to in sub-section (1), but with the additional condition that, if in the opinion of the State Government the holder of the lease had not, before the date of the commencement of this Act, done any prospecting or development work, the State Government shall be entitled at any time before the expiry of one year from the said date to determine the lease by giving three months' notice in writing:

Provided that nothing in this sub-section shall be deemed to prevent any modifications being made in the terms and conditions of the said lease in accordance with the provision of any Central Act for the time being in force regulating the modification of existing mining leases.

(3) The holder of any such lease of mines and minerals as is referred to in sub-section (1) shall not be entitled to claim any damages from the outgoing proprietor or tenure-holder on the ground that the terms of the lease executed by such proprietor or tenure-holder in respect of the said mines and minerals have become incapable of fulfilment by the operation of this Act."

9. The consequence of the operation of Sections 4(1)(a) and 10(1) of the Bihar Land Reforms Act as held by this Court in *Bihar Mines Ltd. v. Union of India*, (1967) 1 SCR 707 = AIR 1967 SC 887 and reiterated in *Chhatu Ram Horil Ram Private Ltd. v. State of Bihar*, (1968) 2 SCR 881 = AIR 1969 SC 177 was not that the old original contractual leases of mines and minerals comprised in the estate and subsisting on the date of vesting continued with the Government substituted as lessor in place of original lessor but was that the original contractual leases came to an end on the date of vesting as a result of Section 4(1)(a) of the Act and for the remainder of the terms of those leases, fresh statutory leases in favour of the lessees came into being under Section 10(1) of the Act.

10. All the estates of Jharia Rajya within which the leases in question fell became vested in the State of Bihar on November 3, 1951. Thenceforth i.e. from November 3, 1951, the subsisting leases came to be treated as new statutory leases granted by the State Government in terms of Section 10(1) of the Bihar Land Reforms Act in view of the decision of this Court in *Bihar Mines Ltd. v. Union of India*, (1967) 1 SCR 707 = (AIR 1967 SC 887) (supra).

11. In 1956 the Mining Leases (Modification of Terms) Rules, 1956 providing for the modification and alteration of the terms and conditions of the mining leases granted prior to the commencement of the 1948 Act so as to bring them in conformity with the terms and conditions of the mining leases granted after the commencement of the 1948 Act in accordance with the Mineral Concession Rules, 1949, were promulgated under Section 7 of the 1948 Act on September 4, 1956. These Rules by virtue of the definition of the "existing mining lease" contained in Rule 2(c) of the Mining Leases (Modification of Terms) Rules, 1956 were made expressly inapplicable to mining leases in respect of coal granted before October 25, 1949 — the date of commencement of 1948 Act with the result that the mining leases or sub-leases of the respondents were not affected by the provisions of the 1948 Act or the rules made thereunder.

12. The 1948 Act was replaced by the Mines and Minerals (Regulation and Development) Act, 1957 (Act No. 87 of 1957) (hereinafter referred to as 'the 1957 Act') which though after being passed by the Parliament under Entry 54 of List I of the Seventh Schedule to the Constitution received the assent of the President on December 28, 1957, came into force on June 1, 1958. Section 9 of the 1957 Act provided:—

"9. Royalties in respect of mining leases:—

(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed by him from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.

(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed by him from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.

(3) The Central Government may, by notification in the official gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not—

(a) fix the rate of royalty in respect of any mineral so as to exceed twenty per cent of the sale price of the mineral at the pit's head, or

(b) enhance the rate of royalty in respect of any mineral more than once during any period of four years.

13. It will be noticed that sub-section (1) of the above quoted section made it obligatory for the holder of a mining lease granted before the commencement of the 1957 Act notwithstanding anything contained in the instrument of his lease or in any other law in force at the commencement of the 1957 Act to pay in respect of any mineral removed by him from the leased area after December 28, 1957, royalty at the rate specified in the Second Schedule of the 1957 Act which for coal was fixed at 5% of F. O. R. price subject to a minimum of fifty N. P. per ton.

14. Section 16 of the 1957 Act provided that mining leases granted before October 25, 1949 would, as soon as might be, after the commencement of the 1957 Act, be brought into conformity with the provisions of the 1957 Act and the rules made under Sections 13 and 18 thereof.

15. Section 29 of the 1957 Act provided for the effective continuance of the rules made or purported to have been made under the 1948 Act in so far as they related to matters provided for in the former Act and were not inconsistent therewith.

16. The effect of Section 9 of the 1957 Act as held by this Court in *State of Madhya Pradesh v. Dadabhai's New Chirimiri Ponri Hill Colliery Co. Pvt. Ltd.* (1972) 2 SCR 609 = (AIR 1972 SC 614) was that the rate of royalty was enhanced in case of those lessees who, under the leases obtained by them before the commencement of the Act, were paying a rate lesser than 5% while the royalty payable by lessees similarly placed was reduced if they were paying royalty at a higher rate. As the enhancement envisaged by Section 9 of the 1957 Act was apprehended to lead to an increase in the cost of production of coal which is a vital mineral for the industrial development and occupies a basic position in the economy of the country, various representations were made to the Government of India to reduce the royalty. Impelled by these representations, the Central Government moved a bill in March, 1958, being Bill No. 33 of 1958, and got, by means of Mines and Minerals (Regulation

and Development) Amendment Act, 1958, Section 30-A inserted in the 1957 Act reading as follows:—

"30-A. Notwithstanding anything contained in this Act the provisions of sub-section (1) of Section 9 and of sub-section (1) of Section 16 shall not apply to or, in relation to mining leases granted before the 25th day of October, 1949 in respect of coal but the Central Government, if it is satisfied that it is expedient so to do, may by notification in the official gazette direct that all or any of the said provisions (including any rules made under Sections 13 and 18) shall apply to or in relation to such leases subject to such exceptions and modifications, if any, as may be specified in that or in any subsequent notification."

17. This section, it would be seen, consisted of two parts. Under the first part, the provisions of Sections 9 (1) and 16 (1) were expressly made inapplicable to or in relation to pre-October 25, 1949 mining leases for coal. The second part empowered the Central Government on being satisfied that it was expedient so to do to direct by notification that all or any of those provisions (including the rules made under Sections 13 and 18) would apply to or in relation to such leases subject to such exceptions and modifications, if any, as might be specified in that or any subsequent notification. The "exceptions and modifications" which could be so specified in the notification were obviously in regard to the application, when such application was decided upon, of Sections 9 (1) and 16 (1) and the relevant rules.

18. The aforesaid Section 30-A was given a retrospective effect by virtue of Section 2 of the Amendment Act 15 of 1958.

19. Vide notification No. GSR-432 dated May 29, 1958, the 1957 Act was brought into force with effect from June 1, 1958.

20. By notification No. S. O. 3094 dated December 29, 1961, the Central Government in exercise of the powers conferred on it by the second part of Section 30-A of the 1957 Act, directed the provisions of sub-section (1) of Section 9 to apply with immediate effect to or in relation to mining leases in respect of coal granted before October 25, 1949 subject to the modification that the lessees were required to pay royalty at the rates specified in the agreements between them and the lessor or at the rate of 2½% on F. O. R. price of coal, whichever was

higher, in place of the rate of royalty specified in respect of coal under the Second Schedule.

21. After the notification, the State Government started demanding royalty at 2½% and initiated proceedings under the Public Demands Recovery Act to realize royalty at 2½% for the period between 29-12-1961 and 31-12-1965.

22. On October 26, 1964, the Bihar Land Reforms Act was amended by insertion of Section 10-A originally by the Bihar Amendment Ordinance No. 3 of 1964 which was subsequently replaced by the Bihar Land Reforms (Amendment) Act, 1964 (Bihar Act 4 of 1965). Under this newly added section, the lessees' interest in mines and minerals which were subject to sub-leases also came to vest in the State of Bihar. Thus the State also acquired the right to sub-lease. On October 27, 1964, the interests of Chakroborty and Adhikaris from whom sub-leases appear to have been taken in the beginning of the current century vested in the State of Bihar.

23. On January 1, 1966, a notification being S. O. No. 81 of 1966, was issued by the Central Government under Section 30-A of the 1957 Act superseding the notification No. S. O. 3094 dated December 29, 1961 and applying the provisions of Section 9(1) of the 1957 Act to leases granted prior to the commencement of the said Act.

24. On October 3, 1966, this Court pronounced judgment in Bihar Mines Ltd. v. Union of India, (1967) 1 SCR 707 = AIR 1967 SC 887 (supra) holding therein that the whole or that part of the estate or tenure comprised in any lease of mines and minerals would, with effect from the date of vesting, be deemed to have been leased out by the State Government to the holder of the subsisting lease (i. e. the first lessee) for the remainder of the period of the lease and that the statutory lease thus held by the head lessee from the State Government under Section 10 of the Bihar Land Reforms Act, would be a new lease granted after October 25, 1949, and that the sub-leases would also be deemed to be new leases granted by the new lessee from the State Government, as the rights of the original lessee under the original lease had ceased on the vesting of the estate, and he was to be deemed to have got a new lease from the State.

25. On December 22, 1967, the Patna High Court held in Narendra Nath Mandal v. State of Bihar, C. J. C. No. 653

of 1965 (Pat) that a lessee of a coal mine was liable to pay royalty for the period beginning from the date of vesting of an estate under the Bihar Land Reforms Act to May 31, 1958 at 5% of F. O. R. price of coal subject to a minimum of eight paise per ton by virtue of Section 29 of the 1957 Act read with Rule 41 and Schedule 1 of Mineral Concession Rules, 1949, and at the same rate from the date on which the 1957 Act came into force by virtue of Section 9(1) of the said Act read with Second Schedule thereto because neither Section 30-A nor the notification issued thereunder was applicable to the said lease in view of the effect of the vesting of estate in the State of Bihar and the coming into existence of a new lease by force of Section 10 of the Act which could not be said to be a lease granted before October 25, 1949 which alone was the subject-matter of Section 30-A of the 1957 Act.

26. In June, 1968, demands were made by the District Mining Officer, appellant No. 2 herein, for payment of royalty at the rate specified in the Mineral Concession Rules, 1949 in respect of the period commencing from November 3, 1951 — the date of vesting of the estates of the head lessors under the Bihar Land Reforms Act — till May 31, 1958 and in respect of the period from June 1, 1958 — the date of coming into force of the 1957 Act — to December 12, 1965, at the rate specified in the Second Schedule to the 1957 Act, after setting off 2½% already realised, in view of the decision in Narendra Nath Mandal's case (C. J. C. No. 653 of 1965, D/- 22-12-1967) (Pat) (supra). Aggrieved by these demands, the respondents filed petitions in the High Court of Patna for issue of writs of certiorari and mandamus quashing the demand notices and restraining the State from demanding royalty as indicated above.

27. The case as set up by the respondents in the writ petitions was that as Rule 41 of the Mineral Concession Rules, 1949, requiring royalty to be paid at the rate specified in Schedule I to the rules, applied only to a lease granted under the said Rules after the commencement of the 1948 Act and had no application to the leases and sub-leases of the respondents, royalty could not be claimed on the basis of 5% of F. O. R. price of coal in respect of the period between the date of vesting under the Bihar Land Reforms Act and May 31, 1958 — the date immediately preceding the date on which the 1957 Act was brought into force; that

as regards the period between June 1, 1958 and December 28, 1961 royalty at contractual rates alone was payable because the provisions of Section 9 (1) of the 1957 Act had no application to statutory leases deemed to have come into existence under Section 10 (1) of the Bihar Land Reforms Act and alternatively because by virtue of the provisions of Section 30-A of the 1957 Act the provisions of Section 9 (1) of the said Act were not applicable to or in relation to the mining leases in respect of coal granted before October 25, 1949 until the Central Government, by notification, decided otherwise; that as regards the claim in respect of the period from December 29, 1961 to December 31, 1965 royalty at 2½% of F. O. R. price of coal had already been paid by the respondents as per notification of the Central Government issued in exercise of the power under Section 30-A of the 1957 Act and having itself invited and accepted this payment in full discharge of the respondents' liability for royalty payable for the said period, the State was not entitled to unilaterally revoke the aforesaid discharge of satisfaction and claim further royalty at 2½% of F. O. R. price of coal over and above what has already been paid.

28. In reply the appellants herein submitted inter alia that the demands were lawful, that the combined effect of Sections 9 and 29 of the 1957 Act read with Second Schedule thereto and the Mineral Concession Rules, 1949 was that the respondents who were lessees or sub-lessees were liable to pay royalty at the rate of 5% of F. O. R. price of coal from the date of vesting of the respective estates of the proprietors who had granted head leases in the State of Bihar for the entire period in question; that Section 9 (1) of the 1957 Act was very comprehensive and applied to all leases whether contractual or statutory which came into existence before the 1957 Act was brought into operation; that Section 30-A of the 1957 Act applied only to leases in respect of coal which had been granted before October 25, 1949 and not to the new statutory mining leases of the respondents deemed to have been granted by the State Government before the coming into operation of the 1957 Act under the provisions of Section 10 of the Bihar Land Reforms Act; and that the provisions of Section 9 (1) of the 1957 Act could not be taken to have been suspended by Section 30-A of the Act so far as the leases in question were concerned.

29. All the writ petitions were heard by a Special Bench of five Judges of the High Court. The said Bench by its judgment and order dated September 3, 1970 allowed all the writ petitions filed by the respondents and quashed the impugned notices holding that Narendra Nath Mandal's case (C. J. C. No. 653 of 1965, D/- 22-12-1967) (Pat) (supra) had been wrongly decided; that Rule 41 of the Mineral Concession Rules, 1949 made under Section 5 of the 1948 Act which was claimed by the appellants to have been continued in force by virtue of Section 29 of the 1957 Act and to justify the demand for royalty for the period prior to June 1, 1958 was applicable only to contractual grants envisaged by the said Rules and could have no application to statutory leases arising by virtue of Section 10 of the Bihar Land Reforms Act; that there was no warrant for pushing back Section 9 of the 1957 Act by virtue of Section 29 thereof to any date anterior to that on which the said Act came into force; that as Section 30-A of the 1957 Act on its true interpretation, imposed a temporary bar on the operation of the provisions of Section 9 (1) not only in respect of mining leases granted before October 25, 1949 in respect of coal but also 'in relation to' those leases which expression covered the statutory leases of the respondents which must be deemed to have come into existence with effect from the date of vesting under the Bihar Land Reforms Act, the demand for royalty for the period commencing from June 1, 1958 to December 31, 1965 was also unjustified and illegal.

30. Aggrieved by the judgment and order of the Special Bench of the High Court, the appellants filed a petition in the High Court under Arts. 132 and 133 (1) (a) of the Constitution for grant of certificate of fitness for appeal to this Court. The High Court by its order dated January 22, 1971 granted the certificate of fitness under Article 133 (1) (a) of the Constitution enabling the appellants to prefer the aforesaid appeals to this Court.

31. Counsel for the parties have reiterated before us the contentions urged on behalf of their clients before the High Court.

32. Two important questions arise for determination by us in these appeals: (1) whether the claim for royalty in regard to the period prior to June 1, 1958 can be sustained; (2) whether the claim for royalty in regard to the period from

Officer authorising him to discharge function of a President when there is no Vice-President till elections are held. The submission, therefore, made on behalf of the appellant that as the District Magistrate had found that the election of respondent No. 1 was illegal, therefore, he could lawfully appoint the Additional District Magistrate to discharge the function of the Vice-President is devoid of substance.

11. Apart from the above the appointment of the Additional District Magistrate as Vice-President was only consequential to the cancellation of the special resolution by the Commissioner. As we have found that the Commissioner was wrong on rescinding the resolution respondent No. 1 was entitled to function as Vice-President. In these circumstances Section 54-A could not be pressed into service in the instant case.

12. The submission made on behalf of the appellant that as the respondent No. 1 did not make any specific prayer for quashing the order of the District Magistrate dated 23-7-1975, therefore, the learned single Judge committed an error in holding it to be invalid does not impress us. In our opinion the learned single Judge rightly held that since the order passed by the Commissioner on 21-7-1975 under Section 34 of the Municipalities Act had been held to be an illegal order, it necessarily follows that the impugned order passed by the learned District Magistrate being based upon this order is also illegal.

13. For the reasons given above the special appeal fails and is dismissed with costs payable by the appellant to the respondent No. 1.

Appeal dismissed.

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PREM PRAKASH, J.

U. P. State Electricity Board, Lucknow, Applicant v. Mahabir Prasad Srivastava, Opposite Party.

Civil Revn. No. 162 of 1971, D/- 10-12-1975.*

(A) Telegraph Act (1885), Sections 16 (3) and 10 — Electricity (Supply) Act

*(Against judgment and decree passed by B. C. Jauhari, Addl. Dist. J., Lucknow, in Misc. Case No 114 of 1968, D/- 30-1-1971).

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(1948), Section 42 — State Electricity Board cutting trees to lay transmission line — Application for compensation lies under Section 16 (3).

In view of Section 42 of 1948 Act where the State Electricity Board cuts trees for laying transmission line in implementation of the scheme sanctioned under the 1948 Act an application for compensation for cutting trees is maintainable under Section 16 (3). (Paras 4, 5)

ORDER:— This rule in revision has been obtained against the order of Addl. District Judge, Lucknow, made under Section 16 (3) of the Indian Telegraph Act 1885 awarding Rs. 2400/- as compensation for the trees that were cut away by the U. P. State Electricity Board in laying the transmission line (Single circuit Kanpur-Lucknow line). An application was made by the opposite party for award of a sum of Rs. 3,400/- as compensation, the Chief Engineer having determined the amount in a sum of Rs. 320/-. The learned Addl. District Judge upon a survey of the evidence, adduced by the opposite party, held that he was entitled to compensation in a sum of Rs. 2400/-. The State Electricity Board did not produce any evidence in rebuttal of the evidence so adduced by the opposite party. Accordingly, he made an order of the description aforesaid, directing the State Electricity Board to pay Rs. 2400/- to the opposite party.

2. Being aggrieved against that order the U. P. State Electricity Board has come in revision before this Court and the only question that has been raised is that the Addl. District Judge could not have awarded compensation under Section 16 (3) of the Telegraph Act 1885 which is applicable only to cases where the telegraph authority causes damage to another's property in order to place and maintain telegraph lines and posts.

3. That brings me to Section 42 of the Electricity (Supply) Act, 1948 which gives the Board the powers of the Telegraph Authority in respect to the placing of transmission apparatus in circumstances where its powers under the Electricity Act 1910 shall not be adequate for the purpose. It states that notwithstanding anything contained in Indian Electricity Act 1910 where provision in such behalf is made in a sanctioned scheme, the Board shall have, for the placing of any wires, poles, wall-brackets and appliances for the transmission and distribution of electricity, all the powers which the tele-

graph authority possesses under Part III of the Indian Telegraph Act 1885 with regard to a telegraph established or maintained by the Government or to be so established or maintained.

4. In view of the express language of Section 42, which confers all the powers which the telegraph authority possesses under Part III of the Indian Telegraph Act 1885, in respect of a sanctioned scheme, the contention of the learned counsel for the revisionist that Section 16 of the Telegraph Act was inapplicable does not seem to have any merit. Section 16 of that Act states that if in the exercise of the powers mentioned in Section 10 in respect of property referred to in clause (d) of that section, any dispute arises concerning the sufficiency of the compensation to be paid under Section 10, clause (d), it shall on application for that purpose by either of the disputing parties to the District Judge within whose jurisdiction the property is situate, be determined by him. In enumerating the powers under Section 10, the Telegraph Act provides under clause (d) of the Proviso that in exercise of the powers conferred upon the telegraph authority, the latter shall do as little damage as possible, and when it has exercised those powers in respect of any property other than that referred to in clause (c), it shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers. Section 10 has been placed in Part III bearing the heading "Power to place Telegraph Lines and Posts." Having regard to the scheme of the Telegraph Act and the language of S. 42 of the Electricity (Supply) Act 1948 it is clear that the Board in case of a sanctioned scheme shall have all the powers which the telegraph authority possesses under Part III of the Telegraph Act 1885 and that if the Board in exercise of such powers causes damage to property, other than the property vested in or under the control or management of any local authority, it shall pay full compensation to all persons interested in any damage sustained by them. Section 16 also appears in Part III and whenever there is a dispute the jurisdiction is of the District Judge to determine the compensation. The finding of the Additional District Judge is that the transmission line in question was being laid in implementation of the scheme sanctioned under the Electricity (Supply) Act 1948. I see no reason to differ from that finding.

5. From the discussion in the above it, therefore, follows that the trees in question were cut away in laying the transmission line which had been sanctioned under the Electricity (Supply) Act 1948 and because the Board exercises the powers of a "telegraph authority", when laying transmission lines in implementation of the sanctioned scheme, the opposite party could rightly make an application for determination of the compensation, under Section 16 (3) of the Telegraph Act. It is not a case in which the Additional District Judge exercised jurisdiction which he did not possess. The contention is, therefore, overruled.

6. For the reasons stated in the above, I, therefore, see no force in the revision which is hereby dismissed with costs.

7. Let the record be sent back to the court below without any delay.

Revision dismissed.

AIR 1976 ALLAHABAD 370

CHANDRA PRAKASH, J.

Abdul Shakoor, Applicant v. Lateef Uddin, Opposite Party.

Civil Revn. No. 583 of 1974, D/- 10-12-1975.*

(A) U. P. Cantonments (Control of Rent and Eviction) Act (10 of 1952), Sections 11, 12 — Application for eviction of X on ground of non-payment of arrears of rent — X objecting that he was not a tenant or an allottee — Sections 11 and 12 of the Act do not apply and X need not deposit the arrears along with his application. 1961 All LJ 631, Rel. on.

(Para 9)

Cases Referred: Chronological Paras 1961 All LJ 631 = 1961 All WR (HC) 508 9

Swami Dayal, for Applicant.

ORDER:— This is an application in revision against the order dated 8-4-1974 of Shri K. K. Birla, District Judge, Agra, dismissing the applicant's revision after confirming the order of the trial court.

2. The facts leading to this application in revision are not disputed and may be narrated as follows. The applicant moved an application under Section 11 of the U. P. Cantonments (Control of

*(Against judgment and order of K. K. Birla, Dist. J., Agra, in Civil Revn. No. 16 of 1974, D/- 8-4-1974.)

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Rent and Eviction) Act, 1952 (hereinafter referred to as the Act) against the opposite party on the allegation that the opposite party was a tenant of the applicant under an allotment order and that more than three months' rent amounting to Rs. 444/- had fallen into arrears. This application under Section 11 of the Act was presented on 24-3-1971. Notice was issued to the opposite party for 31-7-1971. On 31-7-1971 the opposite party did not appear. The service of notice on him was held to be sufficient. The case was, however, adjourned to 8-10-1971 for disposal. It appears that the case was not taken on that date and it was adjourned to 7-1-1972. On 7-1-1972 also nobody appeared on the side of the opposite party and the trial court passed an order of eviction under Section 12 of the Act and communicated it to the District Magistrate. On 24-12-1972 the opposite party was evicted.

3. Within a month of the eviction, that is, on January 8, 1973, the opposite party moved an application for setting aside the ex parte order passed against him on the ground that he had not been properly served. This application was moved by the opposite party under Order IX, Rule 13, Civil Procedure Code and Section 151, Civil Procedure Code. This application of the opposite party was allowed on 20-10-1973 and the ex parte order evicting him was set aside. On December 8, 1973 the opposite party filed an objection under Section 11 of the Act alleging that he was not a tenant of the applicant, nor were the premises in dispute allotted to him under the Act.

4. The trial court after hearing the parties and taking evidence came to the conclusion that the premises in dispute were not allotted to the opposite party and as such he was not a tenant contemplated by Section 11 of the Act. Accordingly the application under Section 11 of the Act against the opposite party was dismissed.

5. Against the above order the applicant filed a revision in the Court below and the learned District Judge after hearing the parties dismissed that revision.

6. Against the above order the applicant-landlord has come up in revision before me.

7. I have heard the learned counsel for the parties. I have also gone through the record. I am afraid the order passed against the applicant cannot be interfered with.

8. The learned counsel for the applicant has not challenged the order setting aside the ex parte order of eviction against the opposite party and indeed it is not open to challenge for that order was passed on 20-10-1973, and no revision or appeal was filed against it and, therefore, it has become final.

9. The grievance of the applicant, however, is that under Section 12 of the Act the opposite party could not file any objection except with regard to costs without depositing the arrears of rent which had been demanded from him. Admittedly, no arrears of rent were deposited by the opposite party in the case. But Sections 11 and 12 of the Act apply to tenants as contemplated by the Act and the tenant is one to whom the premises in dispute had been allotted under the Act. The objection of the opposite party was that he was not a tenant of the applicant at all and the premises in dispute were never allotted to him, and the Court below has found that the opposite party was neither a tenant of the applicant, nor was he allottee under the Act. In this view of the matter Sections 11 and 12 of the Act will not apply to the present case at all, for the simple reason that the opposite party was not a tenant as contemplated by the Act. I am supported in my view by the ruling reported in *Shri Dhar Shukla v. Babu Lal*, (1961 All LJ 631). This ruling was passed on Section 7-B of the Control of Rent and Eviction Act and Section 11 of the Act is analogous or similar to Section 7-B of the Control of Rent and Eviction Act.

10. For the reasons given above, this application in revision has no force and it is accordingly dismissed with costs.
Application dismissed.

AIR 1976 ALLAHABAD 371

AMITAV BANERJI, J.

Om Prakash Gupta and another, Appellants v. State of U. P. and another, Respondents.

First Appeal No. 16 of 1975, D/- 16-1-1976.*

(A) U. P. Nagar Mahapalika Adhiniyam (1959), Section 381 — Appeal against

*(Against award and decree D/- 30-11-1974 of Nagar Mahapalika Tribunal, Allahabad in Land Acquisition Reference No. 6 of 1965, D/- 30-11-1974.)

DT/FT/B239/76/MBR

decision of Tribunal — Decision relating to compensation for compulsory acquisition of land — Court-fee whether payable under Section 8 or Sch. II of Court-fees Act (1870). (Court-fees Act (1870), Section 8 (as amended by U. P.), Sch. II, Article 1).

During the pendency of the land acquisition proceedings under the provisions of the U. P. Town Improvement Act, 1922, the U. P. Nagar Mahapalika Adhiniyam came into effect. After the award, the matter of compensation was referred to the Tribunal under Section 371 of the Adhiniyam who gave its decision. In the meanwhile, the Development Authority created under the provisions of the U. P. Urban Planning and Development Act, 1973 took over the schemes pending with the Nagar Mahapalika. With the constitution of the Authority, the provisions of Chapter XIV of the Adhiniyam stood suspended, but under Section 59 of the Development Act all proceedings relating to acquisition of land pending immediately before such suspension before any court or tribunal were to be continued as if those provisions were not suspended. The question for consideration was as to the court-fee leviable on an appeal filed under Section 381 of the Adhiniyam to the High Court against the decision of the Tribunal.

Held that the court-fees as provided under Section 8 of the Court-fees Act, 1870 (as amended by U. P.) and not under Sch. II, Article 1 of that Act were leviable. (Para 9)

The appeal filed before the High Court is a continuation of the proceedings for the acquisition of land. Therefore, the provisions relating to acquisition which have been saved under Section 59 of the Development Act would by fiction of law keep intact the provisions of Chapter XIV (in which Section 381 is also included). While it is true that acquisition was not being made under the provisions of any land acquisition Act, in this case the acquisition was being made under a statute similar to that of the Town Improvement Act. Nevertheless it was an acquisition of land for public purposes. Since the appeal was filed under Section 381, it contemplated the existence (for the purpose of the appeal) of the provisions of Chapter XIV. AIR 1966 All 227, Followed. (Paras 5, 7, 8)

Cases Referred: Chronological Paras
 AIR 1966 All 227 1, 4, 5
 AIR 1959 Cal 609 = 63 Cal WN 325 7
 AIR 1939 All 127 = 1938 All LJ 1124 7

V. P. Misra, for Appellants; Standing Counsel, for Respondents.

JUDGMENT:— This is a reference by the Taxing Officer in the matter of the amount of court-fee leviable on an appeal filed against the decision of the Tribunal constituted under the U. P. Nagar Mahapalika Adhiniyam, 1959, (hereinafter referred to as the Adhiniyam). The appellants have filed a memorandum of appeal against the decision of the Tribunal and claim that they are liable to pay a court-fee of Rs. 5/- only and are not liable to pay ad valorem court-fees. The appellants have claimed a sum of Rupees 4,52,341.00 before the Nagarmahapalika Tribunal (hereinafter referred to as the Tribunal) but were awarded a sum of Rs. 36,560.70 only. In the present appeal the claim is in respect of a sum of Rupees 1,62,740.30 only. The Stamp Reporter has pointed out a sum of Rs. 13,035.00 is payable as court-fees on the memorandum of appeal. Two objections were filed on behalf of the appellants and it was stated therein that the above appeal is not directed "against an award made by a Tribunal constituted under the U. P. Town Improvement Act or any other similar statute" and consequently it was not covered by Section 8 of the Court-fees Act. It is further stated that with the enforcement of the U. P. Urban Planning and Development Act, (U. P. Act No. 11 of 1973), hereinafter referred to as the Development Act, the provisions of Chapter XIV of the Adhiniyam had been deleted with effect from the 2nd September, 1973 and consequently the Development Act is a similar statute to the U. P. Town Improvement Act as contemplated under Section 8 of the Court-fees Act. It was further stated that there is no other specific provision providing for court-fees on appeals against an award or order relating to compensation for compulsory acquisition of land passed by the Tribunal constituted under the Adhiniyam. In view of the repeal of the provisions of Chapter XIV containing Sections 343 to 384 of the Adhiniyam it could not be said that the Adhiniyam was a statute similar to the U. P. Town Improvement Act. It is further stated that under Section 59 of the Development Act only the right to appeal under Section 381 has been preserved. Reference was also made to the decision of this Court in Aijaz Uddin v. Taxing Officer, AIR 1966 All 227 wherein the learned single Judge held that the decision by the Tribunal constituted under the U. P. Nagar Mahapalika Act was an

award made by a Tribunal as contemplated under Section 8 of the Court-fees Act. The Taxing Officer finding the matter one of general importance has referred it for a decision to this Court.

2. In June 1944, the land of the appellants was notified for acquisition under the provisions of the U. P. Town Improvement Act, 1922. During the pendency of the proceedings the U. P. Nagar Mahapalika Adhiniyam came into effect from 1st February, 1960. The Collector gave the award in 1961 and thereafter possession of the land was taken on the 16th November, 1961. The matter of compensation was referred to the Tribunal constituted under Section 371 of the Adhiniyam. In the meantime the appellants filed a writ petition against the acquisition and the matter went up to the Supreme Court. The proceedings meanwhile remained stayed. The appeal was partly allowed and the impugned modifications were held to suffer from the vice of discrimination and were quashed but the Court upheld the acquisition and the validity of the award made on the 13th April, 1961. On the 30th November, 1974, the Tribunal gave its decision. In the meanwhile under the provisions of the U. P. Urban Planning and Development Act, 1973 a Development Authority was created for Allahabad on the 19th August, 1974 and the schemes which were pending with the Nagar Mahapalika were taken over by the Development Authority. With the constitution of the Allahabad Development Authority the provisions of Chapter XIV of the Adhiniyam stood suspended as contained in Section 59, of the Development Act but it made clear that "all proceedings relating to acquisition of land and interest in land for improvement schemes under the said enactments pending immediately before such suspension before any court, tribunal or authority may be continued and concluded in accordance with the provisions of the said enactments (which shall mutatis mutandis apply) as if those provisions were not suspended."

3. The principal question to be considered in this case is whether the memorandum of appeal filed under the provisions of Section 381 of the Adhiniyam to the High Court is liable to be charged with court-fees as provided under Section 8 of the Court-fees Act (as amended by the State Legislature) or is to be treated as an application or petition under the provisions of Schedule II

of the Court-Fees Act and liable to a fixed court-fees of Rs. 5/- only.

4. The contention of the learned counsel for the appellants in brief is this; the provisions of Section 8 are inapplicable in this case because it is a decision of the Tribunal not constituted under any similar statute as that of the United Provinces Town Improvement Act and as such court-fees payable on the memorandum of appeal would be only Rs. 5/- as is provided in Item 1 of Schedule II of the Court-fees Act. In other words, his contention is that the matter of compensation was before a Tribunal constituted under the Adhiniyam which was a statute similar to that of the United Provinces Town Improvement Act but by the time the award came to be made and with the deletion of Chapter XIV of the Adhiniyam it could not be said that the Adhiniyam was a similar statute as that of the United Provinces Town Improvement Act and consequently Section 8 of the Court-fees Act would have no application. He further contended that notwithstanding the preservation of the provisions in relation to proceedings relating to acquisition of land and interest in land for improvement schemes to pending proceedings before any court, tribunal or authority the repeal of the remaining provisions took away from the Adhiniyam the provisions by which it could be judged to be a statute similar to that of the U. P. Town Improvement Act. Learned counsel further contended that the Court-fees Act was a fiscal statute and if there were two interpretations possible the benefit must go in favour of the appellants. I have also heard the Chief Standing Counsel for the State of U. P. He has contended that the provisions of Section 8 of the Court-fees Act will apply wherever it is an acquisition for a public purpose. He further contended that the Nagar Mahapalika Adhiniyam is a similar statute like the Town Improvement Act notwithstanding its repeal under Section 59 (1) (a) of the Development Act. He also contended that in view of the provisions of sub-section (13) of Section 59 of the Development Act wherein clause (a) of Section 59 (1) had not been assigned to be the function of the Development Authority, which indicated that notwithstanding the repeal of Chapter XIV of the Adhiniyam by the Development Act for the purposes of appeal the Adhiniyam would be deemed to be existing law. He also referred to the U. P. General Clauses Act Section 6 (c) and (e) and con-

tended that it saved the provisions of the Adhiniyam notwithstanding their repeal by the Development Act. He placed reliance on the decision of the learned single Judge in the decision of Aijaz Uddin v. Taxing Officer, AIR 1966 All 227. He further contended that the acquisition in the present case was for a public purpose although it was initiated under the U. P. Town Improvement Act and continued under the Adhiniyam. Lastly, he contended that the meaning to be given to words "all proceedings" in Section 59 (1) (a) of the Development Act would have the effect of keeping intact until the disposal of the appeal the provisions for the acquisition of land for public purposes.

5. There can be no manner of doubt that the acquisition in the present case was for a public purpose. The scheme was put forward under the provisions of the U. P. Town Improvement Act and carried through under the provisions of the Adhiniyam. The Tribunal was duly constituted under the provisions of the Adhiniyam. It considered the questions before it and ultimately by its order dated the 30th November, 1974, gave its award. The award of the Tribunal becomes final unless appealed from as is provided under Section 381 of the Adhiniyam. The appeal that is being filed in this Court is, therefore, under the provisions of Section 381 of the Adhiniyam. This section is also contained in Chapter XIV of the Adhiniyam. Chapter XIV has been suspended under the provisions of Section 59 (1) (a) of the Development Act. However, under the provisions of Section 59 (1) (a) all proceedings relating to acquisition of land and interest in land for improvement schemes under the Adhiniyam which were pending before any court, tribunal or authority was to be continued and concluded in accordance with the provisions of the Adhiniyam as if those provisions were not suspended. This provision, therefore, ensures that a proceeding before a Tribunal was to be continued and concluded as if Chapter XIV of the Adhiniyam had not been repealed. It could be argued that the proceedings before the Tribunal comes to an end with the giving of the award but this is not quite correct. Clause (a) of Section 381 (1) makes it clear that an appeal to the High Court against the decision of the Tribunal would lie where the Chairman of the Tribunal gives a certificate that the case is a fit one for appeal. Thus, the proceedings for the appeal cannot commence unless the Chairman of the

Tribunal is approached for a certificate and he either grants the certificate or refuses the certificate. In the event of his refusal it is open to the appellants to seek a certificate from the High Court itself. Therefore the appeal filed before the High Court is a continuation of the proceedings for the acquisition of land. Therefore, the provisions relating to the acquisition of land which have been saved under Section 59 of the Development Act would by fiction of law keep intact the provisions of Chapter XIV of the Adhiniyam. The appeal itself is being filed under the provisions of Section 381 of the Adhiniyam. It is not being filed under any other provision of law and certainly not as a petition or an application. Since it is being filed as an appeal against a decision of the Tribunal under Section 381 of the Adhiniyam it contemplates the existence for the purpose of the appeal in this Court of the provisions of Chapter XIV of the Adhiniyam. It goes without saying that the Adhiniyam is a statute similar to that of the U. P. Town Improvement Act. The decision in the case of Aijaz Uddin v. Taxing Officer, AIR 1966 All 227 is an authority for the said proposition. I see no reason to take a different view from the one taken in that case.

6. The principal basis for the contention of the appellant's is that while the provisions of Chapter XIV of the Adhiniyam have to be ignored for a comparison to find out whether it is a statute similar to that of the U. P. Town Improvement Act but their appeal under Section 381 of the Adhiniyam is maintainable. A perusal of Section 59 (1) (a) of the Development Act makes it clear that the entire Chapter XIV of the Adhiniyam is to remain suspended with the coming in force of the Development Act. It virtually amounts to a repeal for the duration of the Development Act. There is nothing in sub-section (1) (a) of Section 59 to preserve the right of an appeal under Section 381 of the Adhiniyam unless it could be said that the appeal was included in the words "all proceedings relating to the acquisition of land and interest in land". If it were to be held that the appeal under Section 381 was not a proceeding relating to acquisition of land and interest in land, then in that event the result would be that no appeal would lie. Once it is conceded that an appeal lies under Section 381 of the Adhiniyam then it follows that it could be only by

virtue of being included in the words "all proceedings relating to acquisition of land and interest in land". It is not the appellant's contention that the appeal lay under any other provisions of law and on the contrary it is their case that an appeal lay under Section 381 of the Adhinyam. In this view of the matter for the purposes of the appeal it will be presumed that the provisions of Chapter XIV were not suspended. Once the provisions of Chapter XIV of the Adhinyam were deemed not to be suspended then it provided a nexus for comparison with the provisions of the U. P. Town Improvement Act. In this view of the matter the contention of the learned counsel for the appellants cannot be accepted.

7. Learned counsel contended that the first part of Section 8 of the Court-fees Act would not be applicable for the acquisition was not being done under the provisions of any Act for the acquisition of land for public purposes. Secondly, it was not being done under the provisions of an Act which was for the time being in force. His contention was that the U. P. Nagar Mahapalika Adhinyam was not an Act for the acquisition of land for public purposes and secondly, even if it was treated to be an Act for the said purpose, it had ceased to be an Act in force on the date of the filing of the appeal. It cannot be denied that the relevant date for the purposes of payment of the court-fees is the date when court-fees is payable viz., the date on which the appeal is filed. Chapter XIV of the Adhinyam, it was contended remained suspended on the date on which the memorandum of appeal was filed in this Court. It was, therefore, sought to be contended that it was not an Act which was for the time being in force. While it is true that acquisition was not being made under the provisions of any Land Acquisition Act in this case, the acquisition was being made under a statute similar to that of the United Provinces Town Improvement Act. Nevertheless it was an acquisition of land for public purposes. In the first part of Section 8 there is no reference to any Tribunal. In the second part of Section 8 there is a reference to a Tribunal. In the first part any order relating to compensation under any Act for the acquisition of land for public purposes is liable to court-fees as under Section 8 of the Court-fees Act. A question arose as to what was the meaning to be given to the word 'order' appearing in the first part of Section 8. In the case of Satya Charan

v. State of West Bengal, AIR 1959 Cal 609 it was held that "Section 8 of the Court-fees Act does not use the expression 'order' simpliciter but uses the expression 'order relating to compensation under any Act for the time being in force'. That being so, there is no reason why the expression 'order' in Section 8 must be treated as an order under Section 2 (14), Civil Procedure Code. An award made under Section 7 of the Requisitioning and Acquisition of Immovable Property Act is an order within the meaning of Section 8 of the Court-fees Act and in an appeal against such an award court-fee under Schedule I Article 1 of the Court-fees Act is payable on the difference of the amount awarded by the arbitrator and that claimed by the appellant". It was held therein that the memorandum of appeal was liable to Court fees under Schedule I article 1 of the Court-fees Act. A similar question had been considered by this Court in the case of Debi Din v. Secretary of State, AIR 1939 All 127. It was held therein that an order of compensation passed by a Tribunal constituted under the U. P. Town Improvement Act is an order of the Civil Court and the Court fee was payable under Section 8 of the Court-fees Act on the difference between the amount awarded and the amount claimed by the appellant. In this decision the question that arose was against the decision of a Tribunal, as in the present case. It was held that a decision by a Tribunal under the U. P. Town Improvement Act was appealable and the court-fee was payable in accordance with Section 8 of the Court-fees Act. It is, therefore, clear that whenever there is an appeal against a decision of a Tribunal constituted under a statute similar to that of the U. P. Town Improvement Act, Section 8 of the Court-fees Act would be applicable. It, therefore, follows that the first part of Section 8 relates to an order made in regard to compensation under any Act for the acquisition of land for public purposes. This position may have arisen if Chapter XIV of the Adhinyam had been repealed as a whole without any saving clause and a party had to take recourse to the original award. In such a case the provisions of the first part could have been made applicable. It is, therefore, not necessary in this matter to rely on the first part of Section 8.

8. A perusal of sub-section (6) (a) of Section 59 of the Development Act makes it clear that notwithstanding the

provisions of Section 59 (1) of the Act which suspends the provisions of Chapter XIV of the Adhiniyam, anything done or any action taken under the Adhiniyam shall continue in force so far as it is not inconsistent with the provisions of the Development Act. The scheme for acquisition, the proceedings relating to acquisition were all taken under the provisions of the Adhiniyam. These are saved under Section 59 (6) (a) notwithstanding the suspension of Chapter XIV of the Adhiniyam. Thus the entire acquisition proceedings in the present case have been saved notwithstanding the suspension of Chapter XIV of the Adhiniyam. The contention of the learned counsel was that there is nothing in sub-section (6) (a) or the subsequent clauses which ensure the keeping alive the provisions of Chapter XIV of Adhiniyam. In my opinion, it was not so. Section 59 (1) (a) suspended the provisions of Chapter XIV of the Adhiniyam but the saving clause in that very provision provided that all proceedings relating to the acquisition of land and interest in land are to be continued and concluded as if those provisions were not suspended. The acquisition proceedings were under the provisions of Chapter XIV of the Adhiniyam. It did not merely keep alive those provisions of Chapter XIV which related to the proceedings in hand, but, in my opinion related to the entire Chapter XIV of the Adhiniyam. Otherwise, it would then result in keeping alive Section 381 of the Adhiniyam but keep the other provisions of Sections 343 to 384 as if non-existent. I am unable to accept the contention of the learned counsel for the appellants that apart from Section 381 of the Adhiniyam all other sections of Chapter XIV of the Adhiniyam remain suspended and non-existent for the purpose of this appeal.

9. I am, therefore, of the opinion that the provisions of Section 8 of the Court-fees Act applied to the facts of the present case. It is well settled that if the memorandum of appeal was to be charged with court-fees as provided in Section 8 of the Court-fees Act then the provisions of Schedule II would have no application whatsoever. For the reasons indicated above, I am of the opinion that the contentions raised on behalf of the appellants have no merits. The memorandum of appeal in the present case is liable to court-fees as held by the Stamp Reporter. There is a deficiency of Rupees 13,035/- on the memorandum of appeal

and the appellants should now be called upon to make good the deficiency.

10. The reference is answered accordingly.

Reference answered.

AIR 1976 ALLAHABAD 376

K. N. SINGH, J.

Dr. J. P. Kulshreshtha and others, Petitioners v. Chancellor, Allahabad University Lucknow and others, Respondents.

Civil Misc. Writ No. 594 of 1974, D/- 12-1-1976.

(A) Education — Allahabad University Act (3 of 1921), Section 32 (2) (f) — Ordinance 9 (2) (i) (ii) framed under — Selection of candidates for Reader's Post — Essential qualifications — Selection of candidates not possessing essential qualifications is without jurisdiction — "High Second Class Master's Degree" in Ordinance 9, meaning of — High Court's power to interfere, extent of — Members of Select Committee biased in favour of a candidate — His Selection is vitiated.

(a) The qualifications prescribed under sub-clauses (i) and (ii) of Ordinance No. 9 (2) framed under Section 32 (2) (f) of the Act are essential qualifications for selection to the post of Reader in the University, and the Selection Committee has no jurisdiction to select a person for such appointment who does not fulfil the said essential qualifications. (Paras 4, 8, 13)

(b) The words "high second class degree" in Ordinance 9 (2) sub-clause (i) have been used in relation to qualification which signifies an upward standard, and refer to the percentage of marks by the candidates. (Para 6)

(c) Where a second class master's degree is awarded to candidates who obtain 48 to 59 per cent. of marks, only such candidates who obtain more than 54 per cent marks can be considered to have obtained a "high second class degree". (Para 7)

(d) The High Court has jurisdiction to interfere where the Select Committee or the Chancellor or the Executive Council of the University violates the statutory binding rule contained in the Ordinance. AIR 1975 SC 192, Rel. on. (Paras 10, 11)

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A selection made on the basis of incorrect data as to the marks obtained by a candidate is vitiated. (Para 12)

(e) Where after selection, the Select Committee deleted the name of a selected candidate from the list of selected candidates on untenable grounds the procedure adopted was held to be without jurisdiction. (Para 30)

(f) Where the recommendation of the Selection Committee has been influenced by bias on the part of some of its members, the selection would be vitiated. (Para 28)

(g) But a selection will not be vitiated by reason merely of the fact that the Committee interviewed the candidates or failed to maintain a record of the result of such interview. (Paras 16, 19)

Cases Referred: Chronological Paras.

AIR 1975 SC 192 = 1975 Lab IC 141 11

AIR 1973 SC 2701 = 1973 Lab IC 1607 21

AIR 1966 SC 707 = (1966) 1 SCR 974
9, 11

AIR 1965 SC 491 = (1964) 4 SCR 575
9, 10

AIR 1964 SC 72 = (1964) 4 SCR 733 21

S. P. Gupta, Triloki Nath and S. C. Khare, for Petitioners; S. D. Agarwal, Shanti Bhushan, Jagdish Swarup and Standing Counsel, for Respondents.

ORDER:— Dr. J. P. Kulshreshtha and three other Lecturers in the English Department of the University of Allahabad have invoked the jurisdiction of this Court by means of this petition under Article 226 of the Constitution challenging the selection and appointment of Dr. Mrs. Hemlata Joshi and five others to the posts of Reader in the English Department of the University.

2. In October 1970, six posts of Readers in the English Department of the Allahabad University were advertised. The petitioners, as well as respondents Nos. 5 to 10, Dr. Mrs. Hemlata Joshi, H. S. Saxena, Dr. R. R. Dutt, I. N. Agarwal, A. K. Bhattacharya and Dr. L. M. Upadhyaya, who were also Lecturers in the University in English Department, applied for the same. A number of other candidates from outside also applied for the same in the prescribed form. A Selection Committee was constituted in accordance with the provisions of the Allahabad University Act, 1921, and the Statutes and Ordinances framed thereunder. The Selection Committee decided to interview the candidates who had applied for appointment to the post of Reader. On 1st March, 1973, the Selection Committee in-

terviewed candidates at Allahabad. The petitioners and other candidates including respondents Nos. 5 to 10 were called for interview. Petitioner No. 2 Skand Gupta, did not appear before the Selection Committee as in his opinion the interview was without any authority of law. Dr. A. K. Bhattacharya, respondent No. 9, had also indicated his disinclination to appear for the interview but later he appeared before the Selection Committee for Viva Voce test. The Selection Committee recommended Dr. Mrs. Hemlata Joshi, Servasri H. S. Saxena, R. R. Dutt, I. N. Agarwal, A. K. Bhattacharya and L. M. Upadhyaya, respondents Nos 5 to 10, for appointment to the six posts of Readers. Petitioner No. 2, Skand Gupta, made a representation to the Executive Council challenging the legality of the selection. The Executive Council accepted the recommendations of the Selection Committee at its meeting held on 17th March, 1973. Consequently respondents Nos. 5 to 10 were appointed Readers. Thereafter the petitioners approached the Chancellor under Section 42 of the Allahabad University Act (hereinafter referred to as the Act) and submitted their representation against the appointment of respondents Nos. 5 to 10. The Chancellor by his order dated 22nd November, 1973, which was communicated to the petitioners on 15th December, 1973, upheld the selection and appointment of the said respondents and rejected the petitioners representation. Aggrieved, the petitioners approached this Court by means of this petition challenging the validity of the selection and appointment of the respondents. They have claimed relief for quashing the order of the Chancellor dated 22nd November, 1973, and the resolution of the Executive Council dated 17th March, 1973, appointing the respondents as Readers and the recommendations of the Selection Committee. They have further claimed a relief of mandamus directing the Executive Council and the University to make appointments in accordance with law.

3. Learned Counsel for the petitioners contended that the selection and appointment of Dr. Mrs. Hemlata Joshi, H. S. Saxena and I. N. Agarwal, respondents Nos. 5, 6 and 8 respectively was illegal as they did not fulfil the minimum essential qualifications prescribed for the post of Reader. It is asserted that the aforesaid respondents did not possess first or high second class Master's degree in the subject of English and as such they

were not eligible for appointment to the post of Reader; the Selection Committee committed patent error of law in selecting the aforesaid respondents and the Executive Council exceeded its jurisdiction in appointing the aforesaid respondents.

4. Section 29 of the Act lays down that teachers of the University shall be appointed by the Executive Council on the recommendations of the Selection Committee, the powers and functions of the Selection Committee are prescribed by the Statutes framed under Secs. 30 and 31 of the Act. Statutes 125 to 145 have been framed regulating the selection and appointment of teachers. In pursuance of Section 32 (2) (f) of the Act, Ordinances have been framed prescribing qualifications for the appointment of teachers in the University. Ordinance 9 (2) prescribes qualifications for appointment of teachers in the Faculties of Arts, Science, Commerce and Law. The relevant portion of Ordinance 9 which prescribes qualifications for appointment of Readers is in the following terms:—

"9. The following qualifications are prescribed for the appointment of teachers in the Faculties of Arts, Science, Commerce and Law:

(2) For Readers:

(i) First or High Second Class Master's degree in the subject concerned and good academic record.

(ii) Established reputation for sound scholarship and be competent to teach upto Master's degree and guide research.

(iii) A doctor's degree, or equivalent published work.

(iv) At least 5 years' teaching experience of the subject concerned in post-graduate classes in a University recognised by law, or research experience in a Research Institute recognised by the University or the State, or the Central Government.

Provided that the Selection Committee may relax the qualifications contained in clause (iii) for the post of Readers in the case of candidates whose total length of service as teachers in this University is not less than the period required to reach the maximum of the Lecturer's grade and who shall have established a reputation as teachers.

Provided further that in the case of women teachers of this (i.e., Allahabad) University, in place of qualification No. (iv) requiring 5 years' teaching experience in post-graduate classes a minimum of

5 years' teaching experience of the subject concerned in the graduate classes in this University may also be considered adequate for the post of Readers."

The above Ordinance requires that a person who is candidate for appointment to the post of Reader must possess a Master's degree either in first class or in high second class in the subject with a good academic record, he must have an established reputation for sound scholarship. He is further required to have a doctor's degree or equivalent published work. The candidate must have five years teaching experience of post-graduate classes. The first proviso to the Ordinance confers power on the Selection Committee to relax qualification No. 3, namely the requirement of having a doctor's degree or equivalent published work in respect of those candidates whose total length of service as teacher in the University may not be less than the period required to reach the maximum of the Lecturer's grade and who may have established reputation as teachers. Similarly, the second proviso carves out an exception in the case of women teachers of the University. In the case of lady candidate she need not possess five years' teaching experience in post-graduate classes but she must have five years' teaching experience of the subject concerned in graduate classes in the University of Allahabad. The provisions contained in the Ordinance thus make it clear that the Qualifications prescribed under sub-clauses (i) and (ii) are essential qualifications which cannot be relaxed by the Selection Committee or by any authority of the University. A candidate for appointment to the post of Reader is essentially required to possess a Master's Degree in first or high second class and a good academic record. In addition to that, the candidate must have reputation of sound scholarship and be competent to teach upto Master's Degree and guide Research. These are two essential qualifications which cannot be dispensed with. In the absence of any of these two qualifications a candidate is not eligible for selection or appointment to the post of Reader and the Selection Committee has no jurisdiction to select a person for appointment who may not be fulfilling any of these two essential qualifications.

5. The petitioners have asserted that none of the three respondents, namely, Dr. Mrs. Hemlata Joshi, respondent No. 5, H. S. Saxena, respondent No. 6 and I. N. Agarwal, respondent No. 8, ful-

filled the essential qualifications inasmuch as none of them possessed Master's degree either in first class or in high second class in English. The percentage of marks obtained by them has been set out in paragraph 32 of the petition which is not disputed by the respondents. The three respondents had obtained second class Master's degree in English; their percentage of marks were as under:

1. Dr. Mrs. Hemlata Joshi 52.2 per cent.
2. Sri H. S. Saxena 49.3 per cent.
3. Sri I. N. Agarwal 53.8 per cent.

None of these three respondents possessed a Master's degree in first class, instead all of them have got Master's degree in English in Second Division. The question arises as to whether these respondents fulfilled the qualifications as laid down by Ordinance 9 (2) (i). The petitioners contended that high second class Master's degree requires high percentage of marks and it does not mean a mere second class degree. On the other hand the respondents urged that there is nothing like high second class Master's degree, it means a second class degree irrespective of percentage of marks. It is admitted between the parties that all the three respondents had obtained Master's degree from the University of Allahabad. It is further admitted that the University of Allahabad awards first class Master's degree to those candidates who obtain 60 per cent. or above marks in their examination for the said degree. It is further admitted that those candidates who obtain 48 to 59 per cent marks are awarded only second class Master's degree. Thus a candidate who obtains mere 48 per cent or 49 per cent is awarded second class. Similarly those who obtain 58 or 59 per cent. marks are also awarded second class. The framers of Ordinance 9 (2) knew that there was no categorisation of a high second class Master's degree and yet they deliberately laid down high second class degree as an essential qualification. The use of the expression "high" which qualifies the second class degree is significant. It is difficult to accept the contention that this expression has no meaning or significance or that it merely contemplates a bare second class degree. If that were so, there was no necessity to use the expression "high". The Ordinances have been framed by a body which consists of eminent persons and academicians who are well acquainted with the teaching requirements of the University. While prescribing qualifications for the post of

Readers they used this expression with some purpose and meaning.

6. The expression "high second class Master's degree" has not been defined either in the Act, Statutes or Ordinances. In the absence of any definition it is permissible to consider the meaning of the expression 'high' with the aid of meaning given to this expression in the eminent dictionaries. In Shorter Oxford English Dictionary the word 'high' when used as adjective has been defined as "of considerable upward extent or magnitude, lying upwards, having a specified upward extent, denoting upper part". In Webster's New International Dictionary the meaning given to the word 'high' when used as adjective is in the following words:

"Reaching or passing upward considerably from any given point elevated or advanced in character or quality, whether moral or intellectual possessing a characteristic quality in a supreme or superior degree, ..."

The aforesaid meanings given to the expression 'high' indicate that the expression 'high' connotes a characteristic quality of superior degree. It contemplates a Master's degree in second class of superior standard. It must be well above the fixed norms. The use of the expression 'high' before the second class Master's degree clearly denotes that the second class degree must be of a higher standard. The term "high" in Ordinance 9 (2) (i) has been used in relation to qualification which signifies an upward standard. The term "high second class Master's degree" refers to percentage of marks obtained by a candidate. The qualifying term "high" occurring before the expression "second class" refers to a definite percentage of marks. The term 'high' when used in relation to qualification, signifies upward standard. In my opinion the expression "high" has been used in the Ordinance with a certain meaning and purpose.

7. The question then arises what is the percentage of marks contemplated by the high second class Master's degree. As already noted in the University of Allahabad second class degree is awarded to those candidates who obtain 48 to 59 per cent. marks. The difference between 48% and 60% is 12. If the total range of second class marks is divided in two parts it would appear that those candidates who obtain 54 per cent. marks do not fall in the category of high second

class Master's degree. On the other hand, those who obtain more than 54 per cent. of marks can be characterised as having high second class Master's degree. The term "high second class degree" means a quantifiable range of second class marks and in order to obtain a quantified meaning it would be reasonable to divide the range into two parts and then to determine the upper slab as high second class. This will be in consonance with the purpose sought to be achieved by the Ordinance in question. A Reader is required to teach post-graduate classes, he occupies a high and responsible office in the academic world of the University. The Ordinance requires that such a person must possess preferably a first class Master's degree in the subject failing which he must possess a high second class Master's degree. The emphasis is towards a higher percentage of marks in Master's degree. The purpose behind this requirement is to employ those persons who may have better academic career and those who may have obtained higher percentage of marks in Master's degree. This was necessary to achieve efficiency in teaching. In the prevailing system of examination, academic achievement of an examinee is measured by the percentage of marks and division is awarded to the successful candidates on the basis of percentage of marks. There can be no dispute that those who obtain higher percentage of marks are considered better in academic qualifications and talent than those who acquire lesser percentage of marks. The criterion for classification is the percentage of marks. In this background the Ordinance required that those who may have obtained higher percentage of marks should be eligible for appointment to the post of Reader. The framers of the Ordinance never intended that a candidate who obtained a mere second class Master's degree having 48 or 50 per cent. of marks should be eligible for appointment to the post of Reader. No doubt those having second class Master's degree are eligible, but that must be of high order namely the percentage of marks must be high and superior. I have already observed that the expression "high second class" means that the candidate must have obtained more than 54 per cent. marks in the Master's degree examination. If the respondent's contention is accepted the purpose and object of prescribing high second class Master's degree would be defeated. The interpretation

given by me to the expression "high second class Master's degree" fully carries out the purpose and object of Ordinance 9 (2) prescribing qualifications. I am therefore of the opinion that a candidate obtaining 54% marks or less does not fulfil the essential qualifications of "high second class Master's degree" as required by Ordinance 9 (2).

8. In the instant case, Dr. Mrs. Hemlata Joshi had obtained 52.2 per cent. of marks in her M. A. examination. Similarly, H. S. Saxena obtained 49.3 per cent. while I. N. Agarwal obtained 53.8 per cent. of marks. None of these three respondents fulfilled the essential qualification of high second class Master's degree. The Selection Committee selected these respondents in violation of Ordinance 9 (2) (i). It appears that the Selection Committee did not attach any significance to the words used in the Ordinance prescribing qualifications. The Selection Committee while making selection was bound to act in accordance with the Ordinance, it could select only those who possessed the requisite qualifications. It had no power to dispense with any essential qualification or to relax them except in so far as it was permitted to do so under the two proviso to the Ordinance. As already noted the qualifications prescribed in sub-clauses (iii) and (iv) could be relaxed by the Selection Committee but so far as the qualifications prescribed in clauses (i) and (ii) are concerned, the Selection Committee had no jurisdiction to relax the same. It was bound to consider and select only those persons who fulfilled the essential qualifications prescribed therein. It had no jurisdiction to ignore the essential qualifications or to select persons not equipped with the qualifications prescribed in the said Ordinance. In the instant case the Selection Committee exceeded its jurisdiction in selecting persons who did not possess high second class Master's degree in English subject. The Executive Council accepted the recommendation of the Selection Committee and appointed the aforesaid respondents. The appointments were made on the basis of the recommendations made by the Selection Committee. Therefore the order of appointment made by the Executive Council is also vitiated. These questions were raised before the Chancellor also but even he failed to appreciate these questions and the requirements of Ordinance 9 (2) (i) were not appreciated. For these reasons I am of the opinion that the selection and appointment

ment of respondents Dr. Mrs. Hemlata Joshi, H. S. Saxena and I. N. Agarwal was made in contravention of Ordinance 9 (2) (i); as such it is rendered illegal.

9. Learned counsel for the respondents urged that the Selection Committee was an expert body, it was well equipped to judge as to whether the aforesaid respondents possessed the requisite qualifications for appointment to the post of Reader in English. This Court should not interfere with their selection and it should not substitute its opinion for that of the Selection Committee. Reliance was placed on *University of Mysore v. Govinda Rao*, (AIR 1965 SC 491) and *Principal, Patna College v. Kalyan Srinivas Raman*, (AIR 1966 SC 707).

10. In *University of Mysore v. Gobinda Rao*, (AIR 1965 SC 491) the Supreme Court observed that while considering the recommendations made by the Selection Committee or appointments made on the basis of the said recommendations the courts should be slow to interfere with the opinions expressed by experts. The Supreme Court further struck a note of caution that normally it would be wise and safe for the courts to leave the decisions of academic matters to the experts who are more familiar with the problems they face than the courts generally can be. In view of these observations it is true that this Court cannot substitute its opinion for the opinion expressed by the experts in academic matters. But if a grievance is made that the Selection Committee consisting of experts did not act in accordance with any statutory or binding rule or if they contravened Ordinance or statutory rule in making the selection, the Court has jurisdiction to interfere with their decisions or recommendations. The Supreme Court itself observed in the aforesaid case as follows:

"What the High Court should have considered is whether the appointments made by the Chancellor had contravened any statutory or binding rule or ordinance and in doing so, the High Court should have shown due regard to the opinion expressed by the Board and its recommendations on which the Chancellor has acted."

Applying the principle laid down by the Supreme Court it is clear that this Court has jurisdiction to interfere if the Chancellor or the Selection Committee or the Executive Council of the University violated any statutory binding rule as contained in the Ordinance. As discussed

above, the Selection Committee as well as the Executive Council contravened the provisions contained in the Ordinance 9 (2) (i) in selecting the respondents Nos. 5, 6 and 8 even though they did not possess the minimum essential qualifications and appointed them to the post of Reader in violation of Ordinance 9 (2).

11. In *Principal, Patna College v. K. S. Srinivas Raman*, (AIR 1966 SC 707) the Supreme Court observed that if the matter involved is one of interpreting a regulation framed by the Academic Council of a University, the High Court should ordinarily be reluctant to issue a writ of certiorari where it is plain that the regulation was capable of two constructions. On the strength of these observations it was urged by the respondents that in past the University has been following a practice in treating a candidate holding a bare second class Master's degree eligible for appointment to the post of Reader. The practice relied upon is of recent years, it was never challenged before any court of law. The respondents have not given any specific cases in support of their assertion about the practice. The Supreme Court in the case of *K. S. Srinivas* merely struck a note of caution that ordinarily the High Court should be reluctant to issue a writ of certiorari if two interpretations were possible but in the present case the expression used in Ordinance 9 (2) is not capable of two interpretations. As already discussed it is difficult to comprehend that a person having a bare second class Master's degree having obtained 48 per cent. is eligible for appointment to the post of Reader. The construction of the expression "high second class Master's degree" does not admit of any such interpretation. I am therefore of the opinion that the alternative construction suggested by the respondents is neither reasonable nor possible. If the authorities of the University violate any statutory rule, it is always open to this Court to interfere. In *State of Bihar v. Asis Kumar Mukerjee*, (AIR 1975 SC 192), the Supreme Court interfered with the interpretation of the regulations as given by the Government of Bihar in considering the appointment to the post of Lecturer in Orthopaedics. The Supreme Court examined the meaning of the relevant regulation and took a contrary view to that taken by the University as well as the Government of Bihar. There is thus ample authority that the jurisdiction of the Court in cases of violation of the statu-

tory provisions, is not ousted. No doubt the decision of experts familiar with academic matters should be respected but if it is found that they acted in violation of binding rule, the Court has jurisdiction to interfere with their decision. There is no dispute before me that Ordinance 9 (2) framed under the Act has statutory force and it was binding on the Selection Committee and other authorities of the University.

12. Learned counsel for the petitioners urged that the relevant data in respect of candidates was incorrectly placed before the Selection Committee as a result of which the Selection Committee made its recommendations on assumption of non-existent facts. As already noted Smt. Hemlata Joshi had obtained 52.2 per cent. of marks but in her application she had mentioned that she had obtained 54 per cent. of marks in her M. A. examination. Learned counsel for the University has placed before me the original record which shows that the Selection Committee proceeded on the assumption that Dr. Hemlata Joshi had obtained 54 per cent. marks in her Master's degree. This was no doubt an incorrect fact. The Selection Committee was misled to believe that she had obtained 54 per cent. of marks though she had obtained only 52.2 per cent. marks. In her counter-affidavit Dr. Joshi has explained that she had mentioned the percentage of marks by memory in a hurry, it was a mistake committed inadvertently. This explanation does not appear convincing: be that as it may, it is clear that incorrect data was placed before the Selection Committee and it selected her on the assumption that she had obtained 54 per cent. of marks. It is well established that the decision taken by an authority on non-existent facts cannot be sustained in law. The selection of Dr. Mrs. Hemlata Joshi is vitiated on this ground also.

13. The decision of the Selection Committee in selecting I. N. Agarwal was further assailed on the ground that in the data placed before the Selection Committee, emphasis was laid on the musical and poetic talent of Sri Agarwal. It was asserted that the data in respect of Sri I. N. Agarwal as placed before the Selection Committee indicated that Sri Agarwal had written some poems in Hindi. It was urged that the musical talent of Sri Agarwal or his poetic talent in Hindi had no relevance to his suitability for appointment to the post of Rea-

der. There is no doubt that Ordinance 9 (2) does not prescribe any such qualifications, but that does not forbear the Selection Committee in taking into account any other extra-curricular qualifications of a candidate. The selection would be invalid if the essential qualifications are ignored and irrelevant qualifications are taken into account.

14. Learned counsel for the petitioners urged that the recommendation of the Selection Committee was vitiated as it did not record grounds on which the selected candidates were recommended to the Executive Council for appointment as required by clause (c) of Regulation 5. The Executive Council has framed regulations regulating the transaction of business by the Selection Committee. Regulation 5 lays down that the report of the Selection Committee should state definitely what person is recommended; it should ordinarily select at least three persons in order of merit. Clause (c) of that regulation requires the Selection Committee to state the names and qualifications of the candidates and the ground on which the candidates are selected and recommended to the Executive Council. I have perused the recommendations made by the Selection Committee in original. It does not contain any ground as required by Regulation 5 (c). But this does not vitiate the recommendation of the Selection Committee.

15. The Selection Committee was not an authority of the University prior to 1955. The Allahabad University Act was amended in the year 1954 by U. P. Act No. V of 1955. By that amending Act Selection Committee was constituted as an authority of the University under Section 16 of the Act. Thereafter the State Government amended the Statutes in 1958. The amended Statutes as published in the Calendar of the University of Allahabad for the year 1968 contain provisions regulating the manner of transaction of business at the meeting of the Selection Committee. Statutes 126 to 136 deal with the constitution and powers of the Selection Committee as well as the manner in which its business shall be transacted at its meeting. Statute 137 lays down that subject to candidates having requisite merit being available, the Selection Committee shall recommend three persons for each appointment and shall arrange their names in order of preference. The recommendations made by the Selection Committee in the instant

case were made in accordance with the provisions contained in the Statutes. Statute 137 has statutory force, it contains a binding rule. Regulation 5 (c) was framed by the Executive Council at a time when the Selection Committee was not an authority of the University. The Executive Council at that stage was competent to frame regulations for the transaction of business by the Selection Committee. But after the Selection Committee became an authority of the University the Executive Council ceased to have any jurisdiction to frame any regulation to regulate the transaction of business by the Selection Committee. Moreover, the provisions contained in the Statutes have overriding effect over the regulations framed by the Executive Council. The Statutes do not require the Selection Committee to state grounds or reasons in making its recommendations. I am therefore of the opinion that the absence of grounds in the recommendation made by the Selection Committee did not vitiate its recommendations.

16. It was then urged for the petitioners that under the Act, Statutes and Ordinances there was no provision for holding interview for selection of teachers for appointment to the post of Reader. In the advertisement issued by the University inviting applications for appointment to the post of Readers the University did not place any such condition that the candidates would be required to appear for interview before the Selection Committee. It was urged that in the absence of any statutory provision, the Selection Committee had no jurisdiction to hold interview or to disregard the candidature of a person who did not appear before it for interview. In this background it was urged that the Selection Committee exceeded its jurisdiction in considering the case of only those candidates who appeared before it for interview in disregard of other candidates who fulfilled the requisite qualifications. It is true that neither the Act, nor the Statutes nor the Ordinances contain any provision that selection of teachers shall be made after a viva voce interview of the candidate, but the Act, the Statutes and the Ordinances contemplate that appointment of a teacher in the University including a Reader shall be made by selection. The Statutes further require that selection shall be held by a Selection Committee constituted in accordance with the provisions contained therein. Thus the Act and the Statutes contem-

plate selection. There can be various methods of selection. It may be by a competitive examination, another by examination cum viva voce or by viva voce alone and fourthly by examination of academic record with a viva voce test. The Act and the Statutes framed thereunder do not prescribe any specific method of selection, though the Statutes contemplate selection of candidate by a Selection Committee. The Selection Committee considered it necessary to hold selection by holding interview of the candidates. The interview was not the sole criteria for the selection. The Selection Committee admittedly considered the data of the qualifications, teaching experience and other academic records of the candidates. Selection on the basis of interview is a well recognised method of selection, it was not prohibited by the Act or the Statutes framed thereunder. The Selection Committee did not contravene any provisions of the Act, Statutes or Ordinances in holding interview of the candidates for the purpose of making selection. The records produced before me show that letters of request were sent to all the candidates who had applied for appointment to the post of Reader including petitioner No. 2 to appear for interview before the Selection Committee on March 1, 1973, at 10-30 A. M. in the Vice-Chancellor's chamber, Senate Hall, Allahabad. Out of 25 persons who had applied for the Reader's post, 13 candidates turned up and all of them were interviewed by the Committee. In the counter-affidavit of Sri B. M. Singh, Registrar of the University, it has been asserted that the Expert members of the Committee were of the opinion that only those should be considered who had appeared for interview, other members of the Selection Committee agreed with this proposal and as such the cases of only those candidates who appeared for interview were considered by the Selection Committee and those candidates who did not appear for interview were not considered for selection. In pursuance of this decision, the case of Skand Gupta, petitioner No. 2, was not considered by the Selection Committee as he did not appear for interview before it. In my opinion the Selection Committee did not contravene any provision of the Act or Statute in adopting the method of interview for making selection in addition to consideration of the academic records.

17. It was then urged for the petitioners that even if interview was

permissible, the Selection Committee did not fix any norm for allotting marks to evaluate the comparative merits of the candidates who appeared before it for interview. In the absence of any fixed norms the Committee acted arbitrarily in making the selection. It was further urged that the record of the Selection Committee does not show as to on what basis or ground the Selection Committee found respondents Nos. 5 to 10 superior in merit in comparison to petitioners Nos. 1 to 4. Further the Selection Committee did not record the result of the interview in any form nor the same was forwarded to the Executive Council with the result the Executive Council could not take into consideration the result of the interview held by the Selection Committee. The petitioner's averment in paragraph 60 of the petition that the Selection Committee did not record the result of the interview in any form and that it did not remit the result of the interview in any form to the Executive Council is not disputed by the respondents. The petitioners raised this grievance before the Chancellor also but the Chancellor rejected the contention on the ground that the Selection Committee was the best judge of the merits of the candidates and it was assessed by experts; therefore, it was not possible to brush aside the assessment and evaluation of the worth of the candidates unless there are compelling reasons for it and the Committee is shown to have violated any provisions of the Act or the Statutes.

18. As already noted there is no Statutory provision for interview nor any procedure has been prescribed either under the Statutes or the Ordinances laying down any criteria for evaluation of merit at the interview. In the absence of any statutory provision it is not possible to hold that the Selection Committee acted arbitrarily in evaluating comparative merits of the candidates at the time of interview. No doubt it would be desirable for the Selection Committee to keep a record of the interview and the marks allotted, if any, to the respective candidates at their viva voce interview. The Selection Committee is required to assess the merit and suitability of the candidates in an objective manner. The recommendations made by the Selection Committee are forwarded to the Executive Council. The members of the Executive Council deliberate over the recommendations of the Selection Committee and the Executive Council is em-

powered under the Statutes to disagree with the recommendations and to send the same back to the Selection Committee for reconsideration or to forward its opinion to the Chancellor for orders. The Statutes clearly show that the Executive Council has power to disagree with the recommendations of the Selection Committee. The Executive Council cannot perform its function and its members cannot properly discuss the recommendations unless the Selection Committee forwards the result of viva voce interview along with its recommendations. No doubt the Selection Committee was the best judge of the merits of the candidates but it cannot act arbitrarily in making selection. In order to avoid charge of arbitrariness it would be proper to maintain record of the interview as that would further benefit the members of the Executive Council also in discharging their functions.

19. In the instant case the Selection Committee has failed to maintain any record of the viva voce interview, but I do not consider it proper to interfere with the entire selection on this ground. The opinion of the experts should not lightly be brushed aside by this Court. As already discussed in academic matter this Court will not interfere with the selection unless there is violation of statutory provisions. In the absence of any statutory provisions to the contrary, the Selection Committee as an authority of the University was competent to adopt its own method to judge the merit and suitability of candidates. Though maintenance of result of interview would have been desirable, but in the absence of such record, the Selection Committee cannot be presumed to have acted arbitrarily. The Selection Committee did not contravene any statutory rule, therefore its recommendations cannot be quashed on this ground.

20. It was urged that the Selection Committee was partial and biased in favour of Dr. A. K. Bhattacharya, respondent No. 9, some of its members personally interested in his Selection as a result of which the recommendations made in his favour are vitiated. It was further urged that Dr. A. K. Bhattacharya as well as petitioner No. 2, Skand Gupta, both had not appeared before the Selection Committee on 1-3-1975 under protest. But since members of the Selection Committee were personally interested in the selection of Dr. A. K. Bhatta-

charya, he was sent for and interviewed, no such opportunity was afforded to Skand Gupta, petitioner No. 2. The Selection Committee did not give equal treatment to Skand Gupta.

21. The Selection Committee was an authority of the University constituted under the Act. It was required to hold selection in an impartial and unbiased manner. The selection would be vitiated if it is demonstrated that some of the members of the Selection Committee were biased in favour of respondent No. 9. It is well settled that bias is a facet of mala fides. Bias vitiates exercise of power in the same manner as mala fide exercise of power is void. In *Partap Singh v. State of Punjab*, AIR 1964 SC 72, the Supreme Court observed that mala fide exercise of power is no exercise of power at all. In considering the question of mala fides the dominant motive or purpose should be taken into account. It is not always possible to prove mala fides by direct evidence. It is permissible to discern mala fides on proved facts and circumstances. In *S. Parthasarathi v. State of Andhra Pradesh*, AIR 1973 SC 2701, it was held that there must be a "real likelihood" of bias, that means that there must be a substantial possibility of bias. The Court has to judge the matter as a reasonable man would judge on any matter in the conduct of his own business. After considering the question at length the Supreme Court observed that there was difference between "real likelihood" and "reasonable suspicion"; while in the latter case plea of bias could not be upheld, but in the former case the plea would be established if on the existence of circumstances from which a reasonable person could think it probable that the authority concerned was biased, in that situation, test for real likelihood of bias would be fulfilled. It is in the light of these principles that the petitioner's plea of bias needs consideration.

22. In paragraphs Nos. 12 to 16 of the petition the petitioners have stated that Skand Gupta, petitioner No. 2 and Dr. Bhattacharya, respondent No. 9 both did not appear before the Selection Committee for interview on 1-3-1973 in protest. The interview commenced before the Selection Committee on 1-3-1973 at about 10.30 A. M. The Selection Committee had completed the interview of all the other 12 candidates who presented themselves before it by 2.30 p.m. Thereafter the Selection Committee started its

deliberations. A little later the Selection Committee sent a special messenger to the staff room of the English Department of the University to fetch Dr. Bhattacharya who had not presented himself for interview. Dr. Bhattacharya was not present in the campus. Sri H. S. Saxena, who was present in the staff room went to fetch Dr. Bhattacharya. During all this time the Selection Committee kept waiting for Dr. Bhattacharya. On receiving the message Dr. Bhattacharya arrived; he was met in the room of Personal Assistant to the Vice-Chancellor by the Dean, Faculty of Arts, Prof. G. R. Sharma and the Head of the English Department, Professor Y. Sahai, who were members of the Selection Committee. They talked to Bhattacharya and persuaded him to appear before the Selection Committee. Dr. Bhattacharya was escorted to the Committee Room and interviewed by the Selection Committee. The Selection Committee did not send any invitation, or offer or information of second opportunity of interview to Skand Gupta, petitioner No. 2, who had also not presented himself for interview, although he was present in the campus of the University. In paragraph 16 of the petition the petitioners have asserted that on these facts it can reasonably be inferred that some of the members were personally interested in the selection of Dr. Bhattacharya. They were partial to him and it was with that end in view that the Selection Committee sent message to Dr. Bhattacharya to present himself for interview and the Members of the Selection Committee went out of their way to persuade Dr. Bhattacharya to present himself before the Selection Committee for interview. No such message was sent to Skand Gupta, petitioner No. 2.

23. Dr. Bhattacharya and B. M. Singh, Registrar of the University have filed counter-affidavits which contain replies to the allegations made by the petitioners. Dr. Bhattacharya has stated his version in paras. 10 to 16 of his affidavit. In the first place he denies to have refused to appear for interview before the Selection Committee. He has asserted that the Selection Committee had power to hold interview of the candidates for making its recommendations, no special messenger was sent to him nor he was asked by any member of the Selection Committee to appear before the Selection Committee. He has further asserted that he had been informed by his friends that the Selection Committee had

interviewed a number of candidates and was about to break for lunch and would resume its session after 2 P. M. He went for lunch to the residence of H. S. Saxena and after lunch he presented himself for interview on his own. By that time the Selection Committee had not completed the interview. In fact, two outside candidates were being interviewed and he had to wait for his turn. He has denied to have met the members of the Selection Committee in the room of the Personal Assistant to the Vice-Chancellor.

24. Normally after the denial of the petitioner's allegations by Dr. Bhattacharya no further investigation would have been necessary, but the version placed before the Court in the affidavit of B. M. Singh, the Registrar of the University is quite different. Relevant facts in this respect are stated in paragraphs 12 to 16 of the affidavit of B. M. Singh, the Registrar of the University. It would be pertinent to quote the relevant portion of the Registrar's affidavit as contained in paragraph 14 of this affidavit:—

"In fact 13 candidates had been interviewed by the Selection Committee. It may further be stated that Dr. A. K. Bhattacharya and Shri Skand Gupta did not present themselves for interview at the prescribed time. On behalf of Dr. Bhattacharya it was pleaded by some members of the Selection Committee that he was not appearing at the interview under protest in view of the fact that his contention with regard to the fixation of his salary had not been accepted by the University in the past and also because he felt indignant at being called for interview after having served for a number of years. The members of the Selection Committee were of the view that they would not consider a person unless he presented himself for interview, and accordingly, a message was sent out to Shri Bhattacharya that if he likes, he could appear at the interview. Thereafter Dr. A. K. Bhattacharya appeared before the Selection Committee. In regard to the contents of this paragraph, it is only stated that the Selection Committee had sent a messenger to the Staff Room of the English Department of the University to inform Dr. A. K. Bhattacharya that in case he liked, he could appear at the interview. The rest of the allegations made in this paragraph are not admitted for want of knowledge."

25. In paragraph 15 of his affidavit the Registrar has stated that it was open to the petitioner No. 2 also to appear before the Selection Committee, but he himself did not appear before the Selection Committee. In paragraph 16 of his affidavit the Registrar states that the members of the Selection Committee were not biased or partial towards Dr. A. K. Bhattacharya. He has further asserted that Dr. A. K. Bhattacharya was not fetched by the Selection Committee as stated. Only a messenger was sent to the English Department to inform Dr. A. K. Bhattacharya that in case he wanted to appear before the Selection Committee it was open to him to do so. The interview was not over when the message was sent. In fact, the meeting of the Selection Committee was continuing and Dr. A. K. Bhattacharya was interviewed when the proceedings were continuing. The allegation that Dr. A. K. Bhattacharya was persuaded to present himself before the Selection Committee for interview is wholly incorrect. The case of petitioner No. 2 and that of Dr. A. K. Bhattacharya was not similar because the members of the Selection Committee did not say that Dr. Bhattacharya did not appear before the Selection Committee under protest.

26. These are the averments contained in the aforesaid three affidavits. On a careful analysis of the same I find that the petitioners' allegation that Dr. A. K. Bhattacharya had also refused to appear for interview under protest is correct. No doubt Dr. Bhattacharya has denied this but the facts stated in the affidavit of B. M. Singh, support the petitioners' contention. Dr. Bhattacharya is highly interested person and his testimony in this matter must be scrutinised with care. B. M. Singh, the Registrar has clearly stated that Dr. Bhattacharya had not appeared for interview at the prescribed time, and that some of the members of the Selection Committee informed other members that Dr. A. K. Bhattacharya did not appear before the Selection Committee for interview under protest, thereafter, on the pleading of the members of the Selection Committee a special messenger was sent to call Dr. Bhattacharya and it was only thereafter that Dr. Bhattacharya appeared and interview took place. These facts are clearly established from the respective affidavits. B. M. Singh's version in this respect appears to be correct. It is noteworthy that on 17th March, 1973 when

the recommendations of the Selection Committee were to be discussed by the Executive Council, the petitioner No. 2, Skand Gupt submitted a written representation to the Vice-Chancellor which is on the record of the file relating to the selection. In that representation petitioner No. 2 had made these very allegations and had raised the question of partiality of the members of the Selection Committee towards Dr. A. K. Bhattacharya. In his representation before the Chancellor the petitioner again raised this question. The University submitted its comment to the Chancellor on April 13/14, 1973, in reply to the petitioner's representation. Those comments are annexed as Annexure 'E' to the affidavit of B. M. Singh. The facts stated in paragraph 6 of that comment clearly support the petitioners' contention that on behalf of Dr. Bhattacharya some members of the Selection Committee pleaded his case and a message was sent out to Dr. Bhattacharya to appear at the interview. It was thereafter that Dr. Bhattacharya came in for interview.

27. In view of these facts and circumstances it is clear that some of the members of the Selection Committee were interested in Dr. A. K. Bhattacharya and for that reason they went out of their way to persuade the members of the Selection Committee to send word to Dr. Bhattacharya to enable him to appear at the interview. As already noted the Selection Committee had decided to consider the cases of only those candidates who appeared before it for interview. In that context letters for interview had already been issued to all the candidates including Dr. Bhattacharya. If Dr. Bhattacharya had not appeared before the Selection Committee, the members of the Selection Committee in the normal course of discharge of their duties had no business to send word to him or to invite or persuade him to appear at the interview. Moreover no such invitation was sent to Skand Gupt. The proved facts clearly show that some of the members of the Selection Committee were partial towards Dr. A. K. Bhattacharya and for that purpose they persuaded other members of the Selection Committee to adopt this unusual course.

28. The petitioners' assertion that Sri G. R. Sharma, the Dean of Faculty of Arts and Sri Y. Sahai, the then Head of the English Department, who were members of the Selection Committee talked

to Dr. A. K. Bhattacharya in the room of the Personal Assistant to the Vice-Chancellor and persuaded and escorted him in the Committee Room where selection was held is denied by Dr. Bhattacharya. But his mere denial is not sufficient to discard the petitioners' averments specially having regard to his denial of other facts which have been found correct, namely, that he never protested or refused to appear before the interview or that any message was sent to him by the members of the Selection Committee calling him for interview. In such a situation it would not be proper to reject the petitioners' averments merely on the denial of Dr. Bhattacharya. The Selection Committee was impleaded as a respondent to the petition. Notices were served on the University authorities, but no affidavit has been filed by any of the members of the Selection Committee. No doubt B. M. Singh, the Registrar, has filed affidavit on behalf of the University and in paragraph 16 of his affidavit he has denied the petitioner's assertion in this respect but the averments contained therein are of no consequence. B. M. Singh was not a member of the Selection Committee. He could have no personal knowledge as to what happened in the Selection Committee. Moreover the averments contained in paragraph 16 of his affidavit that the members of the Selection Committee were not biased or partial towards Dr. A. K. Bhattacharya has been sworn on the basis of records. Learned Counsel for the University has produced the records before me, it does not contain any note by the members of the Committee in this matter. Obviously B. M. Singh was not entitled to speak about the mental state of the members of the Selection Committee. Bias or partiality is not always apparent. Many a time it is the result of a mental state and since B. M. Singh was not a member of the Selection Committee he could not be in a position to deny the petitioners' allegation of bias against the members of the Selection Committee. It is further noteworthy that even in the affidavit of Sri B. M. Singh there is no denial of the petitioners' allegations that Sri Y. Sahai and Sri G. R. Sharma both talked to Dr. Bhattacharya and persuaded him to appear before the Selection Committee. The proved circumstances and preponderance of evidence available on the record clearly point out that some of the members were interested in the selection of Dr. A. K. Bhattacharya and an unusual

method was adopted to send message to Dr. Bhattacharya. In this context the petitioners' assertion that two of the members of the Selection Committee viz., Y. Sahai and G. R. Sharma both talked to Dr. Bhattacharya and persuaded him to appear at the interview before the Selection Committee, appears to be correct. The totality of all these facts and circumstances is sufficient to persuade a reasonable person to arrive at the conclusion that some of the members of the Selection Committee and specially the two members named in the petition were biased in favour of Dr. Bhattacharya. There is no dispute that these two members participated in the deliberations of the Selection Committee and made recommendations in favour of Dr. A. K. Bhattacharya. In this view of the matter, I hold that the recommendation of the Selection Committee for the appointment of Dr. A. K. Bhattacharya is vitiated and his appointment is rendered illegal.

29. Lastly learned counsel for the petitioners urged that the Selection Committee did not act in a just or impartial manner in making the selection, instead, it adopted arbitrary attitude in making the selection. The Selection Committee on the advice of two experts arranged the names of selected candidates on the basis of merit and preferences. In that list one Dr. T. Bose was placed at serial No. 1 for appointment to the post of Reader. But this list was altered by the members of the Selection Committee and the opinion of the experts was overruled and name of Dr. T. Bose was not recommended to the Executive Council for appointment on the ground that Dr. T. Bose had neither submitted his application through proper channel nor produced no objection certificate as required by the rules or the letters issued for interview. A perusal of the original report of the meeting of the Selection Committee as produced before me by the learned counsel for the University shows that the experts on the basis of interview and academic records found Dr. T. Bose the most meritorious and suitable person for appointment to the post of Reader, but other members of the Selection Committee rejected his candidature after the selection had already been made.

30. There are no rules nor any of such rules were brought to my notice by the learned counsel for the parties requiring a candidate to send his applica-

tion through proper channel or to produce no objection certificate. There is no provision either in the Statutes or in the Ordinances that if a candidate does not apply through proper channel or if he fails to produce no objection certificate at the time of interview his candidature shall be cancelled. In the absence of any rules, the Selection Committee had no jurisdiction to exclude the name of Dr. T. Bose from the list of selected candidates. No doubt in the letter which was issued for interview to Dr. T. Bose, he was asked to bring the no objection certificate but the letter did not contain any condition that in the event of non-production of no objection certificate he would not be considered for selection. The purpose behind the no objection certificate is to furnish information that the candidate if employed elsewhere can join the University on his being selected and that his employers would have no objection. It is noteworthy that neither in the advertisement nor in the rules nor in the letter sent for interview to the candidates, they were informed that in case of non-production of no objection certificate, their candidature would be cancelled. Moreover, Dr. T. Bose appeared before the Selection Committee, he was interviewed even though he did not produce no objection certificate and the Selection Committee selected him for appointment even in the absence of no objection certificate. Once Dr. T. Bose was selected and placed at serial No. 1 the Selection Committee had no justification to delete his name from the list of selected candidates on the ground of non-production of no objection certificate. Even if it was open to the Selection Committee to insist on production of no objection certificate, Dr. T. Bose should not have been allowed to appear at the interview in the absence of no objection certificate. But once he was interviewed and found most meritorious candidate, it was unreasonable to delete his name from the list of selected candidates. The procedure adopted by the Selection Committee was arbitrary and without jurisdiction.

31. Learned counsel for the petitioners lastly urged that the petitioners' academic record was much better than that of those selected; but the Selection Committee arbitrarily selected those whose academic record was inferior. The question as to whether the petitioners or respondents should have been selected on the basis of academic records or as to who were most suitable for selection is not

within the jurisdiction of this Court. The Selection Committee had the exclusive jurisdiction to consider this question. This Court cannot sit in appeal over the selection made by the Selection Committee which is more familiar with the academic matters.

32. In view of the above discussion I allow the petition and quash the selection and appointment of Dr. Mrs. Hem Lata Joshi. Sri H. S. Saxsena, Sri I. N. Agarwal and Dr. A. K. Bhattacharya, respondents Nos. 5, 6, 8 and 9 respectively. The order of the Chancellor is also quashed. The petition, however, fails as against Dr. R. R. Dutt and Dr. L. N. Upadhyaya, respondents Nos. 7 and 10. It will be open to the University to hold fresh selection in accordance with law for filling the vacancies in the post of Reader in the English Department. In the circumstances there will be no order as to costs. Order accordingly.

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CHANDRA PRAKASH, J.

Abdul Shakoor, Appellant v. Lateef Uddin, Respondent.

Second Appeal No. 889 of 1974, D/- 10-12-1975.*

(A) U. P. Cantonments (Control of Rent and Eviction) Act (10 of 1952), Section 11 — Ex parte order for eviction — Tenant evicted — Ex parte order subsequently set aside and restoration of possession to tenant ordered — Validity — (Civil P. C. (1908), Section 151, Order 9, Rule 13). 1966 All WR (HC) 355, Dissented from.

A Court passing an ex parte order for eviction of a tenant under the Act has powers to set it aside under its inherent powers and order restoration of possession to the tenant who had been evicted under the ex parte order. 1970 All WR (HC) 183, Followed; 1966 All WR (HC) 355, Dissented from. (Paras 8, 11)

Cases Referred; Chronological Paras 1970 All WR (HC) 183 = 1970 All LJ 82

	11
1966 All WR (HC) 355	10, 11
(1959) Writ Petn. No. 69 of 1958, D/- 29-10-1959 (All)	11

*(Against judgment and order of K. K. Birla, Dist. J., Agra, in Civil Appeal No. 6 of 1974, D/- 8-4-1974.

DT/ET/A955/76/KNA/MVJ

Swami Dayal, for Appellant; S. N. Agarwal, for Respondent.

JUDGMENT:— This is a second appeal against the judgment and decree dated 8-4-1974 of Shri K. K. Birla, District Judge, Agra, dismissing the appellant's first appeal after confirming the decree of the trial Court.

2. The Facts leading to this appeal are not in dispute and may be narrated as follows. The appellant moved an application under Section 11 of the U. P. Cantonments (Control of Rent and Eviction) Act, 1952, (hereinafter referred to as the Act), for the eviction of the defendant respondent on the allegation that the respondent was a tenant of the appellant and that more than three months' rent amounting to Rs. 444/- had fallen into arrears. This application was presented on 24-3-1971. Notice was issued to the defendant-respondent for 31-7-1971. On 31-7-1971 the defendant-respondent did not appear and the service of notice on him was held to be sufficient. The case was, however, postponed to 8-10-1971. On 8-10-1971 also the case was adjourned to 7-1-1972 on the motion of the appellant and on 7-1-1972 an ex parte order of eviction was passed against the respondent and the same was communicated to the District Magistrate. On 24-12-1972 the respondent was evicted.

3. On 8-1-1973 the respondent moved an application under Order IX, Rule 13, Civil Procedure Code read with Sec. 151, Civil Procedure Code for setting aside the order of eviction passed against him ex parte. Notice of that application was issued to the appellant and the appellant filed an objection against it. However, the trial Court after hearing the parties set aside the ex parte order of eviction passed against the respondent on 20-10-1973.

4. After the order of eviction had been set aside the respondent moved an application for re-delivery of possession. After hearing the parties the Court below ordered that the respondent will get the possession back.

5. Against the above order the appellant filed a first appeal in the Court below and after hearing the parties the lower appellate Court dismissed the appeal.

6. Feeling aggrieved, the appellant has come up in second appeal before me.

7. I have heard the learned counsel for the parties. I have also gone

through the record. After giving the matter my anxious consideration I have come to the conclusion that the order passed by the Court below cannot be interfered with.

8. The appellant got possession under an ex parte order which had been set aside and when the order under which the appellant got possession had been set aside he is under law bound to be re-delivered back the possession.

9. It was, however, contended on behalf of the appellant that once the Court below passed the order of eviction and communicated it to the District Magistrate the Court below was functus officio and it could not set aside that order. This contention cannot be accepted for two reasons. Firstly, the ex parte order of eviction was set aside on 20-10-1973 and it has become final because no appeal or revision was filed by the appellant against that order.

10. Secondly, no doubt, it was held in *Radha Rani Bhargava v. Dr. A. P. Singh*, (1966 All WR (HC) 355) by a single Judge of this Court as follows:—

"There is no provision in Sec. 7-B for review of an order or for the setting aside of an order passed ex parte. The Munsif becomes functus officio after he has passed an order of ejectment and has sent it to the District Magistrate for compliance. He has no jurisdiction to review his order. The special provision of a special law must be strictly complied with. The Munsif acts judicially in such matters and unless the statute conferring powers on the Munsif gives him specific power of review he cannot review his order once passed. If for any reason the opposite party was aggrieved by this order, the appropriate remedy for him might have been by way of revision or a writ petition. The Munsif could not, however, set aside his own order when he had sent it to the District Magistrate for execution."

11. The above ruling was reconsidered subsequently by a single Judge of this Court in *Shahabuddin v. Smt. Nayan Kumari Devi*, (1970 All WR (HC) 183). In *Shahabuddin's* case (supra) the case reported in *Radha Rani Bhargava v. Dr. A. P. Singh*, 1966 All WR (HC) 355 (supra) was explained and dissented from. It was specifically pointed out in *Shahabuddin's* case that in the former case of *Radha Rani Bhargava* (Supra) the scope of Section 144, Civil Procedure Code was not considered. In the subsequent ruling reported in *Shahabuddin v. Smt. Nayan*

Kumari Devi (supra) a reference was also made to a decision of the Chief Justice in Writ Petn. No. 69 of 1958 decided on 29-10-1959 (All) in which the Chief Justice had held that the Munsif had power to set aside the order passed ex parte under Sec. 7-B of the Rent Control and Eviction Act under his inherent powers of Section 151, Civil Procedure Code. In any view of the case the ruling reported in *Shahabuddin v. Smt. Nayan Kumari Devi* (supra) which is later, will prevail.

12. For the reasons given above, there is no force in this appeal and it is accordingly dismissed with costs. The stay order is vacated. The appellant is allowed two months' time to vacate the premises.

Appeal dismissed.

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K. B. ASTHANA, C. J. AND
SATISH CHANDRA, J.

St. Joseph's Higher Secondary School, Meerut Cantt. and others, Appellants v. Ravi Shankar Sharma and others, Respondents.

Second Appeal No. 1078 of 1972, D/- 5-12-1975.*

(A) U. P. Intermediate Education Act (2 of 1921), Section 16-G (3) (a) — Applicability to minority education institutions — It violates Article 30 (1) of the Constitution and is hence inapplicable. (Constitution of India, Article 30 (1)).

Section 16-G (3) (a) of the U. P. Intermediate Education Act is violative of Article 30 (1) of the Constitution and accordingly is not applicable to an educational institution established by a religious or linguistic minority. (Para 16)

The power conferred under Section 16-G (3) on the Inspector is a check on the administration. It is uncanalised and unguided in the sense that no facts have been mentioned on the basis of which alone the Inspector may exercise his power. In the absence of any guideline, it cannot be held that the power of approval conferred on the Inspector was solely a check on mal-administration of the institution. Such a blanket power directly interferes with the disciplinary control of the managing body over its

*(Against decree and judgment of G. N. Tripathi, Judge, Sm. C. C., Meerut, D/- 24-2-1972.)

teachers. Hence the impugned provision of Section 16-G (3) (a) is violative of Article 30 (1) of the Constitution. AIR 1974 SC 1389, Followed. (Para 14)

Cases Referred: Chronological Paras
AIR 1975 SC 1821 = (1975) 3 SCR 810 15
AIR 1974 SC 1389 = (1975) 1 SCR 173 5

Amar Nath Srivastava, for Appellants; Vishnu Sahai and B. Dayal, for Respondents.

SATISH CHANDRA, J.:— A learned single Judge of this Court has referred the following question of law for the opinion of this Court:—

"Whether an educational institution established by a religious or a linguistic minority is bound by the provisions of Section 16-G (3) (a) of the U. P. Intermediate Education Act?"

2. Clauses (a) and (b) of Section 16-G (3) of the aforesaid Act provides:—

(a) No Principal, Head Master or teacher may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the Inspector. The decision of the Inspector shall be communicated within the period to be prescribed by regulations.

(b) The Inspector may approve or disapprove or reduce or enhance the punishment or approve or disapprove of the notice for termination of service proposed by the management.

3. Clause (c) of this provision provides for an appeal against the order of the Inspector to the Regional Appellate Committee. The Appellate Committee could, after such enquiry as it considers necessary, confirm the order or set aside or modify it.

4. The question referred to us relates to the fundamental right conferred by Article 30 (1) of the Constitution upon religious and linguistic minorities. This Article confers a right to the minorities to establish and administer educational institutions of their choice.

5. A similar question came up for consideration before the Supreme Court in the Ahmedabad St. Xavier's College Society v. State of Gujarat, (AIR 1974 SC 1389). In that case, the constitutional vires of several provisions of Gujarat University Act, 1949 were considered. Section 51-A of the aforesaid Act provided:—

"51-A. (1) No member of the teaching, other: academic and non-teaching

staff of an affiliated college and recognised or approved institution shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and until:—

(a) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him, and

(b) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf.

(2) No termination of service of such member not amounting to his dismissal or removal falling under sub-section (1) shall be valid unless—

(a) he has been given a reasonable opportunity of showing cause against the proposed termination, and

(b) such termination is approved by the Vice-Chancellor or any officer of the University authorised by the Vice-Chancellor in this behalf.

Provided that nothing in this sub-section shall apply to any person who is appointed for a temporary period only."

6. The attack in that case was upon clause (b) of Section 51-A as well as clause (b) of sub-section (2) of Section 51-A. Both these clauses provided that penalty or termination is to be approved by the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf. Ray, C. J. and Palekar, J., held:—

"The third set of provisions impeached by the petitioners consists of Sections 51-A and 52-A. Section 51-A states that no member of the teaching, other academic and non-teaching staff of an affiliated college shall be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges and given a reasonable opportunity of being heard and until (a) he has been given a reasonable opportunity of making representation on any such penalty proposed to be inflicted on him, and (b) the penalty to be inflicted on him is approved by the Vice-Chancellor or any other officer of the University authorised by the Vice-Chancellor in this behalf. Objection is taken by the petitioners to the approval of penalty by the Vice-Chancellor or any other officer of the University authorised by him. First, it is said that a blanket power is given to

the Vice-Chancellor without any guidance. Second, it is said that the words "any other officer of the University authorised by him", also confer power on the Vice-Chancellor to authorise any one and no guidelines are to be found there. In short, unlimited and undefined power is conferred on the Vice-Chancellor. The approval by the Vice-Chancellor may be intended to be a check on the administration. The provision contained in Section 51-A, Clause (b) of the Act cannot be said to be a permissive regulatory measure inasmuch as it confers arbitrary power on the Vice-Chancellor to take away the right of administration of the minority institutions. Section 51-A of the Act, cannot, therefore, apply to minority institutions."

7. The provision for approval of Vice-Chancellor was held to be bad because it acted as a check on the administration. Further, it was held to confer arbitrary power on the Vice-Chancellor because there was no guidelines on the basis of which the Vice-Chancellor could withhold his approval.

8. Jagmohan Reddy, J., for himself and for Alagiriswami, J., completely agreed with the opinion of Ray, C. J., vide paragraph 50.

9. Khanna, J., held:—

"Although disciplinary control over the teachers of minority educational institution would be with the governing counsel, regulations in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30 (1). Clause (a) of sub-sections (1) and (2) of Section 51-A of the impugned Act which make provision for giving a reasonable opportunity of showing cause against a penalty to be proposed on a member of the staff of an educational institution would consequently be held to be valid. Clause (b) of those sub-sections which gives a power to the Vice-Chancellor and officer of the University authorised by

him to veto the action of the managing body of an educational institution in awarding punishment to a member of the staff in my opinion, interferes with the disciplinary control of the managing body over its teachers. It is significant that the power of approval conferred by cl. (b) in each of the two sub-sections of Section 51-A on the Vice-Chancellor or other officer authorised by him is a blanket power. No guidelines are laid down for the exercise of that power and it is not provided that the approval is to be withheld only in case the dismissal, removal, reduction in rank or termination of service is mala fide or by way of victimisation or other similar cause. The conferment of such blanket power on the Vice-Chancellor or other officer authorised by him for vetoing the disciplinary action of the managing body of an educational institution makes a serious inroad on the right of the managing body to administer an educational institution. Clause (b) of each of the two sub-sections of Section 51-A should, therefore, be held to be violative of Article 30 (1) so far as minority educational institutions are concerned."

10. His Lordship specifically held that the impugned clause (b) interferes with the disciplinary control of the managing body over its teachers. The provision does not restrict its operation to cases of mala fide or victimisation etc. In other words, the power of the Vice-Chancellor was complete. He could refuse his approval on facts, that is to say, on reaching a conclusion that the action of the institution was on facts improper or invalid. The conferment of such a blanket power on the Vice-Chancellor or an officer of the University authorised by him, interfering with the disciplinary control of the managing body over its teachers makes a serious inroad on the right of the managing body to administer an educational institution.

11. Mathew, J., speaking for himself and Chandrachud, J., held:—

"It was argued for the petitioners that clause (1) (b) of Section 51-A has the effect of vesting in the Vice-Chancellor a general power of veto on the right of the management to dismiss a teacher. The exact scope of the power of the Vice-Chancellor or of the Officer of the University authorised by him in this sub-section is not clear. If the purpose of the approval is to see that the provisions of sub-section 51-A (1) (b) are complied with, there can possibly be no objection

in lodging the power of approval even in a nominee of the Vice-Chancellor. But an uncanalised power without any guideline to withhold approval would be a direct abridgment of the right of the management to dismiss or remove a teacher or inflict any other penalty after conducting an enquiry."

12. He was of the opinion that such a provision constitutes a direct abridgment of the right of the management to dismiss or remove a teacher or inflict any other penalty, after conducting an enquiry.

13. Thus, seven out of nine Judges who constituted the Bench, held the provisions relating to the approval of the Vice-Chancellor were violative of Article 30 (1) of the Constitution. The other two Judges, namely, Hon'ble Beg, J. and Dwivedi, J., were of a contrary view. As already seen, clause (a) of Section 16-G (3) debars the management of an educational institution from discharging or removing or dismissing from service or reducing in rank or serving any notice of termination to a teacher except with the prior approval in writing of the Inspector.

14. The power conferred on the Inspector is a check on the administration. It is uncanalised and unguided in the sense that no facts have been mentioned on the basis of which alone the Inspector may exercise his power. In the absence of any guideline, it cannot be held that the power of approval conferred on the Inspector was solely a check on mal-administration of the institution. As discussed by the Supreme Court in *St. Xavier's College* case, such a blanket power directly interferes with the disciplinary control of the managing body over its teachers. The decision in the case of *St. Xavier's College* is directly applicable to the present case and accordingly it may be held that the impugned provision is violative of Article 30 (1) of the Constitution.

15. Learned counsel for the respondent invited our attention to a decision of the Supreme Court in *The Gandhi Faiz-e-am College, Shahjahanpur v. University of Agra*, (AIR 1975 SC 1821). In the case, the Supreme Court followed the decision in *St. Xavier's College* case. The provisions which were impugned in that case were of entirely different nature.

16. In the result, our answer to the question referred to is that Section 16-G (3) (a) of the U. P. Intermediate

Education Act is violative of Article 30 (1) of the Constitution and accordingly is not applicable to an educational institution established by a religious or linguistic minority. The papers be returned to the learned single Judge with this opinion and answer.

Reference answered.

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(LUCKNOW BENCH)

O. P. TRIVEDI, J.

Bachcha Lal, Applicant v. Lalji, Opposite Party.

Civil Revision No. 312 of 1975, D/- 7-11-1975.*

(A) Civil P. C. (1908), Order 39, Rule 2-A (All) — Breach of injunction — Action taken by Court under Order 39, Rule 2-A does not amount to a prosecution within the meaning of Article 20 (2) of the Constitution. (Constitution of India, Article 20 (2)).

The word "prosecuted" in Article 20 (2) means that the indictment must be before a Criminal Court. Proceedings started for disobedience of injunction under Order 39, Rule 2-A are not criminal proceedings nor proceedings in the nature of criminal proceedings and to such proceedings the bar of Article 20 (2) is not applicable. AIR 1954 SC 375 and AIR 1959 SC 375, Rel. on. (Para 3)

Cases Referred: Chronological Paras
AIR 1959 SC 375 = 1959 Cri LJ 392 3
AIR 1954 SC 375 = 1954 Cri LJ 993 3

ORDER:— This revision has been filed by Bachcha Lal and arises in the following circumstances.

2. It appears that opposite party-plaintiff filed a suit in the Court of Munsif against Bachcha Lal applicant. During the pendency of the suit he applied for temporary injunction which was granted by the Munsif. Thereafter, opposite party moved an application before the Munsif under Order 39 Rule 2-A of the Civil Procedure Code alleging violation of the injunction and stating in the application *inter alia* that for the alleged breach opposite party had already lodged a report with the police and Bachcha Lal

*(Against order passed by M. P. S. Tomar, 4th Addl. Dist. and S. J., Sitapur, in Civil Revn. No. 13 of 1975, D/- 1-9-1975.)

was already being prosecuted in a criminal court for an offence punishable under Section 188 of the Indian Penal Code. It was prayed on these facts and allegations that action may be taken by the court against Bachcha Lal under Order 39, Rule 2-A of the Civil Procedure Code. Against this application Bachcha Lal filed an objection taking the plea amongst others that the bar of Article 20 (2) of the Constitution of India operated and he could not be prosecuted or punished twice for the same offence. This objection was rejected by the Munsif, Bachcha Lal appealed to the District Judge and the District Judge also rejected the appeal upholding the order of the Munsif.

3. I have heard Sri Hargovind Dayal Srivastava in this revision. By amendment of Rule 2 of Order 39, Civil Procedure Code by this court for a breach of terms of an injunction power is given to the court to order attachment of property of the person guilty of disobedience of injunction and also to order his detention in Civil prison for a term not exceeding six months. The orders passed by the courts below do not disclose any error of jurisdiction nor any illegality or material irregularity in the exercise of jurisdiction. They seem to have taken a correct view on the plea raised for Bachcha Lal invoking Article 20 (2) of the Constitution of India. Article 20 (2) provides that no person shall be prosecuted and punished for the same offence more than once. There is no doubt that Bachcha Lal was being prosecuted before a criminal court for breach of injunction for an offence punishable under Section 188 of the Indian Penal Code but any action which may be taken by a court under Order 39, Rule 2-A of the Civil Procedure Code does not amount to prosecution within the meaning of Article 20 (2) of the Constitution of India. In the case of *S. A. Venkataraman v. Union of India*, (AIR 1954 SC 375) the Supreme Court observed that the language of Article 20 and the words actually used in Article 20 (2) afford a clear indication that the proceedings in connection with the prosecution and punishment of a person must be in the nature of a criminal proceedings, before a court of law or judicial tribunal etc., what they emphasised in this case, was that prosecution implies trial of a person in a criminal proceeding or in a proceeding partaking the nature of a criminal proceeding. In the case of *Thomas Dana v. State of Punjab*, (AIR 1959 SC 375) the majority view was ex-

pressed in the judgment of B. P. Sinha, J. (Para. 11). It was observed:

"'Prosecution' means a proceeding either by way of indictment or information in the criminal Courts in order to put an offender upon his trial."

Their interpretation of the word 'prosecution' in this case also made it clear that the indictment must be before a criminal court. I hold that any proceeding started for disobedience of injunction under Order 39, Rule 2-A of the Civil Procedure Code is not criminal proceeding nor proceeding in the nature of criminal proceeding and to such proceedings the bar of Article 20 (2) of the Constitution does not apply.

4. I find no force in this revision which is summarily dismissed. Civil Misc. Application No. 620 (M) of 1975 is also dismissed.

Revision dismissed.

AIR 1976 ALLAHABAD 394

CHANDRA PRAKASH, J.

Sugan Chand Jain, Applicant v. Pradeep Kumar and another, Respondents.

Civil Revn. No. 130 of 1975, D/- 3-12-1975.*

(A) U. P. Civil Laws Amendment Act (37 of 1972), Section 9 — Suit properly filed before Munsif on the regular side — Subsequent notification conferring power to try such cases on the small cause side — District Judge cannot transfer the suit to be tried as small cause — Order of transfer is open to revision by the High Court — Provincial Small Cause Courts Act, Section 32 (2).

The U. P. Civil Laws Amendment Act 1972 came into operation on 20-9-1972 whereunder the High Court could confer small cause jurisdictional powers on the Civil Judges and Munsifs when there was no Court of Small Causes. The petitioner filed a suit on 20-10-1972 on the regular side before the munsif of Gaziabad where there was no Court of Small Causes. By subsequent notification dated 25-10-1972, the High Court, acting under the Act, empowered all Civil Judges and Munsifs (where there was no small cause court) to try cases as Judges of Small Causes in suits of a certain value. Subsequently the suit filed on

*(Against order of 2nd Addl. Dist. J., Meerut, D/- 7-10-1974.)

20-10-1972 was transferred by the District Judge to a Civil Judge to be tried as small cause, in view of Section 9 of the said Act, held: that the District Judge had no power to transfer the suit which had been filed properly on the regular side prior to the notification. Under Section 32 (2) of the Provincial Small Cause Courts Act suits instituted or proceedings commenced in Courts before the jurisdiction to try the cases as Judge Small Causes conferred on them have to be tried on the regular side notwithstanding the fact that subsequently the jurisdiction is conferred on them to try on the Small Causes Court side. AIR 1941 Oudh 161 and AIR 1938 Oudh 224, Dist.

(Paras 7 to 9)

The order of transfer was open to revision by the High Court. (Para 12)

Cases Referred: Chronological Paras
AIR 1975 All 420 = (1975) 1 All LR 501

7
AIR 1941 Oudh 161 = 1940 Oudh WN 1212 10

AIR 1938 Oudh 224 = 1938 Oudh WN 801 10

N. Lal, for Applicant; G. C. Dwivedi, for Respondents.

ORDER:— This is a defendant's application in revision against the order dated 7-10-1974 of Sri Umesh Chandra, Second Additional District Judge, Meerut, dismissing the applicant's revision.

2. The suit giving rise to this appeal was filed by the plaintiff opposite parties against the defendant applicant for the recovery of Rs. 853/- as arrears of rent, Rs. 499.20 P. as mesne profits and ejectment in the court of Munsif, Ghaziabad on the regular side in respect of the property detailed in the plaint. Later on, the suit was transferred to the court of Second Additional Civil Judge, Ghaziabad to be tried on the Small Causes Court side in view of Act No. 37 of U. P. Civil Laws Amendment Act, 1972.

3. The defendant applicant filed an objection that the suit could not be tried on the small Causes Court side. The Second Civil Judge after hearing the parties came to the conclusion that he had jurisdiction to try the suit on the Small Causes Court side and he, therefore, rejected the application of the applicant by his order dated 28-3-1974.

4. Against the above order, the applicant filed a revision in the court of District Judge, Meerut which was eventually transferred to the court of Second Additional District Judge, Meerut for dis-

posal. The learned Additional District Judge after hearing the parties dismissed the applicant's revision and confirmed the order of the trial court dated 28-3-1974.

5. Feeling aggrieved, the defendant applicant has come up in revision before me.

6. I have heard the learned counsel for the parties and I have also gone through the record of the case and I have come to the conclusion that the orders of the courts below cannot be allowed to stand.

7. Certain facts are not disputed. The suit was filed in the court of Munsif, Ghaziabad on 20-10-1972 on regular side. There is no dispute that Munsif, Ghaziabad on 20-10-1972 had jurisdiction to entertain the suit on the regular side. The U. P. Civil Laws Amendment Act, 1972 (hereinafter referred to as "the Act") came into operation on 20-9-1972. The High Court by its Notification No. 526 dated October 25, 1972 conferred powers on the Civil Judges and Munsifs where there is no Court of Small Causes to try cases as Judge Small Causes in suits upto the value specified below:—

The first contention raised by the applicant is that under the above Notification No. 526 dated 25-10-1972 the Civil Judge and Munsif, Ghaziabad got no powers to try cases as Judge Small Causes Court. This contention was considered in detail by a Division Bench of this Court in Civil Revn. No. 821 of 1975, reported in (1975) 1 All LR 501 = (AIR 1975 All 420) Salik Chand v. Mohan Lal and the Division Bench after considering the effect of the above Notification came to the conclusion that the powers of the Judge Small Causes Court were conferred on the Civil Judge, and Munsif, Ghaziabad under the above Notification to try suits as Judge Small Causes Court upto the valuation stated therein. It was contended on behalf of the applicant that the above case requires reconsideration. The decision of the Bench dated 12-5-1975 appears to be correct as there is hardly any reason to revise it and I am bound by it. This contention on behalf of the applicant, therefore, must fail. The second contention raised before me was that the suit was instituted in the court of Munsif, Ghaziabad on 20-10-1972 and on that date he had no powers to try cases as Judge Small Causes Court. Even the Second Additional Civil Judge, Ghaziabad had no power to try the suit as Judge Small Causes Court.

The jurisdiction of Munsif, Ghaziabad and Second Additional Civil Judge, Ghaziabad to try cases as Judge Small Causes Court was conferred by the Notification dated

25-10-1972. It is, therefore, clear that when the suit was filed the Munsif, Ghaziabad and Second Civil Judge had no powers to try the suit as Judge Small Causes Court. The Munsif, Ghaziabad had jurisdiction to try on the regular side and it was rightly instituted. It was, however, contended that under the Act, the District Judge had no power to transfer the case which has been instituted on the regular side to another court subsequently for trying it on the Judge Small Causes Court side. This contention appears to be well founded. Section 9 of the Act is as follows:—

“9. Transitory provisions. Any suit of the nature referred to in the proviso to sub-section (1) and sub-section (2) of Section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887 (whether its value exceeds two thousand rupees, or as the case may be, one thousand rupees, or not) or the proviso to sub-section (3) of Section 15 of the Provincial Small Cause Courts Act, 1887, instituted before the date of commencement of this Act in any court other than a Court of Small Causes or a Court of Civil Judge or Munsif exercising jurisdiction of a Judge of a Court of Small Causes and pending in that court immediately before the said date, not being a suit in which the recording of oral evidence for any part has commenced or concluded before the said date, shall upon the conferment of jurisdiction or enhanced pecuniary jurisdiction on a Civil Judge, Munsif, District Judge or Additional District Judge or on a Court of Small Causes under the said provisions stand transferred to such court and shall be decided by that court.”

8. Under the above section, a suit pending on 20-9-1972 or instituted before that date could stand transferred to Munsif, Civil Judge etc. to try it as Judge Small Causes Court having powers of Judge Small Causes Court provided the oral evidence had not commenced. Section 9 does not apply, for this case was not instituted either on 20-9-1972 or before it. This case was instituted after 20-9-1972 and therefore Section 9 is inapplicable to the present case. There is no power under the Act by which the District Judge could transfer a suit instituted after 20-9-1972 on the regular side to any other court and Judge Small Causes Court for trying it as Judge Small Causes Court. Section 32 of the Provincial Small Cause Courts Act is as follows:

“32. (1) So much of Chapters III and IV as relate to—

(a) the nature of the suits cognizable by Courts of Small Causes,

(b) the exclusion of the jurisdiction of other Courts in those suits,

(c) the practice and procedure of courts of Small Causes,

(d) appeal from certain orders of those Courts and revision of cases decided by them, and

(e) the finality of their decrees and orders subject to such appeal and revision as are provided by this Act.

(Chap. V Supplement provisions) applies to Courts invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts.

(2) Nothing in sub-section (1) with respect to Courts invested with the jurisdiction of a Court of Small Causes applies to suits instituted or proceedings commenced in those Courts before the date on which they were invested with that jurisdiction.”

9. Sub-section (2) above, points out that suits instituted or proceedings commenced in courts before the jurisdiction to try the cases as Judge Small Causes conferred on them have to be tried on the regular side notwithstanding the fact that subsequently the jurisdiction is conferred on them to try on the Small Causes Court side.

10. I was not referred to any authority for the proposition that the District Judge can transfer a case from the court of Munsif instituted on the regular side to any other court to be tried on the Small Causes Court side. My attention on behalf of the opposite parties was drawn to AIR 1938 Oudh 224 Gulzari Singh v. Ram Adhin and AIR 1941 Oudh 161 Abdula Khan v. Tribhuan Dutt Singh, but both the rulings are distinguishable in fact and they did not lay down a proposition that a suit instituted on the regular side in the court of Munsif can be transferred by the District Judge subsequently to the court of Small Causes Judge for being tried under the Small Cause Courts Act.

11. The second Civil Judge, therefore, has jurisdiction to try the suit giving rise to this application in revision on the regular side and he could not try on the Small Causes Court's side.

12. For the reasons given above, the application in revision is allowed and the orders of the courts below are set aside and the applicant is directed to try the suit on the regular side. In the peculiar circumstances of the case, there will be no order as to costs in this case. The record shall be sent expeditiously to the trial court for proceeding in the case on the regular side.

Application allowed.

AIR 1976 ALLAHABAD 397

R. L. GULATI J.

M/s. Rama Roller Flour Mills, Meerut,
Petitioner v. The Regional Food Controller,
Meerut and others, Respondents.

Civil Misc. Writ No. 4156 of 1974, D/-
17-11-1975.

(A) U. P. Foodgrains Dealers Licencing Order (1964) Pre — Licence in forms "B" and "F" granted in 1964 to X — Declared void by Section 5 of U. P. Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1973 — That order subsequently rescinded by Section 10 of the U. P. Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1974 — X's licence is revived. (Para 3)

(B) Essential Commodities Act (1955), Section 3 — U. P. Wheat (Levy) Order (1974), Section 3 — Licensee purchasing stock, not for sale but for his own consumption — Levy order against, if valid.

A licensed dealer in foodgrains is not exempt from levy under the U. P. Wheat (Levy) Order 1974 merely because of the fact that he had purchased the stock not for sale but for his own consumption in his flour mill. The levy Order becomes applicable when two conditions are satisfied (1) that the person concerned is a licensed dealer in foodgrains and (2) he held stock of wheat on the 17th April, 1974, All stock of wheat possessed by a licensed dealer whether meant for resale or for consumption are subject to levy. The intention of the licensed dealer is wholly immaterial. Maybe that the levy Order is likely to result in hardship to certain persons like the petitioner but that by itself is no ground for holding that the levy Order is not applicable. (Para 4)

(C) Evidence Act (1872) Section 115 — Estoppel against Statute — Licensed dealer of foodgrains purchasing wheat with the permission of the Authorities — Government if estopped from ordering levy (on the stock purchased) under the U. P. Wheat Products (Regulation of Trade and Control of Movement) Order 1974.

When a licensed dealer in foodgrains purchased stock with the permission of the authorities at a higher price than the scheduled price and the Government subsequent order levied 50 per cent of the stock at the scheduled rate under the U. P. Wheat Products (Regulation of Trade and Control of Movement) Order 1974. Held: that there was no estoppel against statute. The Government might have induced the petitioner to purchase wheat in the open market for utili-

sation in the preparation of wheat products but when subsequently law enacts that every licensed dealer in foodgrains had to part with 50 per cent of the stock of wheat in favour of the Government, the dealer concerned could not plead estoppel. (Para 5)

Cases Referred: Chronological Paras

AIR 1974 All 170 5

AIR 1968 SC 718 = (1968) 2 SCR 366 5

B. C. Day, for Petitioner; P. Car, for Respondents.

ORDER:— The petitioner owns and runs a flour mill. It also holds a licence in forms B and F under the U. P. Foodgrains Dealers Licensing Order, 1964. Licence in form B is to carry on the business in foodgrains in wholesale and licence in form F entitles a person to carry on the business in foodgrains as a commission agent. Under Section 3 of the Essential Commodities Act, 1955, the Uttar Pradesh Government issued the Uttar Pradesh Wheat (Levy) Order, 1974. Section 3 of this Order requires that every licensed dealer shall sell to the Food Corporation of India or to the State Government at the scheduled price 50 per cent of Wheat in his stock on the date of the commencement of the Order. The petitioner has been required to sell 50 per cent of the stock in his possession on 17th April, 1974 as levy quota. The petitioner is aggrieved and has challenged that order.

2. Now, as noticed earlier, the levy Order is applicable to every licensed dealer. A "Licensed Dealer" has been defined in Section 2 (d) to mean a person holding a valid licence under the Uttar Pradesh Foodgrains Dealers Licensing Order, 1964. On the petitioner's own showing (as mentioned in paragraph 4 of the writ petition), he holds a licence in forms 'B' and 'F' under the U. P. Foodgrains Dealers Licensing Order, 1964. He was thus clearly liable to sell to the Government 50 per cent of his stock as levy.

3. The petitioner's contention is that even if he originally held a licence in Forms B and F under the provisions of the U. P. Foodgrains Dealers Licensing Order, 1964, the licences stood revoked on the promulgation of the U. P. Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1973. Reliance is placed upon Section 5 of the order, which provides:—

"5 (1)— The provisions of the Uttar Pradesh Foodgrains Dealers Licensing Order, 1964, in so far as they relate to licensing of Wholesalers and Commission Agents in respect of wheat and wheat products are hereby rescinded and accordingly on and from the date of commencement of this order—

(a) all licences in Forms 'B' and 'F' of the Uttar Pradesh Foodgrains Dealers Licensing Order, 1964 shall become void in so far as they relate to wheat and/or wheat products....."

It is true that as a result of the above mentioned provision, the licences in forms 'B' and 'F' held by the petitioner became inoperative but the Uttar Pradesh Government subsequently issued another Order, called the Uttar Pradesh Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1974, Section 10 whereof provides:—

"10. The Uttar Pradesh Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1973, is hereby rescinded and the provisions of Sections 6, 8 and 24 of the U. P. General Clauses Act, 1904 shall apply in relation to the repeal of an enactment by an Uttar Pradesh Act.

(2) Notwithstanding the amendment of the Uttar Pradesh Foodgrains Dealers' (Licensing) Order, 1964, Clause 5, of the Uttar Pradesh Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1973 all licences in Form (B) or Form (F) granted under the Uttar Pradesh Foodgrains Dealers Licensing Order, 1973 shall with effect from the date of commencement of this Order, be deemed to have revived and to become valid in respect of wheat and wheat products also."

So these provisions completely nullify the original provisions of the U. P. Wheat and Wheat Products (Regulation of Trade and Control of Movement) Order, 1973 and the licences held by the petitioner under the 1964 Order is revived. The petitioner once again has become a licensed dealer and was so at the time of the promulgation of the levy Order, 1974.

4. The petitioner's next contention is that he had purchased wheat for preparation of wheat products and the stock held by him on the relevant date was not for sale and, as such, the provisions of the levy Order could not apply to him. It is not possible to accept this contention. Maybe that the petitioner had purchased the stock of wheat for the purposes of his own consumption in flour mill and had no intention to sell it but that fact makes no difference inasmuch as the levy Order becomes applicable when two conditions are satisfied (1) that the person concerned is a licensed dealer in foodgrains and (2) he held stock of wheat on the 17th April, 1974. All stock of wheat possessed by a licensed dealer whether meant for resale or for consumption are subject to levy. The intention of the licensed dealer is wholly im-

material. May be that the levy Order is likely to result in hardship to certain persons like the petitioner but that by itself is no ground for holding that the Levy Order is not applicable.

5. Lastly the petitioner pleaded estoppel. According to him he had purchased the stock of wheat in question with the permission of the authorities concerned on the express understanding that he would utilise the wheat for preparing wheat products and he had purchased wheat at a higher rate than the scheduled price. According to the petitioner in these circumstances the Government is estopped from requiring it to part with a portion of his stock by way of sale in favour of the Food Corporation or the Government. He places reliance upon a decision of this Court in *M/s. Khunnoo Lal and Sons v. Union of India* (AIR 1974 All 170). In that case the Government of India had launched a scheme for the import of spare parts of essential machinery and equipments from U. S. A. under the U. S. Aid Non-Project Loan and consequently the Minister of Commerce had issued a public notice setting out the conditions and procedure for obtaining licences for spare parts of machinery. The petitioner in that case applied for the import of certain machineries specified in that notice. The Department of Customs issued to the petitioner a notice under Section 112, of the Sea Customs Act requiring it to show cause why the goods should not be confiscated.

In that connection it was held that even assuming that the provisions relating to the issue of trade notices offering inducement to the prospective exporters are in character executive, the Union Government and its officers are not entitled at their mere whims to ignore the promises made by the Government. A public body is not exempt from liability to carry out its obligations arising out of representations made by it relying upon which a citizen has altered his position to his prejudice. That decision is based upon the well known case of the Supreme Court in *Union of India v. Anglo Afgan Agencies* (AIR 1968 SC 718). That was also a case where a person had acted on the representations made in an export promotion scheme. The present case is clearly distinguishable because in the instant case we are not dealing with any scheme or public notice issued by an executive authority but we are dealing with statutory provisions. It is well settled that there is no estoppel against a statute. The Government might have induced the petitioner to purchase wheat in the open market for utilisation in the preparation of wheat products but when subsequently law enacts that

every licensed dealer in foodgrains has to part with 50 per cent of the stock of wheat in favour of the Government, the dealer concerned cannot plead estoppel.

6. For all these reasons the petition fails and is accordingly dismissed. There will be no order as to the costs.

Petition dismissed.

AIR 1976 ALLAHABAD 399

GOPI NATH, J.

Brij Kishore, Appellant v. Smt. Mushtari Khatoon, Respondent.

Second Appeals Nos. 119 and 3009 of 1972, D/- 28-10-1975*.

(A) Transfer of Property Act (1882), Section 111 (g) — Forfeiture of lease for denial of landlord's title — Denial should relate to the landlord-tenant relationship between parties — Question of ownership of the property is not material — (U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 3 (f)).

For forfeiture of lease to occur, the denial by the tenant should relate to his character as the tenant of the person who claims to be the landlord. Tenant's expression of doubts about the ownership of the property in the landlord is not such a denial. Where the tenant alleged that the property was purchased by the husband and son benami in the name of the landlady and on that account rents were being paid to her, held, did not amount to "denial of title" within the meaning of Section 111 (g) of the T. P. Act and did not result in forfeiture. AIR 1958 All 847 Foll. 1969 All LJ 198 Dist. (Paras 5 and 7)

(B) Civil P. C. (1908), Order 6 Rule 17 — Pleadings amended — Unamended original text should be ignored for all purposes.

Where the tenant who originally expressed doubts about the ownership of the property in his landlady, had the pleadings amended by substituting the portion stating that she was the landlady and he had been paying rents to her as such, held, the amended pleading alone should be considered and no reference ought to be made to the original pleadings while deciding an issue. AIR 1948 Oudh 307 and 1959 (2) WLR 109 Foll.

(Para 6)

Cases Referred: Chronological Paras
1969 All LJ 198 = 1969 Ren CJ 317 6

*(Against decree of S. R. Shrivastava Civil J. Moradabad, in Civil Appeal No. 163 of 1973, D/- 12-11-1971).

ET/FT/B583/76/KSB

AIR 1965 SC 1923 = (1966) 1 SCJ 484 4
1961 All LJ 644 = 1961 All WR (HC) 9 4
(1959) 2 WLR 109 = (1959) 1 All ER 120 6
AIR 1958 All 847 5
AIR 1948 Oudh 307 = ILR 22 Luck 522 6
AIR 1945 All 293 = 1945 All LJ 86 6
AIR 1943 All 273 = 1943 All LJ 254 6
AIR 1919 All 320 = 17 All LJ 569 6
AIR 1918 Pat 174 = 45 Ind Cas 642 6
(1888) ILR 12 Bom 352 6

K. C. Saxena, for Appellant; K. P. Singh, for Respondent.

JUDGMENT:— These are two connected second appeals arising out of two suits filed by Smt. Mushtari Khatoon the plaintiff appellant in Second Appeal No. 3009 of 72 and the plaintiff respondent in Second Appeal No. 119 of 72. It appears that there were two shops in a building which were leased out to two persons. Ishtiaq Ahmad the defendant respondent in Second Appeal No. 3009 of 72 is the tenant of one shop and Brij Kishore the defendant appellant in Second Appeal No. 119 of 72 is the tenant of the other shop. The plaintiff Smt. Mushtari Khatoon had given notices to the two tenants to vacate the premises temporarily for a short period so that the shops may be reconstructed as they appeared to be in a damaged condition requiring repair, and alteration and reconstruction of the same. On the notices issued the two tenants filed two injunction suits restraining Smt. Mushtari Khatoon from demolishing the property or taking any steps to reconstruct the same. Suit No. 417 of 68 was filed by Ishtiaq Ahmad while Suit No. 418 of 68 was filed by Brij Kishore. In the plaint of these two suits Ishtiaq Ahmad and Brij Kishore stated inter alia that the property in dispute was actually purchased by the husband and the sons of Smt. Mushtari Khatoon though in her name and they were the real owners, but since the sale deed was in the name of Smt. Mushtari Khatoon the rent was being paid to her and she was issuing receipts to them. On this allegation in the plaint Smt. Mushtari Khatoon issued a notice terminating the tenancy of the two tenants on the ground that they had denied her title and forfeited their tenancy. This notice was given to both the tenants on 14-11-1968. The tenants replied to the notice immediately thereafter stating that they never denied the plaintiff's title or renounced their character as her tenants. The reply is Exh. A 12. They sent two months rent to Smt. Mushtari Khatoon thereafter by a money order treating her as their landlady. The money order was refused. The tenants thereafter deposited the rent under Sec. 7-C of the U. P. Temporary Control of Rent and

Eviction Act in the name of the landlady Smt. Mushtari Khatoon. These deposits are evidenced by Exts. A1 to A11. The tenants thereafter moved an application for amendment of the plaint to the effect that Smt. Mushtari Khatoon was the owner of the property in dispute and the allegations which in her opinion cast a doubt on her title may be deleted, learned Munsif allowed the amendment. The amended plaint was to the following effect:—

"That the defendant No. 1 was the owner of the shop in dispute and the defendants Nos. 2 to 5 realised the rent from the plaintiff but the receipt was issued under the signature of defendant No. 1."

2. The suits giving rise to the instant appeals were filed prior to the amendment of the plaint on the basis of the allegations made in Suit Nos. 417 and 418 of 1968 that the sale deed in the name of Smt. Mushtari Khatoon was benami and the real owners were her husband and her sons. The ejectment of the tenants was claimed on the ground of forfeiture of their tenancy by the denial of the title of the landlady.

3. The defence delivered in the two suits was that the defendants had not denied the landlady's title. They had only given their impression about the nature of the sale transaction and they had in fact been paying rent to her and she had been issuing receipts to them. The defendants further pleaded that the required notice terminating their tenancy under the Transfer of property Act had not been given and the suits thus could not be decreed. Suit No. 2 of 1969 was filed against Brij Kishore defendant appellant in S. A. No. 119 of 72 and Suit No. 3 of 69 was filed against Ishtiaq Ahmad defendant respondent in S. A. No. 3009 of 72. Suit No. 3 of 69 was dismissed by both the courts on the ground that a notice under Section 111 (g) of the Transfer of Property Act terminating the defendants' tenancy on the ground of denial of the landlady's title was necessary. No decree for ejectment without such notice could be passed. Aggrieved, by that decree the plaintiff has filed Appeal No. 3009 of 72. Suit No. 2 of 1969 was dismissed by the trial court on the same ground that the required notice under Section 111 (g) of the Transfer of Property Act having not been given to the defendant no decree for ejectment could be passed against him. This decree was however reversed by the lower appellate court on the finding that the notice given under Sec. 106 of the Transfer of Property Act could be construed as a notice under Section 111 (g) of that Act; consequently the suit had been properly filed and did not suffer for any defect

of notice. The suit was accordingly decreed by the lower appellate court and the defendant Brij Kishore has filed the S. A. No. 119 of 72, aggrieved by the decree.

4. The main question involved in the two appeals is whether the defendants had forfeited their tenancy by a denial of the title of the landlady. Sri K. C. Saksena learned counsel for the defendants in the two suits has urged that the tenants had never denied the landlady's title. They had only given their impression about the sale transaction; but they had always been paying the rent to the landlady and had never renounced their character as her tenants or disclaimed her as their landlady. Forfeiture of tenancy by denial of title has to be in clear and unequivocal terms. See *Mohammad Amir Ahmad Khan v. Municipal Board Sitapur* (AIR 1965 SC 1923), *Ram Das v. Lachman Janki* (1961 All LJ 644). It was held in the second case cited that forfeiture of tenancy by denial of title is governed by following principles:—

1. That the denial of the landlord's title must be unequivocal and absolutely definite.

2. Where the denial is contained in a writing the writing should be construed as a whole without giving undue emphasis to one or other part of it.

3. That the landlord has to prove that the lessee has directly and unequivocally repudiated his title.

4. That if the lessee has in good faith and for his own protection put the transferor or lessor to strict proof of his title he would not be liable to incur a forfeiture in the circumstances.

5. Sri Bashir Ahmad learned counsel for the appellant has urged that a tenancy is liable to termination by forfeiture even if some reflection is cast on the title of the person who had leased out the property. Reliance has been placed on *Hashmat Husain v. Saghir Ahmad* (AIR 1958 All 847) where it was held that an allegation by a tenant that the landlord was only a cosharer with another in the demised property was enough to entail determination of the lease. Such an allegation amounted to setting up a title in a third person alleging that he was a tenant of a third person also. Since one of them alone could not terminate the tenancy, Section 111 (g) of the T. P. Act is attracted. That section so far as material, provides as follows:—

"111. A lease of immoveable property determines:—

(g) by forfeiture; that is to say:

(1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter;

Or

(2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself;

.....
The provision is concerned with the determination of a lease and is attracted only when the tenant denies that he is a tenant of person who claims to be his landlord, either by stating that he is a tenant of a third person or by stating that he is no tenant at all. The question of the ownership of the property is only ancillary. A person may not be an owner and yet be a landlord. Landlord is defined in the U. P. (Temp.) Control of Rent and Eviction Act as follows:—

“Landlord means a person to whom the rent is payable by a tenant in respect of any accommodation and includes the agent, attorney, heir or assignee of such person.”

Section 105 of the Transfer of Property Act states that a lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, and the transferee a lessee; the price is called the premium, and the money, share, service or other thing to be so rendered is the rent. Thus in order to constitute a landlord a transferor may not be an owner of the property. Section 111 (g), this to my mind is only concerned with the question whether the relationship of landlord and tenant exists or not. If a title is set up in a third person the tenant thereby declares that the third person is the landlord and not the person who claims to be so. The tenant thus renounces his character as a tenant of the person who alleges himself to be his landlord. When a title is set up by the tenant in himself, what is declared is that the alleged tenant is not the tenant of the premises and the person who alleges himself to be his landlord is not his landlord. If the alleged tenant was the owner no demise of the property could be made in his favour by another person. The question of title of a person with respect to the property is immaterial so long as the relationship of landlord and tenant is accepted by the tenant. He cannot in that situation renounce his character as a lessee and does not dispute the title of the person alleging himself to be a landlord. Thus if there is no repudiation of the relationship of landlord and tenant by the tenant, the question of forfei-

ture would not arise. In the instant case the tenants accepted that the plaintiff was the landlady. Though it was alleged in suit Nos. 417 and 418 of 1968 that the real owners of the property were the husband and the sons of the plaintiff, the sale being benami in her favour, she was accepted to be a landlady. The rents were paid to her and receipts obtained from her. The defendant's impression about the nature of the sale deed to my mind has no material bearing on the question whether the defendants were renouncing their character as tenants. In their reply to the notice they clarified this position. They tendered two months' rent by money-order to her. On her refusal the rent was deposited in her name under Section 7-C of the U. P. Temporary Control of Rent and Eviction Act. In these circumstances their conduct clearly showed that they were accepting the plaintiff as their landlady. In the suits the tenants in their written statements admitted that Smt. Mushtari Khatoon was their landlady and they never did or intended to renounce their character as her lessees. In this view of the matter the tenants cannot be said to have denied her title.

6. Sri Bashir Ahmad learned counsel for the landlady has made two broad submissions:—

1. That the forfeiture in the instant case was incurred under Section 3 (f) of the U. P. Control of Rent and Eviction Act which is wider in scope than Section 111 (g) of the Transfer of Property Act.

2. That the amendment of the pleadings in suit Nos. 417 and 428 of 1968 did not help the tenants in regard to forfeiture as the cause of action had accrued to the landlady before amendment.

Learned counsel invited my attention to Hashmat Husain v. Saghir Ahmad (AIR 1958 All 847) and urged that in the light of the observations made in that case, the defendants had incurred forfeiture of their tenancy and were liable to eviction on the ground of denying the title of the landlady. Reliance was also placed on Vishnu Chintaman v. Balaji Bin Raghuji ((1888) ILR 12 Bom 352), Mahomed Abdul Latif v. Habibur Rahman (AIR 1918 Pat 174) and Ambika Nath v. Chhedi Nath (AIR 1943 All 273) for the submission that liability of immediate eviction was attracted as soon as a disclaimer was made. It was further urged that amendment of pleadings has a limited scope and rights accrued on the basis of pleadings prior to their amendment are not affected by their amendments. Attention was invited to the

case of *Mt. Wali Bandi Bibi v. Mst. Tabeya Bibi* (AIR 1919 All 320). The allegations in Suit Nos. 417 and 418 of 1968 prior to their amendments were as follows:—

“Yeh ki muddalehum 2 laget 5 ak manzil dookan mahdooda wa munfasala zail ke malik hain magar kisi maslahat ki bina par dookan ka bainama muddalehum No. 1 ke nam kara rakha hai. Muddalehum 2 5 kiraya muddai se wasool karte hain. Magar raseed muddalehum No. 1 ke nam se jari karte hain.”

Sri Saxena learned counsel for the tenants urged that the allegations only disclosed the tenants' impression about the nature of the sale transaction. The landlady was characterised as a Benamidar but the defendants had not renounced their character as her tenants. Even a benamidar could eject a tenant as an owner. Thus so far as the relationship of landlord and tenant was concerned there was no denial of the title of the landlady. The rent was paid to her and the receipts obtained from her. There was thus no unequivocal or unambiguous denial of the landlady's title as required by law to entail forfeiture of tenancies. It is apparent from the material on record that as soon as an exception was taken by the landlady to the statement made in the pleadings of the earlier suit, the present defendants clarified the position and stated that the plaintiff was the owner of the premises and they were her tenants. So whether she was the real owner or notional owner her rights as landlady qua the defendants was not questioned. Law leans against forfeiture. See *Ram Das v. Lachman Janki* (Supra) and *Shiam Behari Lal v. Madan Singh* (AIR 1945 All 293). The word title in clause (f) of Section 3 of the Act as also in sub-clause (g) of Section 111 of the Transfer of Property Act refers to a title as a landlord, on the basis of which ejectment can be claimed of a tenant. Proprietary title is immaterial for the purposes of those sections. See *Hashmat Husain v. Saghir Ahmad* (AIR 1958 All 847). If the defendants had not denied the landlady's title as a landlord a controversy as to the real ownership of the property was wholly immaterial for the purposes of either Section 111 (g) of the Transfer of Property Act or Section 3 (f) of the U. P. Temporary Control of Rent and Eviction Act. In *Hashmat Husain's* case this court took the view that allegations regarding co-ownership of the property affected the sole right of the person alleging to be the landlord to eject the tenant concerned, and thus a cloud was cast on his title for the purposes of the ejectment suit. In the instant case, no such assertion was made in suit Nos.

417 and 418 of 1968 and it could not be said that the landlady was rendered incompetent on the basis of the allegation made, to file a suit for the ejectment of the present defendants. No forfeiture could thus be incurred by the tenants. The case of *Zamin Ali v. Shanti Swaroop Garg*, (1969 All LJ 198) is wholly distinguishable on facts. In that case the tenant disowned his liability to pay any rent to the landlord. He alleged that some other person was a tenant who was liable to pay the rent. It was accordingly held that the tenant had renounced his character as such and had forfeited his tenancy under Section 111 (g) of Transfer of Property Act and Section 3 (f) of the U. P. Temporary Control of Rent and Eviction Act. The court observed that the scope of section 3 (1) (f) was larger than Section 111 (g) of the Transfer of Property Act. It is not necessary to enter into a discussion as to the scope of the two sections as I am of the opinion that the defendants had not renounced their character as tenants of the plaintiff. There was thus no disclaimer of her title. The plaintiffs in Suit Nos. 417 and 418 of 1968 were subsequently amended and the present plaintiff was unequivocally admitted to be owner of the premises. In *Prabhu Narain Singh v. Jitendra Mohan Singh*, (AIR 1948 Oudh 307) it was held that the court must take the pleadings as they stand after amendment and leave out of consideration the unamended ones. In *Warner v. Sampson* (1959 (2) WIR 109) it was laid down that a writ as amended becomes for that purpose the original commencement of that action. It was observed that once pleadings are amended that which stood before amendment was no longer material. Ejectment on the ground of disclaimer was accordingly refused in that case.

7. The defendants thus could not be said to have forfeited their tenancy. The suits for their ejectment accordingly could not be decreed on that ground.

8. In the result Second Appeal No. 3009 of 1972 is dismissed while Second Appeal No. 119 of 1972, is allowed. Suits Nos. 2 of 1969 and 3 of 1969 are dismissed. In the circumstances of the case the parties shall bear their own costs.

Order accordingly.

AIR 1976 ALLAHABAD 403

(LUCKNOW BENCH)

**SATISH CHANDRA AND PREM
PRAKASH, JJ.**

Badshah Ali, Appellant v. Commissioner Lucknow Division and others, Opposite Parties.

Special Appeal No. 6 of 1975, D/- 11-3-1976.

(A) U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 7-A (1) — Applicability — Order dismissing allotment application on ground that need of landlord for his own occupation was genuine — Order falls within Section 7 (2) — Section 7-A (1) is attracted. (Para 4)

(B) U. P. Urban Building (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 43 (2) (t) — Enforcement of orders under U. P. Act 3 of 1947 — Eviction order passed by Commissioner in revision under S. 7A (4) of 1947 Act — Can be enforced under Sec. 43 (2) (t) as if it was an order passed under new Act — Question whether competent authority acting under new Act could have passed such Order on same grounds or not is immaterial. (Para 4)

SATISH CHANDRA, J.:— One Zulfikhar Hussain was the tenant of the accommodation in dispute. Fasih Uddin, respondent No. 3, the landlord applied for and obtained permission under Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 for filing a suit for the ejection of the tenant. The permission was granted on the ground that the need of the landlord for using the accommodation for his personal purposes was genuine. This permission was granted on 20th November, 1959. The landlord, however, did not file any suit; but it appears that after some years the tenant vacated the house whereafter Badshah Ali, the present appellant, came in possession of the house. He, on 15th July 1969, moved an application before the Rent Control and Eviction Officer for allotment of the house in question in his favour. He supplemented this application by another one filed on 5th August, 1969. In these proceedings the erstwhile tenant Zulfikhar Husain filed an application intimating that he vacated the premises in dispute in May, 1966. The landlord opposed the application for allotment. On 7th April, 1971 the Additional District Magistrate (Executive) rejected the application for allotment on the ground that since the need of the landlord for his personal use of the house in question was held to be

genuine there was no case for allotment of the same in favour of the appellant.

2. Subsequently, the landlord moved an application under Section 7-A (1) of the U. P. (Temporary) Control of Rent and Eviction Act for the eviction of Badshah Ali, the present appellant, from the disputed accommodation. The appellant filed objections which were upheld by the Rent Control and Eviction Officer by an order dated 5-5-1972. The landlord went up in revision. The Commissioner acting under Section 7-A (4) of the Act allowed the revision and directed the eviction of the appellant. Aggrieved, the appellant came to this Court by way of a writ petition under Article 226 of the Constitution, which was dismissed. Hence this appeal.

3. The first point urged by the learned counsel for the appellant is that the finding that the appellant was a trespasser is manifestly erroneous in law. The finding apparently is on a question of fact. The appellant does not have any documentary evidence in his possession to sustain the plea that he is a tenant of the accommodation in dispute. There are no rent receipts in his favour. He relies on his own admission contained in the applications and the affidavits filed in support thereof. He also relies upon some letters written by him to the landlord. These are admissions by him in his own favour and it cannot be held that the authorities below committed any error of law in not placing reliance on these documents or the further fact that the landlord did not institute any suit for eviction of Zulfikhar Husain in spite of having obtained permission. The matter was considered by the Commissioner. It has also been discussed by the learned single Judge and we are not satisfied that the finding that the appellant was a trespasser, who had been inducted by the erstwhile tenant, is vitiated by any error of law.

4. The second point urged by learned counsel was that Section 7-A (1) was not applicable to the facts of the present case. Sec. 7-A (1) applies in several contingencies mentioned therein, one of them being—

“.....Where an order requiring any accommodation to be let or not to be let has been duly passed under sub-section (2) of Section 7

In the present case the appellant applied for allotment under Section 7 (2) of the old Act. The Rent Control and Eviction Officer dismissed the application on the ground that the need of the landlord for his own residence was genuine and so the accommodation cannot be allotted to the appellant. This, in our view, was an order within the purview of Section 7 (2). Its effect was a direction to the

landlord not to let it out. It clearly fell within the purview of the clause "an order requiring any accommodation.....not to be let..... passed under sub-section (2) of Section 7" occurring in Section 7-A (1) of the Act. In this view, Section 7-A (1) was attracted.

5. The third point urged by learned counsel was that the order passed by the Commissioner could not be enforced under the U. P. Act No. 13 of 1972, Section 43 of this Act lays down the repeals and savings. Clause (t) of sub-section (2) of Section 43 provides that—

"any decision of the District Magistrate, the Prescribed Authority, the District Judge, the Commissioner or the State Government under the foregoing clauses may be enforced, whenever necessary, in like manner as if it were an order of the competent authority under the corresponding provisions of this Act."

6. This provision deals with decisions of the stated authorities made "under the foregoing clauses". Clause (h) provides any revision pending immediately before the commencement of this Act before the Commissioner under sub-section (4) of Sec. 7-A of the old Act shall be decided by him, and his order thereon shall be final."

Clearly, decision of a revision by the Commissioner is within the purview of clause (t).

7. Clause (t) provides for enforcement of such a decision in a manner "as if it were" an order of the competent authority under the corresponding provision of this Act. The phrase "as if it were" by a fiction makes the decision of the Commissioner, an order of the competent authority under the new Act. The fiction goes on to provide that it will be enforced in like manner. Since this Clause, by a fiction, makes the decision of the authorities under the old Act to be a decision of the competent authority under the new Act, it is not permissible to scrutinise the decision to see whether it in fact could be an order of the competent authority under the new Act. The provision does not contemplate that the order must have been based on grounds on which alone the competent authority under the new Act could pass a similar order.

8. This interpretation is reinforced by other provision of Section 43. For instance, clause (a) of sub-section (2) provides for applications under Section 3 of the old Act pending before the District Magistrate. They are to stand transferred to the Prescribed Authority and are to be disposed of in accordance with Section 21. Similarly, under clause (b) proceedings pending before the

District Magistrate under Section 7 or rule 6 of the old Act are to be disposed of by him in accordance with the provisions of sections 16 and 17 of this Act. If the Legislature intended that clause (t) was to apply only if the decisions under the old Act was such that it fulfilled the conditions of the corresponding provisions of the new Act, it would have used language like clauses (a) and (b). Clause (t) on the other hand contents itself by merely providing for the enforcement or execution of the order passed under the old Act in accordance with the enforcement machinery provided for the corresponding provision of the new Act.

9. Section 16 (4) of the new Act provides for eviction of unauthorised occupants. This is a provision corresponding to Section 7-A of the old Act. An order passed under Section 7-A of the old Act could be enforced or executed in accordance with the machinery provided for enforcing an order under Section 16 (4) of the new Act. It is necessary that an order under Section 7-A must be such as to fulfil the conditions laid down by Section 16 (4) for the making of an order of eviction thereunder.

10. We see no substance in this submission.

11. It was also argued that the notice issued under Section 7-A (1), Annexure 3 to the writ petition, did not give the details or particulars of the order of which a breach is alleged to have been committed by the appellant. No such objection was taken by the appellant before the authorities below. He participated in the proceedings and took all possible pleas and objections before them. We are not satisfied that the appellant has suffered any material prejudice because of this defect in the notice.

12. In the result, the appeal has no substance and is accordingly dismissed with costs.

Appeal dismissed.

AIR 1976 ALLAHABAD 404

G. C. MATHUR AND K. N. SETH JJ.

The Dist. Magistrate, Meerut and another, Appellants v. Jagdish Saran Rastogi, Respondent.

Special Appeal No. 271 of 1975, D/- 27-11-1975*.

*(Against judgment of K. C. Agarwal J., in Civil Misc. Writ No. 4598 of 1973, D/- 8-7-1975).

DT/DT/A975/76/KNA

(A) U. P. (Temp.) Accommodation and Requisition Act (25 of 1947), S.3 — Requisition not for any specified public purpose but merely for implementing Government policy is not permissible. (Para 2)

R. N. Upadhyaya, Standing Counsel, for Appellants; H. C. Rastogi and Vinay Singh, for Respondent.

G. C. MATHUR, J.:— This is an appeal by the District Magistrate, Meerut, against the judgment of a learned single Judge quashing an order of requisition dated July 13, 1973. By this order a residential house was sought to be requisitioned. The order recited that one Mahesh Prakash was living as a tenant in the house and that he had suitable alternative accommodation available to him. It further recited that the landlord, respondent in this appeal, was also in possession of spacious accommodation and his need for the requisitioned house did not exist. However, the order did not recite the actual purpose for which the house was being requisitioned. All it stated was that the house was urgently required for public purpose. The order was quashed by the learned single Judge on the ground that neither the order itself nor the counter affidavit showed what the actual purpose was.

2. Having heard learned standing counsel we are in agreement with the learned single Judge that the order was illegal and is liable to be quashed. The order itself, as already stated, does not recite the actual purpose for which the house was requisitioned. The notice issued to the landlord and to the occupant before requisitioning the house states:

“and whereas the said tenant has got his own house in Mohanpuri Meerut which he has rented out at an abnormal rent to some person;

and whereas in view of Government policy such tenants should vacate the houses under their tenancies and should shift to their own house.”

It is for achieving this Government policy that the house was being requisitioned. It was not requisitioned for any actual public purpose that had arisen but in order to implement Government policy. A requisition of accommodation under the U. P. Accommodation Requisition, Act, 1947, is not permissible for implementing Government policy. Under this Act the requisition could only be made when property was needed for a specific public purpose.

3. The appeal is without merits and is hereby dismissed. No order as to costs.

Appeal dismissed.

AIR 1976 ALLAHABAD 405

G. C. MATHUR AND N. D. OJHA, JJ.

Ranjit Singh Chaurasia, Appellant v. The Union of India and others, Respondents.

Special Appeal No. 354 of 1975, D/- 9-3-1976*.

(A) Army Act (1950), Sections 73, 72 — Scope — Punishment of dismissal in addition to punishment of imprisonment awardable under Section 40 (c) — Summary Court-martial is not incompetent to pass such a sentence.

The summary Court-martial has jurisdiction under Section 73 to inflict the punishment of dismissal in addition to the punishment of imprisonment awardable under Section 40 (c) for the offence of insubordination. The order of the summary court-martial was in accordance with the provisions of Section 73 and cannot be successfully challenged as being without jurisdiction. (Para 5)

Section 73 empowers a court-martial to inflict in addition to the punishments specified for the various offences in Sections 34 to 68, the punishment specified in clause (d) or clause (e) of Section 71 and also any one or more of the punishments specified in clauses (f) to (l) of Section 71. It also empowers a court-martial to inflict the punishment specified in clause (d) or clause (e) of Section 71 together with any one or more of the punishments specified in clauses (f) to (l) of that section even if the punishments provided in Sections 34 to 68 are not inflicted. (Para 3)

It cannot be said that on such an interpretation of Section 73, Section 72 will become redundant. The scope of Section 72 is different from that of Section 73. Sec. 72 empowers a court-martial to inflict some alternative punishment in lieu of the punishments prescribed by Sections 34 to 68. Section 73 empowers a court-martial to combine various types of punishments. Where a court-martial does not desire to inflict the punishments mentioned in Sections 34 to 68 but desires to award an alternative punishment lower in scale set out in Section 71, it has to exercise the power under Section 72; but where it desires to combine more than one punishment, it has to take recourse to the power under Section 73. Civil Misc. Writ Petition No. 6475 of 1973 D/- 25-9-1975 (All), Affirmed. (Para 4)

Prakash Gupta, for Appellant; V. K. Burman and G. K. Sahai, for Respondents.

* (Against Judgment of P. N. Bakshi J. in C. M. W. P. No. 6475 of 1973 D/- 25-9-1975).

ET/FT/B578/76/RSK

G. C. MATHUR, J.— The appellant was an employee in the Indian Army. He was tried by a summary Court-martial for the offence of using insubordinate language to his superior officer. He was found guilty of the offence. The Court-martial sentenced him to three months' imprisonment as well as dismissal from service. The appellant availed of the remedies available to him under the Army Act, 1950, but failed to get any redress. He thereupon filed a writ petition in this Court. The only point he urged before the learned Single Judge was that the summary Court-martial did not have the jurisdiction or power to inflict the punishment of dismissal from service in addition to the punishment of imprisonment for three months. The learned Single Judge did not accept this contention and dismissed the writ petition. Against the judgment of the learned Single Judge, this appeal has been filed.

2. Sections 34 to 68 of the Army Act, 1950, set out the offences punishable under this Act and the punishments that may be inflicted on conviction for these offences. The appellant was tried for an offence under Section 40 (c) for using insubordinate language to his superior officer. The maximum punishment provided for this offence under Section 40 is five years. Section 71 of the Act, which prescribes punishments awardable by Courts-martial, runs thus:—

"71. Punishment awardable by courts-martial.— Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by courts-martial, according to the scale following that is to say,—

- (a) death;
- (b) transportation for life or for any period not less than seven years;
- (c) imprisonment, either rigorous or simple, for any period not exceeding fourteen years;
- (d) cashiering, in case of officers;
- (e) dismissal from the service;
- (f) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to the ranks or to a lower rank or grade, in the case of non-commissioned officers;

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy;

(g) forfeiture of seniority of rank, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers; and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of service;

(h) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;

(i) severe reprimand or reprimand, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers;

(j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;

(k) forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal;

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good."

S. 72, which empowers a Court-martial to award the alternative punishments, provides:

"72. Alternative punishments awardable by court-martial.— Subject to the provisions of this Act a court-martial may, on convicting a person subject to this Act of any of the offences specified in Sections 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable, or, in lieu thereof, any one of the punishments lower in the scale set out in Section 71, regard being had to the nature and degree of the offence." Section 73, which provides for combination of punishments, is in these terms:—

"73. Combination of punishments.— A sentence of a court-martial may award in addition to, or without any one other punishment, the punishment specified in clause (d) or clause (e) of Section 71 and any one or more of the punishments specified in clauses (f) to (l) of that section."

3. The contention of learned counsel for the appellant is that under Section 73 the summary Court-martial could not award the punishment of dismissal from service in addition to the punishment of imprisonment awardable under Section 40 (c). According to learned counsel, under Section 73 the punishment specified in clause (d), or clause (e) of Section 71 alone can be combined with one or more of the punishments specified in clauses (f) to (l) of that Section. Learned counsel would have us read Section 73 as though it stood as follows:—

"A sentence of a court-martial may award in addition to the punishment specified in clause (d) or clause (e) of Section 71 any one or more of the punishments specified in clauses (f) to (l) of that section."

We can see no justification for omitting the words "or without any one other punishment"

and the word "and" from the section. The use of the word 'and' between the words 'specified in clause (d) or clause (e) of Section 71' and the words 'any one or more of the punishments specified in clauses (f) to (l) of that section clearly shows that these types of punishments may be inflicted in combination with some other type of punishment. The other types of punishments can only be those specified in clause (a), (b) or (c) of Section 71 which are punishments prescribed by Sections 34 to 68 for the various offences mentioned therein. The words 'in addition to, or without any one other punishment' have also to be given some meaning. In our opinion, these words cover the following two situations, namely,

(i) in addition to any other punishment; and

(ii) or without any other punishment.

Read thus, Section 73 empowers a Court-martial to inflict in addition to the punishments specified for the various offences in Sections 34 to 68, the punishment specified in clause (d) or clause (e) of Section 71 and also any one or more of the punishments specified in clauses (f) to (l) of Section 71. It also empowers a court-martial to inflict the punishment specified in clause (d) or clause (e) of Section 71 together with any one or more of the punishments specified in clauses (f) to (l) of that section even if the punishments provided in Sections 34 to 68 are not inflicted.

4. Learned counsel for the appellant urged that, on this interpretation, Section 72 will become redundant as section 73 itself would empower a court-martial to award the punishments specified in clauses (d) to (l), even when the punishments specified in Sections 34 to 68 are not inflicted. In our opinion, the scope of Section 72 is different from that of Section 73. Section 72 empowers a court-martial to inflict some alternative punishment in lieu of the punishments prescribed by Sections 34 to 68. Section 73 empowers a court-martial to combine various types of punishments. Where a court-martial does not desire to inflict the punishments mentioned in Sections 34 to 68 but desires to award an alternative punishment lower in scale set out in Section 71, it has to exercise the power under Section 72; but where it desires to combine more than one punishment, it has to take recourse to the power under Section 73.

5. On our interpretation of Section 73 as set out above we are of opinion that the summary court-martial in the present case had jurisdiction under Section 73 to inflict the punishment of dismissal on the ap-

pellant in addition to the punishment of imprisonment for three months. The order of the summary court-martial was in accordance with the provisions of Section 73 and cannot be successfully challenged as being without jurisdiction.

6. The appeal is without merits and is hereby dismissed. Parties will bear their own costs of this appeal.

Appeal dismissed.

AIR 1976 ALLAHABAD 407

(LUCKNOW BENCH)

T. S. MISRA J.

Ram Bilas Rastogi, Defendant Appellant
v. Ram Mohan Srivastava, Plaintiff Respondent.

Second Appeal No. 148 of 1972, D/- 13-2-1976*.

(A) U. P. Urban Buildings (Regulation of Letting Rent and Eviction) Act (13 of 1972), Sections 40 and 39 — Second appeal arising out of a suit for eviction of tenant from the building to which old Act did not apply — Benefit of Section 40 read with Section 39 when available to the tenant appellant — Expression 'landlord's full costs of the suit' in Section 39 — Interpretation of.

The expression 'full costs of the suit' under Section 39 would mean full costs of the suit as may have been incurred by the plaintiff on or before the date on which the deposit is made under Section 39. Hence the appellant is required to deposit the entire amount of costs which the plaintiff-respondent had actually incurred by the date on which the deposit is made if he wants to take the benefit of section 40 read with Section 39. 1975 All LJ 1 and 1973 All LJ 635, Foll.

(Para 10)

Where the amount deposited by the tenant appellant represented the costs awarded to the plaintiff in the decree of the trial Court as well as the first appellate court together with the amount paid towards court fee on the memo of appeal and other documents including the Court-fee which the plaintiff had already paid on pendente lite and future damages, as well as other taxable expenses incurred in the second appeal including the Advocate's fee and the fee of his clerk.

Held that the tenant-appellant had deposited 'landlord's full costs of the suit' and

*(Against Order of Om Prakash, Civil J. Lucknow in Civil Appeal No. 14 of 1971 D/- 7-12-1971).

ET/ET/B391/76/LGC

hence he was entitled to the benefit of Section 39 read with Section 40. The decree of his eviction from the accommodation was set aside. (Para 11)

Held further that the contention of the landlord that as the decree passed by the trial Court had provided that he shall be entitled to get pendente lite and future damages till delivery of possession, he would not be entitled to execute the decree for future damages until he paid Court fee thereon and hence the additional court fee which the plaintiff would thus be required to pay on the future damages would be the "costs of the suit", could not be accepted. The amount required to be deposited under Section 39 is not deposited for the satisfaction of a decree passed by the trial Court. It is a statutory deposit made in terms of Section 39. The amount is deposited to have the benefit of Secs. 39 and 40 namely to have the decree for ejectment set aside in appeal. The amount so deposited under Section 39 will not be paid to the decree-holder in the execution of the decree of the trial court. It will be available to him in consequence of the order passed under Section 40 read with Section 39. The plaintiff would be entitled to apply for payment of the amount so deposited under Section 39. Such an application for payment would not be a proceeding in execution of the decree so as to bring the case within the purview of Section 11 of the Court-fees Act. No court fee would, therefore, be payable by the plaintiff-respondent when he would seek to withdraw the amount deposited by the defendant under Section 39 of the Act, read with Section 40 which would include the amount of future damages till the date of deposit. (Para 11)

Cases	Referred:	Chronological	Paras
1975 All LJ 1	=	1975 All WC 138	10
1973 All LJ 635	=	1973 All WR (HC)	10
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H. N. Tilhari, for Appellant; S. D. Misra and P. S. Dwedi, for Respondent.

JUDGMENT:— This appeal by the defendant arises out of a suit for his ejectment from quarter No. 10 specified in para 3 of the plaint and for recovery of Rs. 13 as arrears of rent and Rs. 43 as damages and also for a decree for pendente lite and future damages.

2. The plaintiff had alleged that the defendant had committed default in making payment of rent for four months. A composite notice demanding the said arrears of rent and determining the tenancy was served on the defendant but he failed to comply with the same,

hence a suit for the aforesaid reliefs was filed by the plaintiff on 22-4-1968.

3. The defendant contested the suit alleging that he had tendered the rent to the plaintiff but the same was refused. He also challenged the validity of the notice.

4. The trial Court found that the accommodation in question was constructed after 1-1-1951, hence the provisions of U. P. Act III of 1947 did not apply to it. Having found that the notice terminating the tenancy of the defendant was valid the trial court decreed the suit. The defendant preferred an appeal from that decree before the learned District Judge.

5. The appellate court below concurred with the trial court that the quarter in suit was constructed after 1-1-1951 and was, therefore, not governed by the provisions of U. P. Act III of 1947. It also affirmed the finding of the trial court that the notice in question was valid. The appeal was, therefore, dismissed. Aggrieved the defendant has now come up to this Court on second appeal.

6. During the pendency of the appeal U. P. (Temporary) Control of Rent and Eviction Act was repealed by U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, U. P. Act XIII of 1972 which came into force on 15-7-1972. The accommodation in question is governed by the said Act of 1972. The defendant-appellant moved an application on 10-8-1972 for permission to deposit a sum of Rs. 110 in this Court so that the appeal be decided in accordance with the provisions of Sections 39 and 40 of the new Act of 1972 stating, inter alia, that he had already deposited full rent upto 31-3-1972 at the rate of Rs. 15 per month and also the costs of both the courts below and was ready to deposit rent from 1-4-1972 till 31-8-1972 as well as legal cost of the second appeal. Vide order dated 10-8-1972 on C. M. An. No. 514 (S) of 1972 the appellant was permitted to deposit the amount at his own risk and without prejudice to the other party. In his counter-affidavit the respondent averred that he had taken out execution and the appellant had deposited a sum of Rs. 348 in the execution case; that he had applied for payment of Rs. 531.45 alleged to have been deposited in Regular Civil Appeal No. 14 of 1971 of the Court of Civil Judge, Lucknow, but his application was rejected with the remark that the said amount had not been deposited in the appeal aforesaid; and that the tender for Rs. 110 did not cover the decretal amount of the trial court and costs of that court, as well as costs of the lower appellate court and damages from the date of the decree upto 15-8-1972 and costs of execution and cost incurred by him in the present ap-

peal. He also stated that he had already filed an additional court-fee of Rs. 43 on pendent lite damages and will have to pay additional court-fee as per decree of the trial court on future damages from the date of the decree till the date of ejectment. In his supplementary counter-affidavit the respondent alleged that the appellant was bound to deposit the court-fee and the amount of damages for the period from 24-5-1970 to 15-8-1972. The court-fee payable on the future damages for that period amounted to Rs. 51.50. Further, it was alleged that the appellant had also not calculated the costs payable to the respondent in the present second appeal and as he had failed to deposit the requisite amount within the time allowed by Section 39 of the new Act of 1972 he was not entitled to the benefit of Section 40 of the Act. The appellant in his rejoinder affidavit has given details of the payment made by him and the costs which he was liable to deposit.

7. In view of the allegations made by the parties a report of Civil Judge, Lucknow was called for. The learned Civil Judge in his report dated 8-12-1973 has pointed out that a tender for Rs. 531.45 was filed in his court on 25-9-1971 in Reg. Civil Appeal Ram Bilas Rastogi v. Ram Mohan Srivastava and that in the original tender the number of civil appeal was not clearly noted. It could be read as 14 of 1971, 44 of 1971 and even 64 of 1971. In the triplicate tender, however, the number of the civil appeal was clearly mentioned as 14 of 1971. But as the number of the appeal was not clearly noted in the original tender the Assistant Nazir concerned read the number of appeal as 44 of 1971 and wrote the same in register No. 35 but the names of the parties were correctly noted therein. The Civil Judge has, therefore, reported that the money had been deposited in Reg. Civil Appeal No. 14 of 1971 and not No. 44 of 1971 and the entries in the account register, i. e., register No. 35 were incorrectly made as No. 44 of 1971. The triplicate tender dated 25-9-1971 for Rs. 531.45 which was passed on 4-10-1971 shows that the amount in question was deposited in Reg. Civil Appeal No. 14 of 1971. This second appeal is from the judgment and decree passed in the said Civil Appeal No. 14 of 1971. The appellant had thus established that he had already deposited a sum of Rs. 531.45 in Reg. Civil Appeal No. 14 of 1971. This amount covered the arrears of rent amounting to Rs. 13 claimed in the suit, Rs. 43 as damages upto the date of the institution of the suit, Rs. 376 being the pendent lite and future damages from 22-4-1968 to 23-5-1970 and Rs. 99.45 being the

costs decreed by the trial court including additional court-fee of Rs. 47 paid on pendent lite and future damages. The appellant had also deposited in the trial court in Execution Case No. 44 of 1971 a sum of Rs. 341 by tender in compliance with the order of this Court dated 10-4-1972 passed on his stay application. This amount of Rs. 341 covered the damages for the period from 24-5-1970 to 31-8-1972 amounting to Rs. 334 and costs in Reg. Civil Appeal No. 14 of 1971 amounting to Rs. 7. Further he has deposited a sum of Rs. 110 in this Court on 11-8-1972 which covered damages from 1-4-1972 to 31-8-1972 amounting to Rs. 75 and costs of the second appeal amounting to Rs. 35. He further stated that he had thus deposited extra amounts of Rs. 7.50 and Rs. 7.40 which would cover any miscellaneous expenses in execution proceedings. For the appellant it was therefore urged that as he had deposited all the sums required to be deposited under Section 39 of the new Act the decree for eviction passed in the suit against him should be set aside.

8. Section 39 of U. P. Act XIII of 1972 provides that:—

"In any suit for eviction of a tenant from any building to which the old Act did not apply, pending on the date of commencement of this Act, where the tenant within one month from such date of commencement or from the date of his knowledge of the pendency of the suit, whichever be later, deposits in the court before which the suit is pending, the entire amount of rent and damages for use and occupation (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's full cost of the suit, no decree for eviction shall be passed except on any of the grounds mentioned in the proviso to sub-section (1) or in clauses (b) to (g) of sub-section (2) of Section 20, and the parties shall be entitled to make necessary amendment in their pleadings and to adduce Additional Evidence where necessary:

Provided that a tenant the rent payable by whom does not exceed twenty-five rupees per month need not deposit any interest as aforesaid.

Section 40 of the new Act of 1972 reads thus:

"Where an appeal or revision arising out of a suit for eviction of a tenant from any building to which the old Act did not apply is pending on the date of commencement of this Act, it shall be disposed of in accordance with the provisions of Section 39, which shall mutatis mutandis apply."

It was not disputed on behalf of the respondent that in case the appellant was found to

have complied with the requirements of Section 39 of the Act, the decree for eviction would not be sustainable. The learned counsel for the respondent, however, urged that as a sum of Rs. 531.45 has not been entered in register No. 35 as deposit in Reg. Civil Appeal No. 14 of 1971 the defendant would not be entitled to take benefit of that deposit for the purposes of Section 39 of the Act. I find no merits in this contention. As already pointed out a sum of Rs. 531.45 was deposited by the defendant in Reg. Civil Appeal No. 14 of 1971 as is evident from the tender (paper No. 16 B/1) on the record. It appears that the Assistant Nazir read the figure 14 as 44 and, therefore, incorrectly noted in register No. 35 that the deposit was made in Civil Appeal No. 44 of 1971. This incorrect entry made by the Assistant Nazir of the civil court in register No. 35 will not deprive the defendant of the benefit of Section 39 of the Act inasmuch as he cannot be penalised for any mistake committed by an official of the court and for which he was not at all responsible.

9. Learned counsel for the respondent then urged that the defendant-appellant had not deposited 'landlord's full costs of the suit' inasmuch as he had failed to deposit the amount equivalent to the court-fee which the plaintiff would be required to deposit in terms of the decree passed by the trial court on future damages for the period from 24-5-1970 to 15-8-1972 as the respondent cannot be paid the amount deposited by the appellant without paying court-fee on this amount. It was pointed out that the decree of the trial court, passed on 23-5-1970 had provided *inter alia*, that the plaintiff shall be entitled to get *pendente lite* and future damages till delivery of possession at the rate of Rs. 15 subject to payment of additional court-fee.

10. The question which thus falls for determination is as to what amount would represent "landlord's full costs of the suit" in a pending appeal. This question finds its answer in *R. D. Ramnath and Co. v. Girdhari Lal* (1975 All LJ 1) in the following terms:

"The expression 'full costs of the suit' in respect of a pending suit will represent the amount of court-fee paid on the plaint and on other documents and other taxable expenses incurred by the landlord by the date of deposit together with such amount of the Advocate's fee and the fee of his clerk as is taxable on the contested scale whether any certificate of fee has or has not been filed by the date of deposit.

In case of a first appeal or revision filed against a decree or order of the trial Court

it will represent the costs awarded to the landlord in the decree or order together with the amount paid as court-fee on the memorandum of appeal or revision and other documents and other taxable expenses incurred in the first appellate or revisional Court including the Advocate's fee and the fee of his clerk which are to be computed in the manner stated above.

In case of second appeal or revision filed against a decree or order of the first appellate or revisional court it will represent the costs awarded to the landlord in the decree or order of the trial Court as well as the first appellate or revisional Court together with the amount paid towards court-fee on the memorandum of appeal or revision and on other documents and other taxable expenses incurred in the second appellate or revisional Court including the Advocate's fee and the fee of his clerk which are to be computed in the manner stated above."

Similarly in *Sri Chand Gupta v. Madan Lal* (1973 All LJ 635) while noticing that the defendant cannot be required to do the impossible act of depositing even such costs which the plaintiff may incur subsequently, it was held that the expression 'full costs of the suit' under Section 39 if given a reasonable interpretation would mean full costs of the suit as may have been incurred by the plaintiff on or before the date on which the deposit is made under Section 39. On this construction the appellant was required to deposit the entire amount of costs which the plaintiff-respondent had actually incurred by the date on which the deposit was made if he wanted to take the benefit of Section 40 read with Section 39 of the new Act. Admittedly, the plaintiff respondent had not paid any additional court-fee on future damages for the period from 24-5-1970 to 15-8-1972. The contention of the respondent, however, was that as the decree passed by the trial court had provided that he shall be entitled to get *pendente lite* and future damages till delivery of possession at the rate of Rs. 15 per month subject to payment of additional court-fee, he would not be entitled to withdraw the amount of future damages from 24-5-1970 to 15-8-72 deposited by the defendant-appellant unless he pays court-fee thereon. The additional court-fee which the plaintiff would thus be required to pay on the future damages for the said period would, according to the submission, be the costs of the suit. In support of this contention the learned counsel for the respondent referred me to Section 11 of the Court Fees Act, which *inter alia* provides that where a decree directs an enquiry as to mesne profits from the institution of the suit and a final decree is passed in accordance

with the result of such enquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor.

11. The learned counsel for the respondent pointed out that the trial court had already determined that the plaintiff was entitled to future damages at the rate of Rupees 15 per month, hence the plaintiff shall not be entitled to execute the decree for future damages until he paid court-fee thereon. True it is, that if the plaintiff would be required to execute the decree for future damages from 24-5-1970 to 15-8-72 he would have to pay court-fee on the amount of such damages and the court can refuse to execute the decree till additional court-fee is paid but it cannot set aside the decree for future damages if the additional court-fee is not paid. The position, however, would be different in case of a deposit made by the judgment-debtor of his own accord without the decree-holder putting the decree under execution. The amount required to be deposited under Section 39 of the new Act of 1972 is not deposited for the satisfaction of a decree passed by the trial Court. It is a statutory deposit made in terms of Section 39 of the Act. The amount is deposited to have the benefit of Sections 39 and 40 of the Act, namely to have the decree for ejectment set aside in appeal. The amount so deposited under Section 39 of the Act will not be paid to the decree-holder in the execution of the decree of the trial court. It will be available to him in consequence of the order passed under Section 40 read with Section 39 of the Act. The plaintiff would be entitled to apply for payment of the amount so deposited under Section 39 of the Act. Such an application for payment would not be a proceeding in execution of the decree so as to bring the case within the purview of Section 11 of the Court Fees Act. General Rules Civil applicable to civil courts subordinate to this Court dealing with the repayment do not require for payment of any court-fee on the amount of the deposit which the person entitled thereto may seek to recover. It will be a statutory deposit made in the case which would be payable without the decree being put to execution. No court-fee would, therefore, be payable by the plaintiff-respondent when he would seek to withdraw the amount deposited by the defendant under Section 39 of the Act, read with Section 40 of the Act, which would include the amount of future damages till the date of deposit. The defendant in the instant case has, in my view, deposited 'landlord's full costs of the suit' inasmuch as the amount deposited by him represents the costs

awarded to the plaintiff in the decree of the trial court as well as the first appellate court together with the amount paid towards court-fee on the memo of appeal and other documents including the court-fee which the plaintiff had already paid on pendent lite and future damages, as well as other taxable expenses incurred in the second appeal including the Advocate's fee and the fee of his clerk. The defendant appellant is, therefore, entitled to the benefit of Section 39 read with Section 40 of the new Act. The decree for his eviction from the accommodation in question has, therefore, to be set aside. Consequently, the decree for damages shall also be set aside as the appellant shall now be liable to pay rent and not damages for use and occupation of the accommodation in question.

12. In the result, the appeal is allowed, the decree passed by the court below is modified the decree for eviction of the appellant from the accommodation in question is set aside and the decree for damages is also set aside. The suit is dismissed so far as the reliefs for eviction of the defendant from the accommodation in question and the recovery of damages are concerned. The plaintiff shall be entitled to withdraw all the aforesaid amounts deposited by the defendant in the court below as well as in this court. It is made clear that the plaintiff shall be entitled to withdraw the amount of Rs. 531.45 which the defendant had deposited by tender dated 25-9-1971 passed on 4-10-1971 in Regular Civil Appeal No. 14 of 1971 but which the Assistant Nazir concerned has incorrectly noted in Register No. 35 by mentioning the number of civil appeal as No. 44 of 1971 instead of Regular Civil Appeal No. 14 of 1971.

Appeal allowed.

AIR 1976 ALLAHABAD 411

G. D. SRIVASTAVA JJ.

Bhagwat Prasad Appellant v. Damodar Das and others, Respondents.

Second Appeal No. 1845 of 1966, D/- 10-2-1976*.

(A) Transfer of Property Act (1882), Section 11 Second Part and Section 40 — Benefit of exception in the Second Part of Section 11 available only to the transferor — Benefit not available to another transferee

* (Against decree passed by J. P. Saxena 1st Addl. Civil J., Bulandshahr, D/- 25-3-1966).

ET/FT/B557/76/TVN/MVJ

even though all the transfers were made on the same day and contain similar restrictive conditions — Section 40 only applies to transfer of lands burdened with restrictive covenants.

Second Part of Section 11 allowing a transferor to impose conditions on the transferee for the benefit of enjoying the portion retained by the transferor can be enforced only by the transferor and not by another transferee of another portion even though all the transfers have similar conditions imposed and all of them were concluded on the same day. The transferor cannot transfer such benefit to other transferees, although the conditions imposed are intended for beneficial enjoyment of the portions transferred to such other transferees. The above is based on the principle of law that a contract only binds the parties to it and not others. The other transferees cannot also enforce the condition under Section 40 because it applies only to transferees of lands burdened with restrictive covenants. AIR 1951 Ajmer 74 Dist.

(Paras 3 and 4)

Cases Referred: Chronological Paras
AIR 1951 Ajmer 74 = 1948 AMLJ 27 3

Shambhu Prasad and Krishna Murari Sinha, for Appellant; B. Dayal and Vishnu Sahai, for Respondents.

JUDGMENT:— This is a plaintiff's second appeal against the judgment of the Ist Additional Civil Judge Bulandshahr. The appellant brought a suit in the court of Munsif Bulandshahr for demolition of certain constructions raised by respondents 1 and 2 in a strip of land in front of their house. The admitted facts of the case are that Vidya Ram respondent No. 4 was the original owner of a plot of land shown by letters A-B-C-D in the plaint map situated in Dadri town. He divided his plot into five portions, and sold one plot to respondent No. 1, two portions were sold to the plaintiff-appellant and the fourth portion was sold to respondent No. 3, while the last portion was retained by respondent No. 4 for himself. To the north of these portions, a strip of land 10 feet in width was provided for the benefit of all the purchasers and according to the plaint case, it was agreed upon that no constructions would be made on this strip of land by any purchaser. Respondents 1 and 2 made certain constructions on the said strip of land including a latrine. The plaintiff, therefore, sued for demolition of these constructions. The suit was contested by respondents 1 and 2 on various grounds. The main ground with which I am concerned in the present appeal is that the contract for leaving the strip of land unbuilt was arrived at between each

purchaser on one side and the original owner on the other side and, therefore, the plaintiff had no right to sue. The other pleas raised by the respondents were that the suit was barred by estoppel and acquiescence, and that the respondents had not committed any breach of the contract by making the constructions. Both the courts below have held that although respondents 1 and 2 had made constructions in contravention of the terms of the sale deed, yet the plaintiff had no cause of action and had no right to bring a suit. The other pleas raised by respondents 1 and 2 were, however, repelled. In view of the above mentioned findings, both the Courts below dismissed the suit of the plaintiff and hence this appeal.

2. As already noted above, the only point which is involved in this appeal is whether the plaintiff has any right of suit in these circumstances. For the purposes of this appeal, it may be taken to be admitted that the disputed constructions have been made by respondents 1 and 2 in contravention of the condition mentioned in the sale deed. It does not appear to be disputed that when defendant No. 4 sold the various portions to different purchasers, it was expressly mentioned in the various sale deeds that the purchasers would not make any constructions on the open strip of land, which was to the north of these portions. Defendants 1 and 2 alone were given a right to make certain constructions towards the extreme end of this strip in the eastern portion. However it is admitted that defendants 1 and 2 have constructed a latrine and this is against the condition mentioned in the sale deed. The relevant question which arises for consideration is whether in these circumstances the plaintiff had got any right of suit or not.

3. Ordinarily speaking, if a property is absolutely transferred to another person, the transferor cannot impose any condition which might be inconsistent with the absolute right which has been created in favour of the transferee. This principle is embodied in the first part of Section 11 of the Transfer of Property Act. The learned counsel for the appellant, however, placed reliance on the second part of this Section which runs as follows:—

"Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he might have in respect of a breach thereof."

This part of section 11, therefore, provides for an exception to the general rule, namely, that it is permissible to the transferor to impose any condition regarding the enjoyment of the property which has been transferred. In other words, if one part of the property has been sold and the other part has been retained by the transferor, the latter can impose a condition restricting the enjoyment of the property sold, if such a restriction is for the beneficial enjoyment of the property, which has been retained by the transferor. With reference to this provision of law, it was argued by the learned counsel for the appellant that because the restriction imposed on the transferee in respect of the aforesaid strip of land was for the beneficial enjoyment of the other transferees and also the transferor, this condition was valid and could be enforced. It is true that this restriction was for the benefit of the transferee and also the transferor and therefore the condition is valid. But the question which still remains is whether the breach of such a condition can give rise to a cause of action for another transferee. A plain reading of the second part of Section 11 shows that an exception has been provided in respect of any right which the transferor may have to enforce such a direction. Undoubtedly therefore the transferor, namely, respondent No. 4 had a right to enforce the direction contained in the sale deed. The transferor is no doubt a party to the suit and is also supporting the claim of the appellant, but it is evident that he has not come as a plaintiff and is not seeking to enforce the above mentioned direction. It, therefore, now remains to be seen whether the plaintiff, who is only another transferee, can enforce a direction which is contained in the sale deed of another transferee. The general rule of law is that a contract will bind only the parties thereof and a third person cannot enforce any condition or term embodied in the contract. This rule also has certain recognised exceptions but it is clear that the instant case does not fall within those recognised exceptions. Thus ordinarily speaking, because the plaintiff was not a party to the contract, which was arrived at between the transferor (respondent No. 4) and the transferees (respondents 1 and 2) the plaintiff cannot be held entitled to bring a suit for enforcement of any term contained in that contract. As I have already pointed out, a plain reading of the second part of Section 11 shows that an exception has been made by the law only to protect the right of the transferor. The transferee no doubt has a right to transfer this benefit to another person—In the case cited by the lower appellate court, namely, B. D. Ram-

ble v. Mischeal K. Lal, (AIR 1951 Ajmer 74), it has however, been held that unless such a benefit has been expressly transferred to the transferee he will not be able to claim the advantage of that benefit. In the instant case however there could be no question of such a benefit having been transferred to the plaintiff, simply because all the sale deeds were executed by respondent No. 4 on one and the same date.

4. It was next argued that the transferor could impose a condition in respect of another land belonging to any body else. But this does not appear to be the correct position as will appear from the latter part of this exception. I need not repeat that only the transferor has been given a right to enforce such a direction and he alone will have a remedy in respect of a breach thereof. The purpose of the law is that for the beneficial enjoyment of his other property, the transferor can impose such a condition. I do not think it will be permissible for the transferor to impose a condition for the benefit of another property which he is transferring or is intending to transfer to another person on the same day. If such a condition has been imposed by the transferor for his own benefit, he may no doubt transfer that benefit to another person if the land for the benefit of which such a condition has been imposed is subsequently transferred. But he cannot impose a condition for the benefit of another person. Because in the instant case, the various portions of the property were transferred on the same date, it could not be said that the transferor had imposed a condition and had transferred the same for the benefit of the plaintiff-appellant giving him a right to have a remedy in respect of its breach. The appellant has of course not based his right on any easement or tort. The claim is based only on contract and because the plaintiff-appellant was not a party to that contract between defendant No. 4 and respondents 1 and 2, he cannot have a right to bring a suit for breach of that condition. I was also referred to Section 40 of the Transfer of Property Act. In my opinion this section has no application to the present case, because this section only deals with the rights of a transferee of some land which is burdened with any restrictive covenant. The view of law taken by the courts below thus appears to be correct, and the appeal must fail.

5. In the result, the appeal is dismissed. Costs on parties.

Appeal dismissed.

AIR 1976 ALLAHABAD 414

(LUCKNOW BENCH)

HARI SWARUP AND T. S. MISRA, JJ.

Prakash Narain Awasthi Petitioner v. State of Uttar Pradesh, Opposite Party.

Writ Petn. No. 118 of 1976, D/- 27-2-1976.

(A) U. P. Security Prisoner's Rules (1972), Rule 51 (1) — Application by security prisoner for maintenance allowance to his dependants — Purpose of Rule being to save dependants from facing economic hardship, Government should pass necessary orders within reasonable time — Delay of about six months held as unreasonable.

(Para 2)

(B) Constitution of India, Articles 226, 359 — Proclamation of emergency and suspension of Article 21 — Writ petition by security prisoner for enforcement of statutory obligation to pay maintenance allowance to his dependants — Maintainability. (U. P. Security Prisoner's Rules (1972), Rule 51).

Where, during proclamation of emergency under Article 359 and suspension of Article 21, the writ petition is filed by security prisoner for enforcement of an obligation cast by Rule 51 of the U. P. Security Prisoner's Rules, 1972, on the State Government to pay maintenance allowance to his dependants, the suspension of Article 21 cannot bar the maintainability of the petition.

Article 21 does not deal with the 'right to live' which envisages an economic freedom. When a person claims maintenance allowance he relies on the 'right to live' envisaged by Article 39 (a) and Article 41 and not on the right to personal liberty contemplated by Article 21. Further, the relief claimed is not for the benefit of the prisoner but of free citizens for whose benefit Rule 51 has been framed. Rule 51 is independent of Rules dealing with the detention of a person or with the rights contemplated by Article 21.

(Para 3)

P. N. Awasthi, for Petitioner; Umesh Chandra, for Opposite Party.

HARI SWARUP, J.:— This petition has been moved for enforcement of an obligation cast by Rule 51 of the U. P. Security Prisoner's Rules, 1972 (hereinafter referred to as the Rules) on the State Government to pay maintenance allowance to the dependents of a security prisoner. The petitioner is a security prisoner within the meaning of these Rules. The petitioner moved an application for payment of maintenance allowance to his dependents, his wife and two minor children as they had no means of subsistence. That

application has not yet been decided. A counter-affidavit has been filed by the District Magistrate stating that he had looked into the file and directed an enquiry to be made through the Tehsildar. The District Magistrate also sent a reminder to him on 16-2-1976 to expedite the enquiry but it appears that nothing has yet been done. The District Magistrate has stated in the counter-affidavit that ultimately the State Government will pass the orders on the petitioner's application after receiving the report from him.

2. The petitioner has now approached this Court with a prayer that a mandamus be issued to the State Government to decide his application about the payment of maintenance to his dependents. Sub-section (1) of Rule 51 of the U. P. Security Prisoner's Rules, 1972 provides:

"Allowance for the maintenance of the dependents of a security prisoner will only be granted in cases where the State Government are satisfied that the detention of the prisoner in question has substantially affected the means of subsistence of those dependents.

(2) All applications for maintenance allowance must indicate the number and nature of the dependents and state clearly all sources of income available for their subsistence both before and after the detention of the security prisoner.

(3) All applications for maintenance allowance shall be sent to the District Magistrate of the district in which the security prisoner ordinarily resides, who shall, after such enquiry as may be necessary, forward the application to the State Government with a report on the circumstances of the dependents of the security prisoner. If the applicant is not a resident of the Uttar Pradesh, the application shall be forwarded direct to the State Government".

The purpose of the Rule is to save the dependents of a security prisoner from facing economic hardship while the bread-earner by reason of his detention is unable to support them. The intention of the Rule is to provide subsistence allowance to needy dependents of a security prisoner so that they may not face starvation or penury. Although the Rule has fixed no time limit, the intention is that the Government should take decision before it becomes too late. It must, therefore, act without delay and pass necessary orders within a reasonable time. The application of the security prisoner is required to give full details; it has to indicate the number and nature of the dependents and state all sources of income available for their subsistence both before and after the detention of the security prisoner. The District Magistrate

thus gets preliminary material and has basically only to check the correctness of the prisoner's statement and make a report to the State Government for its decision. Of course this does not mean that the authority concerned should not make the necessary enquiry, but the nature of the relief sought makes time an essence of the matter. In our opinion, the reasonable time for such an enquiry should not be more than three weeks. In any case, the lapse of time since August till February is certainly not the reasonable time as contemplated by the Rule. The assertions in the counter-affidavit clearly show that the authorities subordinate to the District Magistrate are not acting with due promptitude. The delay in the making of the report has resulted in the petitioner's application not even reaching the State Government though six months have passed. The action of the subordinate authorities has prevented the State Government from discharging its duties. As however they are only the instrumentalities of the Government itself the lapse must be deemed to be the lapse of the Government itself. In the circumstances we have no option but to direct a mandamus go to the State Government to decide the application of the petitioner on merits and as sufficient time has already passed it may be decided within a period of one month from today.

3. The learned Standing Counsel has, however, urged that the writ petition must be dismissed as it is not maintainable in view of the proclamation of emergency under Article 359 of the Constitution. The relevant part of the proclamation reads as under:

"In exercise of the powers conferred by clause (1) of Article 359 of the Constitution, the President hereby declares that the right of any person (including a foreigner) to move any court for the enforcement of the rights conferred by Article 14, Article 21 and Article 22 of the Constitution and all proceedings pending in any court for the enforcement of the abovementioned rights shall remain suspended for the period during which the Proclamations of Emergency made under clause (1) of Article 352 of the Constitution on the 3rd December, 1971 and on the 25th June, 1975 are both in force."

In our opinion, the suspension of Article 21 has no relevance to the present case as it is not for the enforcement of the right guaranteed under Article 21 of the Constitution that the present petition has been moved. Article 21 deals with the right to personal liberty which consists essentially of the freedom of movement and freedom of speech and expression; it does not deal with the 'right to

live' which envisages an economic freedom, the freedom from want. When a person claims subsistence or maintenance allowance he relies on the 'right to live' envisaged by Article 39 (a) and Article 41 of the Constitution and not the right to personal liberty contemplated by Article 21 of the Constitution. Further, the relief claimed is not for the benefit of the prisoner but of the persons against whom no action has been taken. Although it is the prisoner who has approached the Court the right is claimed for and on behalf of free citizens for whose benefit Rule 51 has been framed. The petitioner does not want that he be set at liberty; he only claims that during the period he remains under detention the State Government should discharge the obligation to maintain his dependents which has been cast upon it by Rule 51. In our opinion Rule 51 is independent of Rules dealing with the detention of a person or with the rights contemplated by Article 21 of the Constitution, and, as such, the suspension of Article 21 of the Constitution cannot bar the maintainability of the present petition.

4. In the result, the petition is allowed. Let a writ in the nature of mandamus issue directing the State Government to decide the petitioner's application under Rule 51 of the U. P. Security Prisoner's Rules, 1972 within a period of one month from today.

Petition allowed.

AIR 1976 ALLAHABAD 415

(LUCKNOW BENCH)

O. P. TRIVEDI, J.

Vidya Sagar and another, Appellants v. Ram Das and another, Respondents.

Second Appeal No. 91 of 1970, D/- 27-2-1976*.

(A) Easements Act (1882), Section 15 — Acquisition of easementary right by prescription — User of Mend existing between fields, for agricultural purposes.

It is common, for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend for agricultural purposes is, generally speaking, never objected to and is, therefore nothing but permissive. No easementary right, therefore, can be acquired by use of a Mend as a passage unless there is clear evidence of such user as a matter of

* (Against order of Dist. J. Sultanpur in C. A. No. 63 of 1969 D/- 19-2-1970).

right. AIR 1975 All 461 and AIR 1922 Mad 5, Relied on.

(Para 4)

Cases	Referred:	Chronological	Paras
AIR 1975 All 461	=	(1975) 1 All LR 435	3
AIR 1922 Mad 5	=	42 Mad LJ 417	3
(1904) 8 Cal WN 359			3

Pradeep Kant, for U. C. Srivastava, for Appellants; Vishal Singh, for Respondents.

JUDGMENT:— This is a second appeal by Vidya Sagar and Ram Sunder, defendants 1 and 2, respectively; Ram Das plaintiff-respondent No. 1 filed a suit against Vidya Sagar and Ram Das, defendants 1 and 2, Puddan defendant No. 3 and Razi Haider defendant No. 4. The plaint allegations were that the plaintiff held certain agricultural plots mentioned in para 1 of the plaint; to the North of these plots exists plot No. 340 which originally belonged to Puddan, respondent-defendant No. 3, and to the immediate West of the said plot there is plot No. 354 in the tenancy of Ram Sunder, defendant No. 2. Puddan sold the western part of plot No. 340 to Vidya Sagar, defendant No. 1 appellant. There existed a 10 Ft. wide passage over plot No. 340 in western extreme where it meets plot No. 354. The plaintiff claimed to have been using this passage for going to his southern fields and had also been taking his bullocks and cows over this passage to his fields. He, therefore, claimed having acquired easementary right by prescription over this passage. It was alleged that the appellant Vidya Sagar had made an encroachment over this passage by constructing an Ahata. It was further alleged in the plaint that the disputed passage, which had been encroached upon by Vidya Sagar, was the only passage by which the respondent Ram Das could reach his fields and a claim was also set up on the basis of easement of necessity. On these facts and allegations the plaintiff prayed for a decree for demolition of constructions made on the Ahata by Vidya Sagar and for restoration of his passage. The contesting defendants 1 and 2 denied existence of any passage between plots Nos. 354 and 340. They also denied that the disputed land was ever used by the respondent Ram Das as a passage to his fields. The trial court dismissed the suit holding that Ram Das had failed to establish that he had acquired any easementary right to use the land in dispute as a passage and as far as the claim of easementary necessity was concerned the finding was that an alternative passage was available to the plaintiff for approaching his fields and the claim could not be sustained on the basis of easement of necessity. The suit having been dismissed Ram Das appealed and the District Judge allowed the appeal

holding that there was a 5 Ft. wide passage between plots Nos. 354 and 340 and the respondent Ram Das had succeeded in proving that he had been passing over this passage to his fields and also taking his bullocks through it for a statutory period and had thereby acquired right of easement by prescription. The judgment and decree of the trial court were set aside. Defendants 1 and 2 were directed to remove the construction which, on demarcation, was found to fall within their plots. It is in these circumstances that the defendants have come to this Court in second appeal.

2. I have heard learned counsel for the parties. The first submission is that no case of acquisition of easementary right by prescription was set up in the plaint and, therefore, the lower appellate court was in error in spelling out a new case of that kind for the plaintiff. This submission, however, does not appear borne out from the plaint because in para 1 of the plaint there was an averment suggesting long user of the disputed land as a passage.

3. The next submission is that there was no evidence to support the lower appellate Court's finding that there was 10 Ft. wide passage between plots Nos. 354 and 340 and that the respondent had been using any such passage either for himself going to his fields or taking his bullocks to the fields. In this connection it is submitted that all that was established from the evidence of defendant's witnesses was that there was a Mend between these two plots and it was this Mend which was being used by Ram Das for going to his fields and for taking his bullocks but it was submitted that this was permissive use of the Mend and there was no evidence that the plaintiff had been using the Mend as of right within the meaning of Section 15 of the Indian Easements Act so as to acquire a right by prescription. This submission appears to be well-founded. In his finding on acquisition of easementary right by prescription the lower appellate court appears to have relied mainly on the statements of defendants' witnesses namely, Gharib (D. W. 2), Sarwar (D. W. 3) and Puddan (D. W. 4) but he lost sight of the fact that those three witnesses only stated that there was a 1 Cubit wide Mend existing between plots Nos. 354 and 340 and that Ram Das had been using this Mend for going to his fields and for taking his bullocks to his fields. The defence witnesses nowhere admitted the existence of a passage between these two plots or on plot No. 340. The trial court had, for good reasons, discredited the oral evidence of the plaintiff and the lower appellate court did not discuss the evidence

Reddy (as he then was) was of the view that a writ petition filed in a representative capacity by an unregistered association cannot be entertained as the association as such is not aggrieved but it is the individual members of the association that could be said to have been aggrieved, entitling them to file separate writ petitions.

In the latter case, a learned Single Judge of the Calcutta High Court also opined that all the members of an unregistered association only can file writ petition and such association is not a legal entity. The aforesaid view expressed by the learned Judges is no longer good law in view of the authoritative pronouncement of the Supreme Court in *Venkateswara Rao v. Govt. of Andhra Pradesh*, AIR 1966 SC 828. Therein it fell for consideration whether the appellant, who represented the committee formed by the villagers of Dharmajigudem to collect a fund of Rs. 10,000 for the purpose of depositing the same with the Block Development Officer for locating a health centre, had locus standi to file the writ petition under Art. 226 of the Constitution questioning the order of the State Government. The law on this aspect has been succinctly laid down by the learned Judge Subba Rao, J. (as he then was) at page 833 thus:

"The first question is whether appellant had locus standi to file a petition in the High Court under Art. 226 of the Constitution. This Court in *Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal*, (1962) Supp 3 SCR 1 at p. 6 = (AIR 1962 SC 1044 at p. 1047), dealing with the question of locus standi of the appellant in that case to file a petition under Article 226 of the Constitution in the High Court observed:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore clear that persons other than those claiming fundamental right can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder, but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right... The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner

himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmajigudem. The villagers of Dharmajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre. The said Committee collected Rs. 10,000 and deposited the same with the Block Development Officer. The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharmajigudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorised to act on behalf of the Committee. The appellant was, therefore a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose. We have therefore, no hesitation to hold that the appellant had the right to maintain the application under Art. 226 of the Constitution."

8. The aforesaid authoritative pronouncement of the Supreme Court leaves no doubt in our minds that the School Committee represented by its President can only file the present writ petition. Just as the appellant in the Supreme Court case, *Surreddi Venkatramaiah* in the present case is the President of the School Committee which, in law, is a trustee of the amounts collected from the villagers for the public purpose of constructing the High School building and providing a playground for the students and he represents that School Committee. That apart, he was also recognised and acknowledged by the District Collector as well as the State Government as the proper person representing the School Committee. From the very impugned orders, we find that the High School Committee has been recognised to be a legal entity. In any event, it has been treated so by the Collector as well as the Government.

In fact, the very order passed by the District Collector directs only the School Committee to shift the fencing beyond the pathway of 9 feet width and the very first copy of the order was marked and

despatched to the President of the School Committee through the Headmaster of the high school. Even in the petition filed by the Harijans and the first and second paragraphs of the impugned order of the Collector, mention was made of the School Committee and the very action sought to be remedied by the Collector's order is nothing but that of the School Committee. The language of the order passed by the Collector is clear in this regard and it does not lie in the mouth of the respondents 1 and 2 as well as the respondents 4 and 5 to raise this technical objection of locus standi and the maintainability of the writ petition for the first time at this stage.

We may add that the writ petition was not dismissed by the learned Single Judge on the ground that it is not maintainable or that the petitioner has no locus standi to file the same. But as pointed out earlier, it has been dismissed on the ground that the petitioner has an effective alternative remedy of a regular suit to determine the question of title to the disputed land. We may also state that the very revision before the State Government was filed by the appellant herein and the orders of the State Government also have been addressed and communicated only to the appellant herein. The high school committee has been formed not now but as early as in the year 1946 or 1947. We may recapitulate that the then Special Officer of the District Board had addressed the President of the School Committee in March, 1948 to arrange for the gift of land of Ac. 9-00 before construction of the school building and the playground.

That apart, Surreddi Venkatramaiah who represents the School Committee is also having an interest in the disputed land in view of the fact that he is one of the donors of a portion of the land given for the playground in the year 1948 and the fact that the High School has been named after Kadiyala Ramayya, who was the ancestor of the principal donors, would speak for itself that the appellant and other members of Kadiyala family have certainly an interest in the property which can be safeguarded in this writ proceeding. They have also got every right to see that the property gifted by them should be used and utilised only for the purpose for which it was gifted but not for any other purpose. The proceedings which they have initiated in a Court of law have to be examined on merits. It is really regrettable that the respondents

have taken such an extreme stand relating to the maintainability of the writ petition, although it was the villagers who were benevolent and munificent enough to donate nearly Ac. 9-00 of valuable land and contribute the requisite funds for the construction of the high school building.

9. The decision of our learned brother, Lakshmaiah, J. in W. P. No. 6111 of 1973, D/- 8-7-1975 = (AIR 1976 Andh Pra 165) on which strong reliance has been placed by the counsel for the respondents 3 and 4, is distinguishable on facts. Therein there was a dispute with regard to title to, as well as possession of the property. In the present case, admittedly the disputed land is in the possession and enjoyment of the school authorities for more than 25 years and there are registered deeds of gift executed by the donors in the year 1948 in favour of the educational institution. Judged from any angle, we are satisfied that the appellant-petitioner has interest and locus standi to maintain the writ petition and the preliminary objection is not sustainable. Our answer to question No. 1 is in the affirmative and in favour of the appellant.

10. This brings us to examine the question No. 2 relating to merits. The school authorities are actually using the entire land gifted under the registered document dated 1-7-1948 as a playground for the students since more than 25 years. When they decided to plant cement pillars and have a barbed wire fencing on the northern side of the playground, the Harijans residing in the Harijanwada, as already stated, have filed an application on 5-6-1972 to the Panchayat Board requesting for leaving 6 yards width of way as a pathway to reach the public latrines. The matter was taken up to the Chairman of the Zilla Parishad and the Dist. Collector. The District Collector, Chairman of the Zilla Parishad, Executive Engineer and some others had inspected the disputed land on a particular day. There is no material on record to show or establish that any of the school committee members or its President was either present on that occasion or an opportunity to make representations with regard to the problem was given. Even the impugned order of the District Collector does not indicate that any notice was given to the school committee or its President although the very operative portion of the order is directed against the school committee to shift the fencing by 9 feet width.

In the impugned order, Sri K. R. Venugopal, the then District Collector, Krishna observed that "to enclose the playground with a fence by the High School Committee cutting across the pathway is unfair and it is against custom and usage and is calculated to deprive the Harijan residents of the facility of the pathway running along side the playground to reach the latrines." We are unable to find any material or justification for the District Collector to make such observations. It is not for the District Collector who went to inspect the disputed land to hold that there was a custom or usage by a particular section of the people when the matter is in dispute. It is the province of the Courts of law, but not an executive officer like the District Collector, to pronounce upon custom and usage. The District Collector Sri K. R. Venugopal appears to have acted high-handedly and arbitrarily and taking the law into his own hands.

He should have thought that he has a duty to act in accordance with law even if he feels that some inconveniences, hardship or injustice has been caused or done to the members of the weaker sections and the Harijans. He clutched at the jurisdiction which he did not have, to decide the question of custom and usage which is the exclusive province of the Courts of law. He appears to have thought that he can do and undo things. He should have realised that he as the District Collector, has a duty to act according to law and he cannot take law into his own hands and act arbitrarily and high-handedly. If he had exhibited some restraint and shown sufficient tact, the present problem would have been solved without any difficulty and to the advantage of the Harijans as well as the High School Committee.

He should have certainly made use of the beneficence and munificence of the villagers and harnessed the same for the development of the public institution and at the same time provided the Harijans with the facility of a pathway to go to the public latrines. It is nobody's case that there is no way for the Harijans to go to the public latrines. Nor is the Collector competent to decide the question of easement by way of necessity or by custom. Even if a pathway for Harijan ladies to go to public latrines, is needed, 9 feet width of way is not necessary. He must have realised that a Commissioner appointed by a Court also inspects the land

in dispute and hears any representations made orally but this does not, however, make him think that he is empowered to decide as to who is entitled to the disputed land or whether there has been a custom or usage or any easementary right on that land in favour of one party or other. The District Collector might have been over-anxious to implement the State policy to help the weaker sections of the people and in particular, the Harijans.

This Court would not, in any way, interfere with the policies of the State. We would certainly appreciate the officers who conscientiously and lawfully carry out and implement the policies of the Government. However, neither the District Collector nor any other employee of the State can take law into his own hands and decide the questions which fall within the exclusive jurisdiction of Courts of law in their anxiety to achieve quick results. The objects may be laudable but in achieving such laudable objects, the concerned authorities must be always conscious of their limitations. They must invariably adopt lawful and peaceful means but, under no circumstances, they should act arbitrarily, capriciously, dishonestly and in accordance with their whims and fancies. It is apposite to notice in this context what has been stated by the learned Judge, Shah, J. (as he then was) speaking for the Court, in *Union of India v. M/s. Anglo Afghan Agencies*, AIR 1968 SC 718 at p. 723 while construing the scope of the theory of executive necessity:

"Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law; if a member of the executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law-common or statute the courts will be competent to, and indeed would be bound to, protect the rights of the aggrieved citizen."

The District Collector, in the discharge of his duties, should set an example to the other officers in the District but should not give room for complaints by resorting to unlawful and short-cut methods not permissible under law and which are violative of the principles of natural justice. The high-handed and arbitrary action of Sri K. R. Venugopal, the then District Collector alone has brought about this unnecessary complication and bad blood between the villagers at Katur affecting the functioning of the high

school as stated by its Headmaster in one of his letters. He could have certainly taken guidance and advice of the Chairman of the Zilla Parishad, Krishna an elected representative of the people, rather than passing this type of order on mere inspection. In the circumstances, he should have either solved the problem amicably without any violence or directed the parties concerned to go to a court of law and establish their rights.

11. We are unable to agree with the District Collector and Zilla Parishad authorities that they could not get at the registered gift deed dated 1-7-1948. It is not permissible for the respondents to ignore registered gift deeds which would disprove the stand taken by them. Their explanation to the effect that the original registered documents of gifts of the land were not traceable in the Zilla Parishad office is neither satisfactory nor worth-considering. The District Collector, who did not even afford an opportunity to the school committee to represent their stand in the matter, did not think it his duty to look into the original documents. If they are not available, certified copies of the registered deeds could have been easily obtained. If the respondents had really applied their minds to the facts with a determination to find out the truth of the cause, the President of the school committee could have been easily asked for the supply of copies of registered documents in which case the appellant would have certainly filed the same before them. In fact, a certified copy of the registered gift deed dated 1-7-1948 has been placed before us. The recitals therein completely destroy and disprove the theory set up by the respondents that the land is a poramboke land.

The recitals in a registered document of the year 1948 at a time when there were absolutely no disputes between the parties would certainly prevail over some entry made in the village accounts that the disputed land is a poramboke land. If it was really a Government Poramboke land, there was no need for the then District Board authorities in the year 1948 to make the execution of a registered gift deed by the donors a condition precedent. A dispassionate authority can certainly find where the truth lies. It is pertinent to notice that the eastern boundary of item No. 1 of the property gifted under the registered deed, viz. Survey No. 202/1 admeasuring Ac. 5-10 cents, was described as 'Harijans' but not as pathway. If the

pathway, as found by the District Collector, was in existence for decades, it should have certainly been mentioned or indicated as the eastern boundary of item No. 1. The stand taken by the respondents is not only not borne by records but is contrary to the recitals found in the registered gift deed. If this document had been looked into, we are sure that the District Collector would not have passed the impugned order which resulted in grave injustice to the public institution.

12. We shall examine the contention of the respondents that the land used as playground for the students of the school is a poramboke. Some entry in No. 10 (1) account of the village is placed before us to show that it is a poramboke land. Poramboke lands may be of different kinds. The land in question is in a Zamindari Village and it is used as a playground for more than 25 years by the school authorities. No land revenue need be paid by the landholder in respect of a poramboke situated in a zamindari village. In fact, this land was described and used to be called as 'Vanam Thota' of Kadiyala family. By the mere fact that no land revenue or cist was paid, it cannot be said that it is a Government poramboke which existed in a Zamindari Village. Taking advantage of the fact that no land revenue was paid by the landholder for this land, the respondents now seek to claim it as Government poramboke otherwise known as playground poramboke.

Even assuming that it is a Government poramboke, the petitioner-school committee as well as the school authorities cannot be evicted from it by use of force or arbitrarily by the District Collector or any other executive authority. In cases of unlawful and illegal encroachment of Government lands or property, the authorities concerned have to follow the procedure prescribed therefor and issue notices under Section 7 of the Land Encroachment Act and, after due and proper enquiry, pass regular orders under Section 6 thereof evicting the persons in possession, but cannot take the law in their own hands and arbitrarily evict them or direct them to be evicted. Admittedly, the District Collector has not proceeded under the provisions of the Land Encroachment Act even on the basis that the land can be treated as Government poramboke.

13. The further submission of the learned Government Pleader that the land is the property of the Zilla Parishad and

the Zilla Parishad has agreed to set apart the same for pathway to the Harijans cannot be accepted. Even under the Rules made under the A. P. Zilla Parishads and Panchayat Samithis Act, particular procedure has to be followed for acquisition and transfer of immovable property. The Zilla Parishad has not actually passed the impugned order in the present case. The mere presence of the Chairman of the Zilla Parishad Krishna and the Executive Engineer at the time of inspection of the disputed site by the District Collector does not satisfy the requirements of law.

14. We need not go into the submission of Mr. Venkataramana that the whole dispute is a result of factions as it is not our concern. No doubt we see that the Harijan representatives, i.e. respondents Nos. 3 and 4 have not even filed a counter-affidavit but some busybody in the village belonging to a higher caste is only concerned and has sworn to a counter-affidavit and engaged a counsel in this court spending his monies. That however has in no way influenced our decision as it is irrelevant for the purpose of determining the points at issue in this case.

15. For the reasons stated, the impugned order of the District Collector which is merged in the order of the Government must be and is liable to be quashed. If the respondents have any right, it is open to them to establish the same in a court of law but they cannot evict the school authorities from the disputed land by force.

16. The appellant's counsel states that the villagers are prepared even to contribute for the construction of the septic tank latrine for the benefit of the poor Harijans if this matter is amicably settled and the dispute has unnecessarily spoiled the peaceful atmosphere in the village resulting in interruption of the school administration and its functioning. That is a matter between the villagers and the Harijans as well as the representatives of the people. In this connection, we wish to make a suggestion. A portion of the Harijanwada is, in fact, divided by the high school building and the other portion of the site used as playground is now sought to be fenced with a barbed wire. The school authorities as well as the Zilla Parishad may, in the interests of the students as well as the institution, consider the desirability and advisability of constructing a regular wall on the remaining portion of site used as play-

ground instead of putting a barbed wire fencing. Such a construction would put an end to any further controversy between the school authorities and the Harijans and ensure the smooth and peaceful functioning of this educational institution.

We are not told by the learned counsel for the appellant that the villagers are also beneficent and munificent enough to contribute for the upgradation of the high school into a college. This educational institution is functioning very satisfactory when judged from its previous performance and results and has got all the potentialities to blossom into a college if sufficient co-operation is extended by the District Collector, the Zilla Parishad and the State Government. We hope and trust that this institution with the co-operation and active assistance of the benevolent and munificent villagers, will bloom into a college imparting higher education to all the pupils including Harijans of the village as well the pupils in the neighbouring villages.

17. In the result, the impugned orders of the District Collector and the Government are hereby quashed and a writ of mandamus will issue restraining the respondents from interfering with the possession and enjoyment of the disputed land by the petitioner. The writ appeal is allowed with costs against respondents 1 and 2 only. Advocate's fee Rs. 100.

Appeal allowed.

AIR 1976 ANDHRA PRADESH 293

A. SAMBASIVA RAO, Ag. C. J. AND
JEEVAN REDDY, J.

Radhakrishna Murthy, Appellant v.
Subbaiah and others, Respondents.

Letters Patent Appeal No. 145 of
1973, D/- 24-7-1975.*

(A) Hindu Law — Division of Status
by preliminary decree for partition — Re-
union — Can be effected by agreement —
Agreement need not be in writing — Can
be inferred from conduct of parties.

What is required to constitute a re-
union amongst the separated members of
a Hindu family is an agreement amongst
the members who are competent to enter
into an agreement to reunite. The agree-
ment to reunite may manifest itself
through writing or may be inferred from
the circumstances of the case. Even if it
is through a decree of court that a divi-

*(Against judgment of Madhava Reddy,
J. in S. A. No. 71 of 1972, D/- 8-12-1972.)

BT/CT/A640/76/KKK

sion in status has been effected, it does not stand in the way of the members to reunite in estate and interest through agreement. AIR 1924 PC 198, Distinguished. (Para 3)

(B) Letters Patent (Madras as applied to A. P.), Cl. 15 — Finding of fact — Binding effect.

The very factum of the reunion of a divided family was in dispute before the Courts below. On thorough examination of the evidence the courts found that there was in fact a reunion. This finding was also affirmed by High Court in second appeal. Therefore this finding cannot be disturbed in Letters Patent Appeal.

(Para 2)

Cases Referred: Chronological Paras
AIR 1962 SC 287 = (1962) 3 SCR 440 3
AIR 1924 PC 198 = 51 Ind App 321 4

T. H. B. Chalapati for A. Hanumantha Rao, for Appellant; M. Adinarayana Raju, for Respondent No. 2.

A. SAMBASIVA RAO, Ag. C. J.:—

Our learned brother, Madhava Reddy, J. has granted leave, while dismissing Second Appeal 71 of 1972, affirming the concurrent decisions of the courts below. That is why this L. P. A. has been preferred. The question posed is whether the reunion of the family is valid in law.

2. It is necessary to note the material facts of the case before we enter upon the discussion on the question raised. On behalf of two sons, who are members of a Hindu undivided family O. S. 233 of 1954 was filed in the District Munsif's Court, Repalle against their father, for partition, when they were still minors. A preliminary decree was passed on 20th of December, 1954 directing partition as prayed for. For reasons best known to themselves, their next friend and guardian, subsequently for some time even after both of them had become majors, no proceedings were taken for passing a final decree. It was one decade after the preliminary decree, that is, in 1964 that I. A. 1489 of 1964 was filed by both the plaintiffs for passing a final decree. The father-respondent kept quiet for reasons which we can easily visualise. Resistance to the passing of the final decree came from respondents 2 and 3. Respondent 2 happens to be the owner of some land which had been given on lease to the father subsequent to the preliminary decree. Respondent 3 is a creditor. Their case was that there was reunion between the father and two sons, and consequently, no final decree could be passed on the basis of the preliminary decree made on

20th of December, 1954. The very factum of the reunion was in dispute before the courts below. On a thorough examination of the evidence on record, the courts found that there was in fact a reunion. This finding was affirmed by our learned brother as well. But then the validity of the reunion was also challenged. Sri T. H. B. Chalapati appearing for Sri A. Hanumantha Rao, learned counsel for the appellant (only, the first plaintiff has chosen to file the L. P. A.) contended that he cannot challenge the unanimous view of the courts below and of our learned brother holding that there was in fact a reunion. He limits his challenge only to its validity.

3. His contention in this behalf is that the preliminary partition was effected through a decree passed by a court, and that could be set at naught only by another order of the Court. We, however, see no justification or valid basis for this argument. What is required to constitute a reunion amongst the separated members of a Hindu family is an agreement amongst the members who are competent to enter into an agreement to reunite. The agreement to reunite may manifest itself through writing or may be inferred from the circumstances of the case. We may here usefully refer to the relevant passage in Mulla's Hindu Law, 14th Edition, paragraph 344:

"To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. In *Bhagwan Dayal v. Reoti Devi* (AIR 1962 SC 287) the Supreme Court pointed out that it is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. Such an agreement may be express or may be implied from the conduct of the parties. The conduct must be of an incontrovertible character and the burden lies heavily on a party who asserts reunion..... Since a minor is not competent to contract, it follows, that an agreement to reunite cannot be made by, or on behalf of, a minor." We have already noted the fact that the two plaintiffs, though minors at the time of the institution of the suit and the passing of the preliminary decree for partition, had attained majority some time after that decree. Therefore, there was competency on their part to enter into an agreement with their father to reunite. There cannot, therefore, be any objection for the reunion on this score. Division in status might have been effected by an

agreement or through a preliminary decree passed by a Court. If the parties, being competent to do so, enter into an agreement to reunite in estate and interest, then, certainly, it would be the legal consequence that a reunion is effected through that agreement. Even if it is through a decree of court that a division in status has been effected, it does not stand in the way of the members to reunite in estate and interest through agreement. That there was an agreement has been the unanimous finding of all the courts. Therefore, there is no basis whatever for the contention advanced by Sri Chalapati.

4. Admitting that there is no direct case on the point, the learned counsel relies on some observations in *Lachmi Narain v. Balmakund*, AIR 1924 PC 198. He invites our attention to the following observations of the Privy Council:

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

Even a reading of this passage makes it clear that this has no application to the case of a reunion. Though division in status has been brought about by a preliminary decree, if the decree-holder does not want to execute the decree or to nullify it, he is fully competent to do so. He cannot be compelled to abide by the decree which has been passed in his favour, and to enforce it. By an agreement with the judgment-debtor, he could settle his rights in any manner the parties like. So, this case does not help the contention of the appellant.

5. As we have already indicated, the contention is wholly unfounded either on legal principle or any precedent. The L. P. A. is accordingly dismissed with costs of the second respondent. The first and third respondents will bear their own costs.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 295

CHINNAPPA REDDY AND
JEEVAN REDDY, JJ.

Valluri Appayya and others, Appellants v. Dosapati Narasimhamurthy and others, Respondents.

Letters Patent Appeal No. 27 of 1974,
D/- 22-12-1975.*

(A) Evidence Act (1872), S. 35 — Inam Fair Register — Though may not be conclusive has great evidentiary value.

It is well-established by the several decisions of the Privy Council, Madras High Court and Andhra High Court that the preparation of the said Inam Fair Register was a great act of State and that the said register was prepared by the Government officials after conducting an enquiry on the spot and after examining all the relevant and available documents. The said register is entitled to great evidentiary value though it may not be conclusive. There may however be cases where the entries in the said register may be rebutted by producing authentic and clinching record. (Para 4)

(B) Letters Patent (Madras as applied to Andh. Pra.), Clause 15 — Appeal under — Whether provisions of S. 105 (2), Civil P. C. apply and order of remand passed by Single Judge can be attacked in appeal from final decree after remand. (Civil P. C. (1908), S. 105 (2)).

Cl. 15 Letters Patent does not confer any right of appeal on an aggrieved party in second appeal. The appeal depends upon a declaration made by a single Judge of the High Court deciding the second appeal and granting of leave to appeal under the Letters Patent. Therefore, S. 105 (2) would not govern appeal under Cl. 15 of the Letters Patent and it is open to the appellant in the appeal against the final decree to attack the correctness of an order of remand passed by a single Judge in second appeal. AIR 1960 SC 941 and AIR 1929 Mad 349, Rel. on. (Para 10)

(C) Evidence Act (1872), S. 35 — 'Yadast' Bogatta — Authenticity and evidentiary value — Entries in, if can be preferred to those in Inam Fair Register.

A 'Yadast' Bogatta purported to have been prepared in 1818 not under any law or under any other orders or instructions of any authority cannot be said to be an authentic document especially when it was not referred to at the time of Inam

*(Against decree of Madhava Reddy, J. in S. A. No. 668 of 1971, D/- 21-3-1973.)

Fair Register inquiry held subsequently. Merely because the said document purports to have been prepared in 1818, the Court cannot automatically take it for granted that it was really so prepared. It is not a public document. Hence there is no presumption regarding the correctness of its contents. Any number of private documents may come from the custody of a public official, but merely on that account, they or their contents, cannot be held to be true or authentic. In that view the entries therein would not prevail over those in the Inam Fair Register. AIR 1944 Mad 468 and 1958-2 Andh WR 134, Dist. (Para 11)

Cases Referred: Chronological Paras
(1974) S. A. No. 176 of 1974 (Andh Pra)

3, 8, 10
AIR 1970 SC 997 = (1971) 1 SCR 207
8, 10
AIR 1969 SC 560 = (1969) 1 SCR 573
8, 11
AIR 1964 Andh Pra 162 = (1964) 1 Andh
WR 22 (FB) 8, 10
AIR 1963 Andh Pra 9 = (1962) 2 Andh
WR 119 8, 10
AIR 1963 Madh Pra 344 = 1963 Jab LJ
590 10
AIR 1963 Pat 165 = 1962 BLJR 985 8, 10
AIR 1960 SC 941 = (1960) 3 SCR 590
8, 10
(1958) 2 Andh WR 134 = 1959 Andh LT
39 7, 12
AIR 1944 Mad 468 = (1944) 2 Mad LJ 56
7, 12
AIR 1929 Mad 349 = 30 Mad LW 787
8, 10
AIR 1917 PC 86 = 20 Bom LR 49 12

N. V. Ranganadham, for Appellants;
T. Ramachandra Rao, for Respondents.

JEEVAN REDDY, J.:— This Letters Patent Appeal is preferred by the defendants by leave granted by Madhava Reddy, J. while dismissing S. A. No. 638 of 1971 arising from O. S. No. 74 of 1960 on the file of the Court of the Dist. Munsif, Rajam.

2. The plaintiffs filed a suit alleging that they are the owners of the suit lands situated in Venkatarayuni Agraharam and that the defendants are their tenants. The said Agraharam is a pre-settlement minor inam and that when the Rent Reduction Act was enforced by the State, the defendants stopped paying the rent whereupon the plaintiffs filed suit O. S. No. 616/1953 on the file of the learned District Munsif, Rajam for a declaration that the said Act is not applicable and that the said suit was decreed. The defendants were therefore estopped from

contending that the lands are situate within a whole inam village and that therefore it is an estate within the meaning of Section 3 (2) (d) of the Madras Estates Land Act and that since they were not parties to the suit O. S. No. 616 of 1953, they are not bound by the decision therein. They claimed occupancy rights in the said lands and submitted that they would be liable at the most in a sum of Rs. 60 only per year in view of the low yield. Other pleas regarding misjoinder etc. were also raised. The main question that fell for decision in the suit therefore was whether the suit land is an estate within the meaning of Section 3 (2) (d) of the Madras Estates Land Act.

3. The trial Court held, on a consideration of the oral and documentary evidence, that Venkatarayuni Agraharam is clearly an estate within the meaning of Section 3 (2) (d) of the said Act and that the defendants are not bound by the decree in O. S. No. 616 of 1953. In view of the finding on the main issue, the suit was dismissed. The plaintiffs filed an appeal which was dismissed confirming the findings of the trial Court. S. A. No. 176 of 1974 (Andh. Pra.) was preferred in this court which came up before Parthasarathi, J. for final disposal. The learned Judge allowed the appeal on the ground that both the courts below have illegally excluded from consideration Ex. A-5, a very material piece of evidence and therefore remanded the matter to the lower appellate court for fresh disposal according to law. On this occasion, the first appellate court allowed the appeal holding that the said Agraharam is not an estate. The defendants filed an appeal which has been dismissed by Madhava Reddy, J. Hence this Letters Patent Appeal by leave.

4. The conclusion that the Venkatarayuni Agraharam is an estate within the meaning of Section 3 (2) (d) of the Act was arrived at by both the courts below on the earlier occasion mainly on the basis of Ex. B-4, the Inam Fair Register and Ex. B-5, the Inam Statement. The sheet-anchor of the plaintiffs' case has been Ex. A-5 which is stated to be a 'Yadast' pertaining to Venkatarayuni Agraharam within the Bobbili Zamindari said to have been prepared in 1818. Inasmuch as the decision of the case turns upon these three documents it would be appropriate to refer to their contents in a little more detail. Ex. B-4 is the Inam Fair Register pertaining to the said Agraharam prepared in or about the year 1865. It is

well established by the several decisions of the Privy Council, Madras High Court and this court that the preparation of the said Inam Fair Register was a great act of State and that the said register was prepared by the Government officials after conducting an enquiry on the spot and after examining all the relevant and available documents. The said register is entitled to great evidentiary value though it may not be conclusive. There may however be cases where the entries in the said register may be rebutted by producing authentic and clinching record. Now, according to the entries in the said register, the name of the grantor as well as the name of the original grantee is mentioned as 'not known'. The further entries in the said register clearly establish that the said Agraharam is an estate. Ex. B-5 is the Inam Statement of the year 1863 which also supports the defendants' case that it is an inam village. As against this, the plaintiffs relied upon Ex. A-5 stated to have been prepared in 1818. We have looked into the said documents carefully. It does not appear as to who prepared the said 'Yadast' or 'Bhogatta' as it is referred to. It contains two signatures at the foot of the document namely of Dosapati Hanumantha Rayudu and Guruzala Krishna Rayudu. It is not prepared under any statute or under any orders or directions of the Government or other competent authority. It is also not known as to what was the occasion for preparing the said 'Yadast'. Though it purports to have been prepared in 1818 and shows the name of the grantor as well as the grantee, it is surprising that it was not referred to at the time of the preparation of the Inam Fair Register. The said Ex. A-5 incorporates a 'Patta Nakalu' whereunder the grantor made a further grant of 2½ vritties in addition to 16 vritties already granted. If the said document were true, it is highly unlikely that none of the concerned parties would have referred to it in the enquiry preceding the preparation of the Inam Fair Register. The relevant contents of the said document (A-5) are as follows:

"1. Name of the Village: Venkatarayuni Agraharam, Rajam Paragana.

2. Name of the person granting patta: Sri Janardhana Rangarayuni Garu.

3. Name of the person obtaining patta: Dosapati Appalayacharyulu."

Then follow the names of the present holders and their relationship with the original grantee. The names of the several

holders are mentioned thereafter along with the land in their respective possession. At the end of the said document, we find an extract under the heading 'Hakikat'. Three items are mentioned thereunder as follows:

"Patta is available

2. How do you know the particulars in the number?

I learnt from my ancestors. Hence stated.

1. There is no difference in the extent mentioned in the patta and the Shrotrium."

Thereafter, under the caption 'Patta Nakalu', the following extract is found:

"Patta of gift of land executed on the 15th day of Karthika Sudhaka of Vilambi year by Sri Janardhana Rangarayuni Garu to the 'Bhuktas' (enjoyers) of Venkatarayuni Agraharam.

As the sixteen 'vritties' of land granted to you previously is found insufficient, the cultivable land commencing from the way leading to Tangulu beyond the stones on the eastern side of your Agraharam, and excluding upto the way leading to Marivalasa Duddu on the southern side and upto the bund of Dambadalamma tank is (hereby) granted. Therefore you shall include that land in our agraharam, cultivate the same and be in happy enjoyment of the produce therefrom from son to grand-son.

(Sanskrit Sloka omitted)

sd. F. J.

Monday, the 13th day of Falguna Sudha of Eswara Year corresponding to

2nd March, 1819.

Sd. Dosapati Hanumantharayudu written by Guru Balakrishnarayudu.

5. It may be noted that the original patta was not produced even on that occasion though it was stated to be available. The 'Patta Nakalu' extract in the said document pertains to additional 2½ vritties granted in the Vilambi year which we are told corresponds to 1778 A. D.

6. The trial Court accepted and acted upon Exs. B-4 and B-5 and so far as Ex. A-5 is concerned, it held that the Patta Nakalu contained in the said exhibit is inadmissible in evidence being a copy of the copy. It was of the opinion that the extract found in Ex. A-5 was taken from a copy of the Patta and not from the original patta and therefore Ex. A-5 represents a copy of the copy. However, it was also observed that the said Patta Nakalu was not referred to or relied upon by the Inams Commissioner at the time of confirming the inam under

Ex. B-4. The said reasoning was confirmed by the lower appellate Court on the first occasion. However, when the matter came up before Parthasarathi, J. the learned Judge was of the opinion that the Patta Nakalu contained in Ex. A-5 must have been extracted from the original patta and not from a copy and that therefore, it is admissible. The learned Judge further observed:

"It appears to have been prepared under the instructions of the Collector. A perusal of the document shows that a comprehensive inquiry in respect of lands situated in the village, the names of the parties in possession of the lands situate therein, the root of their title and the facts and circumstances relating to the original grant was made. The particulars elicited as a result of the enquiry are found recorded in the document. The name of the grantor and the grantee and the extent of the land that was included in the grant, are mentioned. It embodies the statement given by the Inamdar which shows that the particulars were elicited from him by interrogation of the person who conducted the inquiry. In answer to the inquiry, it was stated that a patta was available. At the end of the document is found an entry under the head 'copy of patta.....' The expression 'patta nakalu' can only mean that what is embodied under that heading was copy from the original patta..... In other words, the expression 'patta nakalu' implies that the original was available and a copy had been made..... It does not state that it is a copy of the patta nakalu." On that reasoning, it was held that the patta nakalu in Ex. A-5 is admissible in evidence. It was then observed:

"It is obvious that if the effect of Ex. A-5 is to be taken into account, its evidentiary value has to be weighed against the other features in the case. Though the Subordinate Judge observed that Ex. A-5 is really conclusive in favour of the plaintiffs, in my opinion, it would not be just to rest the conclusion in the second appeal entirely on the obiter dictum of the Subordinate Judge. It is, therefore, necessary to remand these appeals to the lower appellate court for fresh disposal in the light of the observations made therein."

7. When the matter went back to the lower appellate Court, it referred to the observations of Parthasarathi, J. and then proceeded to hold that Ex. A-5 was much anterior to Ex. B-4 and Ex. B-5. It relied upon the decision in Sherfuddin v.

Kairoon Bi (AIR 1944 Mad 468) to the effect that "Wallace's register and Traverse's register which were prepared earlier to the Inam Fair Register, had to be preferred over the Inam Fair Register and then held that inasmuch as Ex. A-5 is anterior to Inam Fair Register, it prevails over the latter. Then the Patta Nakalu was referred to and since it was already held to be admissible in evidence by Parthasarathi, J. it was acted upon and on that basis held that the Inam consists of two separate grants relating to the same village or Agraharam and for that reason, the suit lands are not situated within an estate within the meaning of Section 3 (2) (d) of the Act and allowed the appeal. The defendants then filed S. A. No. 668 of 1971. Madhava Reddy, J. held that though the Inam Fair Register is entitled to great evidentiary value, yet he held, following the decision in Sherfuddin v. Kairoon Bi (supra) and Veerayya v. Punnamma ((1958) 2 Andh WR 134) that anterior documents of undoubted authenticity have to be preferred over the entries in the Inam Fair Register. He then held:

"Reliance can be placed on Ex. A-5, Hageeqat account of 1818, prepared much earlier and the authenticity of which cannot now be questioned in this second appeal having regard to the prior judgment of this court in S. A. No. 176/64, notwithstanding the fact that it does not wholly tally with the entries in Exs. B-4 and B-5 Inam Fair Register and Inam Statement of 1860 respectively." Then the learned Judge referred to the contents of the Patta Nakalu contained in Ex. A-5 and held that the suit lands are not situated within an estate and accordingly dismissed the Second Appeal.

8. Mr. N. V. Ranganadham, the learned counsel for the defendants-appellants, raised two contentions namely (1) that the judgment and the reasoning of Parthasarathi, J. in S. A. No. 176/1964 (Andh. Pra.) is not correct and that he is entitled to question its correctness in this Letters Patent Appeal since Section 105 (2) C.P.C. has no application and does not govern the appeals under Clause 15 of the Letters Patent. He relied upon the decision in Satyadhyan v. Smt. Deorajin Debi (AIR 1960 SC 941); Dewaji v. Ganpatlal (AIR 1969 SC 560) and Srinivasa Varadachariar v. Runganayaki Ammal (AIR 1929 Mad 349) in support of his contention, and (2) that Ex. A-5 is not an authentic document and that Parthasarathi, J. has

not pronounced upon its authenticity but only upon its admissibility. He submitted that the lower appellate court failed to give any finding in regard to its authenticity, while Madhava Reddy, J. has assumed that the authenticity of the said document was concluded by the judgment of Parthasarathi, J. while in fact it is not so. According to him, if Ex. A-5 is excluded from consideration, then the defendants are bound to succeed having regard to the contents of Exs. B-4 and B-5. On the other hand, Mr. T. Ramachandra Rao, the learned counsel for the respondents-plaintiffs, contended that the power of the appellate Court under Clause 15 being co-extensive with the power of the second appellate court, the judgment of Parthasarathi, J. cannot be questioned herein and further that in any event, the said reasoning is correct and unexceptionable. He relied upon the decisions in *Viswapathi v. Venkata Krishna* (AIR 1963 Andh Pra 9); *Sattemma v. Vishnu Murthy* (AIR 1964 Andh Pra 162) (FB); *Nainsingh v. Koonwarjee* (AIR 1970 SC 997) and *Jagannath Ram v. Thakur Prasad* (AIR 1963 Pat 165) in support of his submission regarding the binding nature of the judgment of Parthasarathi, J. We shall first deal with the first submission of Sri N. V. Ranganadham.

9. According to sub-section (1) of Section 105, C.P.C. no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction except where it is expressly so provided, but where a decree is appealed from, any error, defect or irregularity in the order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Sub-sec. (2) then states that notwithstanding anything contained in sub-section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. While Mr. Ranganadham contends that the order of remand passed by Parthasarathi, J. is not an order from which an appeal lies because under Clause 15, the aggrieved party 'had no right of appeal' against the said judgment, since the appeal against the said order depended upon the discretion of the said learned Judge granting a declaration that the case is a fit one for appeal, the bar contained in sub-section (2) of Section 105 cannot operate in this Letters Patent Appeal, it is contended by Mr. T. Rama-

chandra Rao that having regard to the language of Clause 15 of the Letters Patent, the order of Parthasarathi, J. must be deemed to be appealable though the appeal is conditional upon the learned Judge granting the said declaration. He points out that the defendants did not even ask for leave before the said learned Judge. He submits that Section 105 (2) applies to the Letters Patent Appeals which are in the nature of internal Appeals in the same court and that the same limitations as are applicable in the Second Appeal also apply herein.

10. In *Srinivasa Varadachariar v. Runganayaki Ammal* (AIR 1929 Mad 349) (supra) it was held that Clause 15 of the Letters Patent is not controlled by Section 105, C.P.C. and that it is open to an appellant, though he did not appeal against the order of remand, to attack it in the appeal against the final decree. That was a case where an order of remand was made by the High Court itself on an earlier occasion by a learned single Judge of the High Court. Though there is no elaborate discussion in the said decision, we are of the opinion that it lays down the correct principle. In *Satyadhyay v. Smt. Deorajin Debi* (AIR 1960 SC 941) (supra) it was held that:

"The order of remand was an interlocutory order which did not terminate the proceedings and so the correctness whereof can be challenged in an appeal from the final order."

Of course, it was a case where the correctness of an earlier order of remand made by the High Court was allowed to be canvassed before the Supreme Court in the appeal against the final orders of the High Court. But we do not see any distinction in principle between the Supreme Court sitting in appeal and a Bench of the High Court sitting in appeal under Clause 15. Both are appellate Courts. Mr. T. Ramachandra Rao, however, argues that Section 105, C.P.C. has no application to the Supreme Court, whereas it applies to the High Court. We are not able to appreciate it. Section 105, C.P.C. is applicable to Supreme Court inasmuch as it does to High Court. The same principle was followed in *Budhilal v. Jagannadhas* (AIR 1963 Madh Pra 344) where the aforesaid Supreme Court decision was referred to and it was held that inasmuch as no appeal lies from an order of remand under Clause 10 of the Letters Patent of Nagpur High Court (corresponding to our Clause 15), the correctness of such an order can be gone into in the appeal

against the final order. *Dewaji v. Ganpatlal* (AIR 1969 SC 560) (supra) has also been cited by the learned counsel for the appellants in support of his contention. It has been held therein that the correctness of an interlocutory order made by a single Judge can be canvassed in the Letters Patent Appeal preferred against the final judgment in the said appeal. However, that was a case where the interlocutory order referred to was merely an order calling for a finding while keeping the appeal on the file of the High Court, but inasmuch as the earlier Supreme Court decision has held an order of remand to be an interlocutory order, the principle of this decision also can be taken to support the appellants' contention. *Viswathathi v. Venkata Krishna* (AIR 1963 Andh Pra 9) (supra) cited by the learned counsel for the respondents merely points out the distinction between Clause 15 and Section 109, C.P.C./Article 133 of the Constitution namely that while under the latter provisions, there must be a final order of the High Court for maintaining an application for leave to appeal to the Supreme Court, under Clause 15 the order appealed against need not be a final order. We do not see the relevancy of this decision. The next decision cited on behalf of the respondents is in *Sattemma v. Vishnu Murthy* (AIR 1964 Andh Pra 162) (FB) (supra). The said decision declares that a decision refusing to review an order by a learned Single Judge is a judgment within the meaning of Clause 15 and that the right thereunder is not affected by Order 47, Rule 1 or Order 43, Rule 1 or any other provisions of the Civil Procedure Code which restrict the right of appeal. The said decision is equally beside the point. Reliance was then placed on the decision in *Nainsingh v. Koonwarjee* (AIR 1970 SC 997) (supra). But that is a case in which the order of remand in question was made by the Lower Appellate Court against which a right of appeal is conferred under Order 43, Rule 1 and hence it was held that where the aggrieved party against an order of remand does not choose to file an appeal, he cannot question its correctness in an appeal preferred against the subsequent final orders of the lower appellate Court. No exception can be taken to the said principle, but it in no way advances the respondent's contention. Lastly we may refer to the decision in *Jagarnath Ram v. Thakur Prasad* (AIR 1963 Pat 165) (supra) which clearly supports the contention of the respondents' counsel. The reasoning of

the said decision is that inasmuch as an order of remand made by a learned Single Judge of a High Court is appealable under Clause 15 the party not availing of the said right cannot question its correctness later on. We cannot however agree with the said reasoning. We have already pointed out that clause 15 does not confer any right of appeal on an aggrieved party in a Second Appeal. The appeal depends upon a declaration made by the learned Judge deciding the second appeal and not upon the volition of the aggrieved party. Such a declaration is within the exclusive discretion of the Judge and does not necessarily depend upon a request to that effect by a party. Even in the absence of a request, the Judge may make a declaration and then it is open to the party to either avail of it or not. We are therefore of the opinion that it is open to the appellants herein to canvass the correctness of the judgment of Parthasarathi, J. in S. A. No. 176 of 1964 (Andh Pra).

11. We may now take up the second submission of Mr. N. V. Ranganatham. Having held that we are entitled to go into the correctness of the said judgment, we will now examine the observations of the learned Judge with respect to Ex. A-5. It is no doubt true as contended on behalf of the respondents that it is coming from the custody of the Collector, but that by itself is no proof of its authenticity or that it was prepared in 1818 as it purports to have been. It appears that the observation of the learned Judge that "it appears to have been prepared under the instructions of the Collector" is a result of certain confusion. The document nowhere shows that it has been prepared under the instructions of the Collector or any other Revenue Officer. However, the certified copy contains a signature of some officer dated 19-1-1951, 'for Collector, Visakhapatnam'. It is found below the endorsement 'true copy' and it is a part of the certificate to be appended by a public authority while granting a certified copy. The said signature of the officer signing for the Collector is not a part of the original document. Further, it is not shown as to who prepared the said 'Yadast' Bogatta and for what purpose. As pointed out by us hereinbefore, it is not prepared under any law or under any other orders or instructions of any authority. Merely because the said document purports to have been prepared in 1818, we cannot automatically take it for granted that it was really so prepared. It is not a public document. Hence

there is no presumption regarding the correctness of its contents. Any number of private documents may come from the custody of a public official, but merely on that account, they or their contents, cannot be held to be true or authentic. Even in the oral evidence, no effort has been made to explain the circumstances or the occasion for preparing the said document. In view of the fact that it was not referred to at the time of the I.F.R. enquiry and that the name of the grantor and the original grantee is mentioned as 'not known' at the said enquiry though Ex. A-5 clearly refers to both the particulars, we are not prepared to accept Ex. A-5 as authentic and that it was prepared in 1818. It is conceded even by Mr. T. Ramachandra Rao, the learned counsel for the respondents, that the assumption of Madhava Reddy, J. that the authenticity of Ex. A-5 cannot be questioned having regard to the prior judgment of Parthasarathi, J. is not correct. Parthasarathi, J. did not give any finding regarding its authenticity, but his discussion mainly pertained to the realm of its relevancy. In any event, for the reasons given above, we are not prepared to accept the said document to be an authentic one. We may also note that we are equally unconvinced about the reasoning of Parthasarathi, J. with respect to the meaning of the expression 'Patta Nakalu' occurring in Ex. A-5. We are not prepared to hold on the basis of the contents of the said document that the original patta was produced before the authority preparing the said 'Yadast' and that the extract found therein is a copy made from the original. Even the so-called 'Patta Nakalu' referred to in the said document is with respect to 2½ vritties and is not of the original grant. If the original patta was available (whether with respect to the grant of 16 vritties or with respect to the subsequent grant of 2½ vritties), it is unlikely that it would not have been produced by any of the concerned parties at the time of the enquiry preceding the preparation of the Inam Fair Register.

12. At this stage, we may refer to the decisions in Sherfuddin v. Kairoon Bi (AIR 1944 Mad 468) (supra) and Veerayya v. Punnamma (1958-2 Andh WR 134) (supra). Sherfuddin v. Kairoon Bi (supra) was a case where the anterior public documents namely the Wallace's register and the Traverse's register prepared by the Government officials in discharge of their official duties were preferred over the entries in the Inam Fair Register. The

authenticity of the said anterior record was unquestioned and in those circumstances, it was held that the entries in the Inam Fair Register are not conclusive and that the said anterior record has to prevail. Similarly, in the case reported in Veerayya v. Punnamma Ram's register prepared in accordance with Section 15 of Regulation XXXI of 1802 was preferred over the entries in the Inam Fair Register. It was found in that case that the said Ram's Register was prepared in accordance with the said Regulation and after a proper and full enquiry by the concerned Collector in 1768, and that its authenticity and reliability being unquestionable, it was preferred over the entries in the Inam Fair Register. But inasmuch as we are not prepared to accept Ex. A-5 as authentic, the principle of the said decisions can have no relevance herein. Lastly, we may refer to the decision reported in Haradas Achariya v. Secy. of State (AIR 1917 PC 86) cited by the learned counsel for the respondents upon the evidentiary value of 'Hakikat Chowhuddibandi' papers. The 'Hakikat Chowhuddibandi' papers therein were boundary papers prepared by the owners of the estates and sent on to the Government in pursuance of a Government request to afford the Government satisfactory information with respect to various particulars of the villages within their boundaries. But the same cannot be said with respect to either Ex. A-5 or the 'Hakikat' statement found therein. For the above reasons we hold that the suit lands are situated within an estate within the meaning of Section 3 (2) (d) of the Act.

13. We therefore allow the Letters Patent Appeal and dismiss the suit. There shall be no order as to costs in the circumstances of the case.

Appeal allowed.

AIR 1976 ANDHRA PRADESH 301
SAMBASIVA RAO, ACTG. C. J. AND
MUKTADAR, J.

V. T. V. Rangacharyulu and another,
Appellants v. Sriram Gnaneswar, Respondent.

Letters Patent Appeal No. 168 of 1974.
D/- 1-12-1975.*

(A) Letters Patent (Madras as applied to Andhra Pradesh), Clause 15 — "Judgment" — Orders of Single Judge of

*(Against order of High Court, in C. M. P. No. 1948 of 1973, D/- 13-9-1974 (A. P.).)

ET/FT/B608/76/MBR

High Court condoning delay in filing application to set aside abatement of appeal is judgment and hence appealable. AIR 1961 Punj 424, Dissented from.

Where a valuable right and a correlative liability are determined in an adjudication by a Single Judge of the High Court, 'On an independent proceeding which is ancillary to the suit', such an adjudication would be a 'judgment' within the meaning of Cl. 15. In view of this, the order of a Single Judge condoning the delay in filing the application to set aside the abatement determines the valuable right of a party. Hence the order is a judgment within the meaning of Cl. 15 against which the Letters Patent appeal is maintainable. AIR 1916 Mad 869; (1912) ILR 35 Mad 1; AIR 1968 Mad 1 (FB) and AIR 1971 SC 2337, Rel. on; AIR 1961 Punj 424, Dissented from. (Para 11)

(B) Limitation Act (1963), S. 5 — Condonation of delay — Day to day delay must be explained. C. M. P. No. 1948 of 1973, D/- 13-9-1974 (A. P.), Reversed. (Para 13)

Cases Referred: Chronological Paras

AIR 1971 SC 2337 = (1971) 1 SCR 783	6
AIR 1968 Mad 1 = (1967) 2 Mad LJ 1 (FB)	6
AIR 1961 Punj 424 = ILR (1960) 2 Punj 386	6
AIR 1953 SC 198 = 1953 SCR 1159	9
AIR 1935 Rang 267 = 13 Rang 457 (FB)	7
AIR 1933 Mad 417 = ILR 56 Mad 689	8
AIR 1916 Mad 869 = 2 Mad LW 948	6
(1912) ILR 35 Mad 1 = 21 Mad LJ 1	6
(1866-68) 3 Mad HCR 384	7

The Advocate-General and A. Lakshmanachar, for Appellants; Upendralal Wagharey, for Respondent.

MUKTADAR, J.:—The relevant facts necessary for the purpose of this appeal are these:

Aggrieved by the judgment and decree dated 4-10-1967 in O. S. No. 78/64 on the file of the Fourth Additional Judge, City Civil Court, Hyderabad, the plaintiff preferred an appeal before a single Judge of this court. During the pendency of the appeal, the defendant, Ramanuja Swamy died on 25-9-68. On 14-11-1968 C. M. P. No. 20322/68 was filed to bring his wife, Tayaramma on record as his sole legal representative. That C. M. P. came up for orders before the Court with regard to non-payment of batta, and on 1-10-1969 it was ordered that if batta was

not paid within one week, the C. M. P. would stand dismissed. The order not being complied with, the said C. M. P. stood dismissed on 8-10-1969. However, it was again restored on 23-1-1970. Once again, the said C.M.P. was dismissed by Sri-ramulu, J. on 11-8-1970 as the order of the Court was not complied with even by that date. While dismissing the C.M.P. the learned Judge also dismissed the appeal. On 1-1-1970, plaintiff in the suit who was the appellant before the single Judge filed a petition (C. M. P. No. 8678/70) to implead Rangachary and Chandraiah who are appellants in this appeal as additional parties under Order 1, Rule 10, C.P.C. It came up for orders before the Court. A. D. V. Reddy, J. dismissed this petition for default on 2-3-1971. Then another C. M. P. bearing No. 3101/71 was filed on 18-4-1971 to restore C. M. P. No. 8678/70. In this petition, Tayaramma was made a party but not Rangachary and Chandraiah, another C. M. P. bearing No. 4488/71 was filed by the respondent to condone the delay in filing C. M. P. No. 2101 of 1971. Both these C. M. Ps. bearing 2101/71 and 4488/71 were again dismissed for default on 17-9-1971. The respondent then filed C. M. P. No. 4540/71 on 17-9-71 to restore C. M. P. No. 2101/71 which was a C. M. P. to restore C. M. P. No. 8678/70. The respondent also filed C. M. P. No. 4577/71 on the same date to restore C. M. P. No. 4488/71 which was a petition to condone the delay in filing C. M. P. No. 2101/71. During the pendency of these two C.M.Ps. Tayaramma who was made a party to C. M. P. No. 2101/71 died on 23-3-1972. The respondent was directed on 24-3-1972 to take the necessary steps, but no steps were taken within the time, and consequently, C. M. Ps. Nos. 4540/71 and 4577/71 got abated.

2. Once again the respondent filed C.M.P. No. 6734/72 on 12-7-1972 for setting aside the abatement of C.M.P. No. 4577/71 which was a petition filed to restore C.M.P. No. 4488/71. The respondent also filed C.M.P. No. 6735/72 to implead the legal representatives of Tayaramma in C.M.P. No. 4577/71. Another C.M.P. bearing No. 6737/72 was filed by the respondent to set aside the abatement in C.M.P. No. 4540/71 which was a petition to restore C.M.P. No. 2101/71. A fourth C.M.P. bearing No. 6738/72 was also filed for impleading the legal representatives of Tayaramma in C.M.P. No. 4540/71 which was a petition to restore C.M.P. No. 2101/71. All these four C.M.Ps. came up for hearing before A. D. V. Reddy, J. on

29-8-72. The learned Judge passed the following order:

"These are all petitions filed after the disposal of the main appeal C. C. C. A. No. 109 of 1968 which was dismissed on 11-8-1970; they are therefore not even maintainable. It is stated by Mr. Upendralal Waghray appearing for the appellants that the appeal was disposed of without the knowledge of his clients and that he is going to file a petition to have the appeal restored. If the appeal is restored it is then open to him to take advantage of whatever legal consequences that follow on such restoration with regard to the petitions. These petitions are therefore dismissed with costs. One set."

3. It is to be noted that until 22-8-1972 there was no petition on behalf of the respondent to set aside the abatement and dismissal not only on C.M.P. No. 20322/68 but also of the main appeal, C. C. C. A. No. 109/68. For the first time after C.M.P. No. 20322/68 and C. C. C. A. No. 109/68 were dismissed on 11-8-1970, the respondent filed C.M.P. No. 1948/73 to condone the delay of 679 days on 18-10-1972 in filing the C.M.P. to set aside the abatement of the appeal. The respondent also filed C.M.P. (S.R.) No. 71749/72 on 21-10-1972 to condone the delay in filing the petition to set aside the abatement. The respondent also filed C.M.P. (S.R.) No. 80915/73 to condone the delay in filing the restoration petition dismissed on 11-8-1970. This C.M.P. was registered as C.M.P. No. 8119/74 on 18-9-1974. The respondent further filed C.M.P. (S.R.) No. 7416/73 under Order 22, Rule 102 and Section 151, C.P.C. on 7-2-1973 to add Rangachary and Chandraiah who are the appellants before us as the legal representatives of Tayaramma on the ground that they are intermediaries. A further petition bearing C.M.P. (S.R.) No. 7417 of 1973 was also filed on 7-2-1973 to condone the delay in filing the petition to bring the legal representatives on record. C.M.P. (S.R.) No. 7417/73 and C.M.P. (S.R.) No. 7416/73 were endorsed as not necessary on 31-3-1973. The respondent also filed C.M.P. (S.R.) No. 84112/73 on 13-12-1973 to set aside the abatement caused by the death of Tayaramma. In the affidavit filed in support of C.M.P. No. 1948/73 dated 21-10-1972 which was a petition to condone the delay of 679 days, the respondent herein alleged:

"The petitioner's counsel or the petitioner did not know of the dismissal of the appeal till some other petitions came

up for hearing before the Hon'ble Mr. Justice A. D. V. Reddy on the second of August, 1972. After coming to know about the order of the dismissal and ascertaining the necessary facts this application is being filed."

4. This allegation of the respondent in his affidavit is in order to show that he had no knowledge of the dismissal of C.M.P. No. 20322/68 and consequently, the abatement and dismissal of the main appeal until 22-8-1972. This affidavit was filed on 21-10-1972. The affidavit is completely silent with regard to the explanation concerning the day-to-day delay from 22-8-1972 until the filing of this affidavit. The only ground stated in the affidavit is:

"My adoptive father is suffering from cancer and has been advised to go to Bombay. I am in Bombay since more than three weeks along with my father. This application could not be filed earlier because of this."

5. From this, it is evident that the respondent has only explained the delay of three weeks prior to the filing of the affidavit but even according to the affidavit, he had knowledge of the dismissal of C.M.P. No. 20322/68, and consequently, the abatement and dismissal of the main appeal on 22-8-1972. Nothing is forthcoming in this affidavit explaining as to why the respondent herein was not able to file C.M.P. No. 1948/73 from 22-8-1972 upto three weeks prior to the filing of the petition bearing C.M.P. No. 1948/73. Sri-ramulu, J. on the basis of this affidavit considered that the delay ought to be condoned, and hence he allowed this petition to condone the delay of 679 days. Aggrieved by the order dated 13-9-1974 of Sriramulu, J. in C.M.P. No. 1948/73, the respondent herein has preferred this appeal.

6. Mr. Waghray the learned Advocate for the respondent has raised a preliminary point with regard to the maintainability of this appeal. According to him, the order of a single Judge of this court in condoning the delay to set aside abatement of the appeal is not a judgment within the meaning of Cl. 15 of the Letters Patent and therefore this appeal is not maintainable. In support of his contention he cites *Chando Devi v. Delhi Municipality*, AIR 1961 Punj 424. What Mr. Waghray contends is that the order of Sriramulu J. did not determine the rights or liabilities of the parties in the suit, and, therefore, it is not a judgment

within the meaning of Cl. 15 of the Letters Patent. On the other hand, the learned Advocate General contends that the submission of Mr. Waghray is in accordance with the narrow interpretation placed by some courts in India; and that has not been accepted by the Madras High Court nor the Supreme Court. According to the learned Advocate-General, it is now settled that the term 'judgment' appearing in Cl. 15 of the Letters Patent cannot be confined to the test whether it determines the rights or liabilities of the parties in the suit but the term 'judgment' has been given an extended meaning to include the determination of a valuable right in the party to the suit or proceeding. In support of this contention, he has cited *Kyroon Bee v. Administrator-General of Madras*, (1915) 2 Mad LW 948 = (AIR 1916 Mad 869). *Tuljaram Row v. Alagappa Chettiar*, (1912) ILR 35 Mad 1, *Palaniappa v. Krishnamurthy*, AIR 1968 Mad 1 (FB) and *Radhy Shyam v. Shyam Behari*, AIR 1971 SC 2337.

7. We do not consider it necessary to enter into the historical aspect of the various interpretations given by the various courts in this country with regard to the interpretation of the expression 'judgment' contained in Cl. 15 of the Letters Patent. Suffice it to say that on the one extreme is the view as propounded in *Dayabhai Jiwandass v. Murugappa Chettiar*, AIR 1935 Rang 267 (FB) wherein it was held that the word 'judgment' in the Letters Patent 'means and is a decree in a suit by which the rights of the parties at issue in the suit are determined' and at the other extreme is the view propounded by Bittleton J. in *Desouza v. Coles* (1866-68) 3 Mad HCR 384 wherein the learned Judge observed that the word 'judgment' in Cl. 15 of the Letters Patent must be held to have a more general meaning of any decision or determination affecting the rights or the interest of any suitor or the applicant. In between this 'broad stream', there are several judgments of the Madras High Court wherein a more extended view than the one adopted in the Rangoon case has been laid down and which are binding on us. In *Tuljaram Row's* case which is a decision of a Full Bench of the Madras High Court, Sir Arnold White, C. J. observed:

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be

the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

8. Following *Tuljaram Row's* case, a Bench of the Madras High Court in *Kyroon Bee's* case held that an order passed by a single Judge of the High Court sitting on the Original Side, setting aside the abatement of the suit is a judgment within the meaning of Cl. 15 of the Letters Patent and is appealable in spite of the fact that it was 'an order on an independent proceeding which is ancillary to the suit'. However, in *Appaji Reddiar v. Thailammal*, ILR 56 Mad 689 = (AIR 1933 Mad 417) another Bench of the Madras High Court held that an order of the Single Judge directing the respondent in appeal to be brought on record as the legal representatives of the deceased appellant was not an appealable order because it has the effect of allowing litigation which was proceeding to further proceed to a final adjudication. *Beasley, C. J.* distinguished *Kyroon Bee's* case by observing that in that case the suit had already abated, and the question was whether an order setting aside abatement was an order which was appealable or not. The learned Chief Justice further observed:

"The reason for deciding that the order was appealable was because by reason of the abatement of the appeal respondent had acquired a valuable right and that the order setting aside the abatement had the effect of depriving the respondent of that valuable right."

9. Lastly, another Full Bench of the Madras High Court in *Palaniappa's* case further extended the view with regard to the word 'judgment' appearing in Cl. 15 of the Letters Patent to include the determination of a valuable right and a correlative liability between the parties to the enquiry under Order 33, C.P.C. Relying upon *Asrumati Devi v. Rupendra Deb*, AIR 1953 SC 198, four tests were formulated to decide whether an adjudication of a Single Judge is a 'judgment' under Cl. 15 of the Letters Patent. They

were: (1) Whether the order or judgment of the single Judge terminates the suit or proceedings? (2) Whether it affects the merits of the controversy between the parties in the suit itself? (3) Whether it determines some right or liability as between the two parties? (4) Whether, apart from the actual words in the lis or proceeding, a 'conceivable order' or an order to the contrary effect would have disposed of the suit and would come within the definition of 'judgment'. Anantanarayanan, C. J. observed:

"As I have earlier stressed, just as a right to sue in forma pauperis is very valuable right conferred upon a litigant, who has a lis but no means to pay the court-fee, the liability to be sued in the Courts of the land, by a litigant who claims that he must be permitted to do so without paying the court-fee, is a very appreciable liability or obligation. It is for this reason that notice is enjoined upon the defendant who is then permitted to show cause against the grant of leave, upon any of the grounds set forth in Order XXXIII, Rule 5, C.P.C.

Such a right is, indisputably, a very valuable right in that proceeding and it is in my view, a perfectly legitimate argument for a defendant, that he will not be sued in the Courts of the land, by a plaintiff who may take advantage of the provisions in forma pauperis to bring forward an unconscionable, grossly exaggerated or frivolous claim of swollen magnitude, without himself (defendant) being fully heard why the plaintiff should not be granted this indulgence. If the decision is against the defendant, a valuable right of the defendant is clearly affected. Further, and this is very important, several of the grounds upon which the defendant can contest the claim, such as, the possession of means by the plaintiff at that time, the ground of a prior fraudulent conveyance, or the ground of an agreement in champerty, will no longer be available to the defendant, at any further stages of the suit and appeal; they are irretrievably decided against him by the order of the learned Single Judge."

10. In Asrumati Devi's case, in view of the contention involved therein, the Supreme Court did not consider it necessary to formulate a definition of the word 'judgment' as appearing in Cl. 15 of the Letters Patent. It, however, touched upon the various views propounded by

the Rangoon, Calcutta and Madras High Courts without commenting as to the propriety or otherwise of the said rulings.

11. In Radhy Shyam's case, the Supreme Court held that an order in a proceeding under Order 21, Rule 90, C.P.C. was a judgment inasmuch as such a proceeding raised a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction sale. From the above rulings, some of which are binding on us and some are of great persuasive authority, it is manifest that where a valuable right and a correlative liability are determined in an adjudication by a single Judge of the High Court, "On an independent proceeding which is ancillary to the suit," such an adjudication would be a 'judgment' within the meaning of Cl. 15 of the Letters Patent. Applying the principle to the facts of the case on hand, it can safely be held that the adjudication of Sriramulu, J. in condoning the delay in filing the application to set aside the abatement certainly determines the valuable right of the respondent in the first appeal. Hence, we hold that the order of Sriramulu, J. against which this appeal arises is a judgment within the meaning of Cl. 15 of the Letters Patent and therefore, this appeal is maintainable. The contention of Mr. Waghray that an adjudication of a single Judge in setting aside the abatement could be a judgment but not an adjudication condoning the delay in filing an application to set aside abatement cannot be countenanced for the reason that just as there is a valuable right in a party to have the application to set aside the abatement dismissed, so also, there is a valuable right in the party to see that the delay in filing the application to set aside abatement should not be condoned. When an adjudication is made on such a right, we fail to appreciate why such an adjudication should not be termed as 'judgment' within the meaning of Cl. 15 of the Letters Patent. With respect, we are not in agreement with the ruling in Chando Devi's case relied upon by Mr. Waghray as the principle laid down in that ruling adheres to the narrow view as propounded by the Rangoon High Court, in Dayabhai Jawandas's case.

12. In so far as the merits of the appeal are concerned, the learned Advocate-General contends that C. M. P. No.

20322/68 which was a petition to bring the wife of the sole respondent, Ramanuja Swamy on record as his legal representative was dismissed on 11-8-1970 and on the dismissal of that C.M.P. the main appeal also had abated and dismissed on that day. From then onwards, the respondent herein instead of filing any petition to restore C. M. P. No. 20322/68 which was dismissed and also to restore the main appeal which was dismissed as abated, filed C. M. P. No. 8678/70 to add the appellants herein as additional parties to the appeal, and when C. M. P. No. 8678/70 was dismissed for default on 2-3-1971, all the petitions stated above were filed with regard to the ultimate restoration of C. M. P. No. 8678/70 and it was for the first time on 21-10-1972 that C. M. P. No. 1948/73 was filed for condoning the delay of 679 days in filing the petition to restore C. M. P. 20322/68. In the affidavit filed in support of C. M. P. No. 1948/73 the respondent gives 22-8-1972 as the date of knowledge but the affidavit dated 18-10-1972 does not at all explain the day-to-day delay from 22-8-1972 onwards. On the other hand, the affidavit only discloses or explains the delay only for three weeks immediately prior to the filing of the C. M. P. No. 1948/73 to the effect that the respondent herein was in Bombay attending on his father's illness three weeks before the filing of the affidavit. In these circumstances the learned Advocate-General submits that the learned Judge was incorrect in condoning the delay in filing C. M. P. No. 1948/73. We are of the opinion that the contention advanced by the learned Advocate-General has to be acceded to. We have perused the affidavit filed in support of C. M. P. No. 1948/73 and find that the petitioner had miserably failed to explain the delay from 22-8-1972 until three weeks immediately prior to filing of C. M. P. No. 1948/73.

13. In these circumstances, we have no other alternative but to allow this appeal and set aside the order of Sri-ramulu J. condoning the delay of 679 days. Finally we hold that the respondent had not explained the day-to-day delay and, therefore, C. M. P. No. 1948 of 1973 cannot be allowed, and it is accordingly dismissed. Hence the appeal is allowed with costs.

Appeal allowed.

AIR 1976 ANDHRA PRADESH 306

ALLADI KUPPUSWAMI AND
JEEVAN REDDY, JJ.

Jonnala Veerareddy, Appellant v.
Marreddy Seethamma, Respondent.

A. A. O. No. 217 of 1973, D/- 18-11-1975.*

(A) Succession Act (1925), S. 222 —
Grant of probate to executor — Executor
according to tenor of Will — Who is.

The ordinary method of appointing an executor for a testator is to nominate a person in the body of his will by the express designation of 'executor'. Even though a testator may fail to nominate a person on express terms to be his executor, yet if upon a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of the executor such an appointment is sufficient to constitute that person an executor. The person so appointed is called 'executor according to the tenor'. (Para 4)

Where the provisions of the will clearly point to the conclusion that the petitioner had general power to receive and pay what was due to and from the estate and a general power of administration was conferred on the petitioner, it could be held that the petitioner was the executrix according to the tenor of the will. The mere fact that some items were directly bequeathed to certain legatees and she had no duties to perform as far as those legatees are concerned, does not make her any the less an executrix. (Para 7)

Cases Referred: Chronological Paras

AIR 1964 Ker 258	7
AIR 1931 Mad 343 = 60 Mad LJ 264	6
1902 PD 114	6
(1897) ILR 20 Mad 467	7

C. Padmanabha Reddy, for Appellant;
P. L. N. Sarma, for Respondent.

ALLADI KUPPUSWAMI, J.:— The only question for consideration in this appeal is whether the respondent herein is an executrix entitled to probate of the will executed by one Jonnala Ramireddy. She filed an application before the District Court, Guntur for the issue of a probate. This was opposed on various grounds only one of which is necessary to set out

*(Against order of 1st Addl. Dist. J., Guntur, in O. P. No. 135 of 1964, D/- 13-9-1972.)

for the purpose of this appeal. The third respondent in the petition contended that she was not appointed an executrix under the will and was therefore not entitled to the issue of a probate. This contention was negatived and the petition was allowed with costs. The third respondent has preferred this appeal.

2. The array of parties is referred to as in the court below:

The testator, Rami Reddy died leaving a brother, the second respondent and two sisters, the petitioner and the eleventh respondent. Respondents 3 to 5 are the sons of the second respondent. The first respondent is the testator's widow. The sixth respondent is the son of the petitioner and respondents 7 to 10 are his children. The third respondent who is the natural son of the second defendant was also the adopted son of Rami Reddy. Under the will, Rami Reddy referred to the fact that he had taken the third respondent in adoption. He also stated that he had brought up one Shivanagendramma, the daughter of his nephew Ramakrishna Reddy. He directed that his elder sister Seethamma (the petitioner) should get the marriage of the adopted son (respondent 3) and Shivanagendramma performed, incurring expenses for the marriage from out of the income of the property. He bequeathed the entire A Schedule property and all his moveables in favour of his adopted son (respondent 3) and Shivanagendramma. He also bequeathed his B Schedule property in favour of his wife (respondent 1) with life interest and after her death to be enjoyed by his adopted son and his wife. The C Schedule property was bequeathed to his brother's son the fourth respondent. As the fourth respondent was a minor, the C Schedule property was directed to be managed on his behalf by the testator's brother-in-law, Korapolu Venkata Reddy and after the legatee attained majority the property should be handed over to him with the income. His sister, Seethamma, the petitioner should pay Rupees 1,116 to his brother's daughter Subbamma. He bequeathed D Schedule property in favour of his sister's son Ramakrishna Reddy (respondent 6) and E Schedule property to Ramakrishna Reddy's son Shivaranga Reddy (respondent 7) and F Schedule property to Shivasatyanarayana Reddy (respondent 8). He directed his sister Seethamma, the petitioner, to purchase Ac. 2-00 of dry land and give it to Shivavaraprasad Reddy, (respondent 9)

The petitioner should also collect all the amounts due to him under the mortgages, promissory notes and also the Fixed Deposit of Rs. 25,000 in the Andhra Bank. She should give a sum of Rs. 1,500 to Korrapolu Venkata Reddy for the purpose of bullock cart and other cultivation expenses, out of the income from the estate. She should also give five hundred rupees worth of jewels to his niece Saraswathi. He gave a life estate in G Schedule property to his sister, Narayanamma (respondent 11) with vested remainder to his brother's son Ranga Reddy (respondent 4). In a latter part of the will, the testator says that his sister is entitled to purchase Ac. 2.00 to be given to R-9 and Ac. 2.00 to be taken by herself at any place of her choice. The will concludes by saying that the petitioner should manage his property, maintain the accounts accurately and then hand over the property together with the entire income to his adopted son (R-3) as soon as he attained majority.

3. The question for consideration is whether having regard to terms of the above will it can be said that the petitioner is appointed as executrix.

4. The ordinary method of appointing an executor for a testator is to nominate a person in the body of his will by the express designation of 'executor'. Even though a testator may fail to nominate a person on express terms to be his 'executor', yet if upon a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of the executor such an appointment is sufficient to constitute that person an executor. The person so appointed is called executor according to the tenor. In this case, the petitioner has not been appointed by express designation of 'executrix' under the will. But it is contended that she is an 'executrix' according to the tenor of the will, a contention which has been accepted by the court below. We are also inclined to agree with the view of the lower court.

5. The relevant terms of the will have already been set out. As far as the petitioner is concerned, it is found that she is entitled to collect the outstandings of the testator. Certain items of the property mentioned in different schedules are bequeathed to specified individuals. Regarding the A Schedule which is bequeathed to the adopted son who is a minor, the executrix is given the power to manage the property. She is also di-

rected to perform the marriage of his adopted son, R. 3 with Shiva Nagendramma incurring expenses from out of the income of the estate. Apart from this, she is empowered to buy Ac. 2-00 in any place of her choice and deliver possession to the ninth respondent. Similarly, she is entitled to purchase Ac. 2.00 of land and hand it over to the eighth respondent. Apart from this she is entitled to purchase Ac. 2.00 for herself. She is asked to purchase jewels worth Rs. 500 for the testator's niece V. Saraswathi, to pay Rs. 1,116 to R-5 and Rs. 1,500 to Venkatarreddy. Thus, she is given powers generally to administer the estate, except those items which are specifically bequeathed to certain named individuals. She is given considerable discretion in the matter of purchasing Ac 2.00. She is also directed to arrange for the marriage of the adopted son with Shivanagendramma. At the time of his death, the testator had several relations, but it would appear from the recitals that he had great confidence in his elder sister, the petitioner and gave her several powers and duties under the will. Having regard to all these clauses we are inclined to take the view that the petitioner was appointed to perform the essential duties of an executrix and therefore, even though she was not expressly designated 'executrix' she must be considered an executrix according to the tenor of the will.

6. In Williams & Mortimer on Executors, Administrators and Probate (15th Edition at page 15) it is stated— 'An executor appointed by implication is usually called executor according to the tenor for although no executor is expressly nominated in the will by the word 'executor' yet if by any word or circumlocution the testator recommends or commits to one or more the charge and office, or the rights which appertain to an executor, it amounts as much as the ordaining or constituting him or them to be executors.....' On page 16 several examples of appointment by tenor are given. One of the instances given is a case where there was a direction to a person to pay all just debts and it was held that such a person is an executor according to the tenor (vide in the Goods of Pamela Cook 1902 Probate D. 114). In Viramma v. Seshamma, AIR 1931 Mad 343 the testator provided in the will that his nephew was to discharge the debts due by him to the world. It was held that the nephew was appointed an executor of the will by implication and that probate should be

granted to him. Under the illustrations to Section 222 of the Succession Act one of the illustrations given is "I appoint my nephew residuary legatee to discharge all lawful demands against my will and codicils signed on different dates." In our view this case is much stronger because the petitioner was given not only the power to collect all outstanding, of the testator (testator having no debts on his death), but was also given discretion to purchase three sets of land of Ac. 2.00 each at places of her choice and give it to the respective legatees and she was also directed to perform the marriage of the adopted son with Shivanagendramma and to manage the estate.

7. Sri Padmanabha Reddy, learned counsel for the appellant drew our attention to the decision in Seshamma v. Chennappa, (1897) ILR 20 Mad 467 in which it was held that where it was provided in a will that the plaintiffs should take care of the estate during the minority of a son who was adopted to the testator and imposed upon them the duty of providing for the maintenance of persons named therein, the plaintiffs were not appointed executors by implication. It was observed that the duties which the plaintiffs are directed to be performed are not specifically the duties of an executor. It is not the administration of the estate which they were told to carry out. But rather it was as guardian of the child whose adoption is contemplated that they were intended to act. There was no intention to vest any property in them. They were only directed to protect the property during the minority. We are of the view that the facts in the present case are entirely different. As we have already observed, it is not merely a case where the petitioner was to be the guardian of the adopted son during his minority and was liable to hand over the property on his attaining majority. There were several other matters of administration which she was directed to carry out with regard to other legatees. Another decision that was relied on is that in U. M. Pethummal v. Bhargavan Rajan, AIR 1964 Ker 258. In that case two persons Bhargavan and Velappan claimed to be executors. It was found that the only right conferred on them under paragraph 6 of the will was to collect the income from the property for two years and distribute the same among the several individuals mentioned in paragraph 11 of the will. It was held that this is not a general power for ad-

ministration of the estate, but it only shows that they were trustees to the particular persons for whose use they hold it. They had no general power to receive and pay what was due to and from the estate and therefore they were not executors according to the tenor. This decision is also distinguishable from the present case where the provisions of the will clearly point to the conclusion that the petitioner had general power to receive and pay what was due to and from the estate and a general power of administration was conferred on the petitioner. The mere fact that some items were directly bequeathed to certain legatees and she had no duties to perform as far as those legatees are concerned, does not make her any the less an executrix.

8. For the above reasons we agree with the court below that the petitioner in the O. P. (the respondent herein) was an executrix according to the tenor of the will and was entitled to the issues of probate.

9. No other contention was raised before us. The appeal is dismissed, but in the circumstances without costs.

Appeal dismissed.

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GANGADHARA RAO, J.

S. Subba Rao, Petitioner v. Puli Veeraraghavaiah and others, Respondents

Writ Petn. No. 5107 of 1975. D/- 10-11-1975.

(A) Andhra Pradesh Cinemas (Regulation) Act (4 of 1955), S. 12 — Powers of Government — Exemption may be granted suo motu — Application not essential. (Para 6)

(B) Andhra Pradesh Cinemas (Regulation) Act (4 of 1955), S. 12 — Powers of Court — Subjective satisfaction as to existence of grounds for exemption is justifiable — (Constitution of India, Art. 226 — Discretionary executive orders — Powers of Court).

Under Section 12, the Government can grant an exemption provided, in the opinion of the Government, reasonable grounds exist for doing so. The fact that reasonable grounds should exist in the opinion of the Government means that the matter is left to the subjective satisfaction of the Government; but that subjective satisfaction must be based on an

objective consideration of the material before them. Therefore, the subjective satisfaction of the Government is certainly subject to scrutiny by courts. AIR 1974 SC 2249, Rel. on. (Paras 8 & 9)

(C) Andhra Pradesh Cinemas (Regulation) Rules (1970), R. 7 (2) (c) — Notice to show cause against proposed exemption from R. 7 (2) (c) to certain person — Contents of — (Andhra Pradesh Cinemas (Regulation) Act (4 of 1955), S. 12).

If the Government wants to grant exemption with regard to distance under Rule 7 (2) (c) of the Rules, they should give a notice to the other theatre owners who are thereby affected. Where no grounds or particulars on the basis of which the Government proposed to grant exemption in favour of a person are mentioned in the notice, its recipient cannot show cause against the grant of exemption in favour of the person. So, the so-called notice is, in effect, not a notice at all and must be quashed. (Para 10)

Cases Referred: Chronological Paras
AIR 1974 SC 2249 = (1975) 2 SCR 93 9
1942 AC 206 = (1941) 3 All ER 338 9

P. Shiv Shankar, for Petitioner;
A. Panduranga Rao (for No. 1) and Govt. Pleader for Home (for Nos. 2 and 3), for Respondents.

ORDER:— The petitioner is the proprietor of the permanent theatre, Sri Seetharama Talkies, Kuchipudi, Divi Taluk, Krishna District, and he is having a valid licence to exhibit pictures in that theatre. While so, the District Revenue Officer, granted permission on 30th March 1974 to the first respondent to construct a temporary theatre. Under Rule 7 (2) (c) of the Andhra Pradesh Cinemas (Regulation) Act 1955 (hereinafter referred to as the Rules and the Act, respectively) the distance between a permanent theatre and a temporary theatre should be one kilometre. But, in this case, the distance between the petitioner's theatre and the proposed site for construction of a temporary theatre by the first respondent, was only 400 metres. So, the petitioner filed writ Petition No. 5828 of 1974 in this court challenging the permission given by the District Revenue Officer in favour of the first respondent. That writ petition was allowed by this court on 3-2-1975 and the permission granted in favour of the first respondent was quashed. Against that judgment the first respondent preferred Writ Appeal No. 98 of 1975 and it was also dismissed by this Court on 7th February 1975. After the disposal of the

writ petition, the Tahsildar, Avanigadda issued proceedings on 4-2-1975 asking the petitioner (first respondent?) to stop exhibition of shows. Against that order, the first respondent preferred an appeal to the Government on 19th March, 1975. But, it transpires that meanwhile the Government issued G. O. Rt. 154 dated 27-1-1975 granting exemption in favour of the first respondent from the provisions of Rule 7 (2) (c) of the Rules, relating to distance. On 30-7-1975 the Government issued a notice to the petitioner stating that the question of grant of exemption in favour of the first respondent from the operation of Rule 7 (2) (c) of the Rules relating to distance between a temporary cinema and a permanent cinema, was under consideration of the Government and the petitioner was requested to send his representation, if any, within thirty days from the date of receipt of that notice. Thereupon, the petitioner submitted a representation on 5-8-1975 to the Government, requesting them to furnish him with a copy of the appeal petition and the other connected papers pertaining to the proposed grant of exemption from the distance rule. On 16-8-75 the Government furnished the petitioner with a copy of the appeal petition, but stated that they do not consider it necessary to furnish any other papers. The petitioner, then wrote to the Government on 11-1-1975 (sic) to furnish him with copies of the petition if any, filed by the first respondent for exemption and also other papers, on the basis of which the Government proposed to grant exemption. The Government gave a reply on 27-9-1975 stating that inasmuch as the copy of the appeal petition filed by the first respondent was furnished to the petitioner, his further request for furnishing other papers was vague and it could not be complied with. It is at that stage, the petitioner has filed this writ petition questioning the notice dated 30-7-75 issued by the Government.

2. Sri P. Shiv Shanker, the learned counsel for the petitioner, has raised before me two contentions. First, the appeal filed by the first respondent on 19-3-1975 before the Government against the order of the Tahsildar is barred by limitation, for it was not filed within thirty days, and there is no provision in the Act, to condone the delay in filing the appeal. Therefore, the entertainment of the appeal by the Government is bad. Secondly, the notice issued by the Government to the petitioner on 30-7-1975 to show cause as to why exemption should not be grant-

ed in favour of the first respondent from the operation of Rule 7 (2) (c) of the Rules, relating to distance, is bad; firstly, because the Government have no power to issue such a notice suo motu under Section 12 of the Act and secondly, because the said notice does not mention any grounds or particulars on the basis of which the Government proposed to grant exemption to the first respondent, so as to enable the petitioner to submit his explanation.

3. In this writ petition, it is not necessary for me to decide the first contention, for, as I see, the Government have not given any notice to the petitioner with regard to the appeal filed by the first respondent against the order of the Tahsildar. That appeal is still pending before the Government. The petitioner can take objection before the Government that the appeal is barred by limitation. Therefore, I do not propose to decide that question and leave it open.

4. To appreciate the second contention, it is necessary to refer to Section 12 of the Act and Rule 7 (2) (c) of the Rules.

Section 12 of the Act reads as follows:

"Where in the opinion of the Government reasonable grounds exist for doing so, the Government may, by order in writing exempt, subject to such conditions and restrictions as it may impose, any cinematograph exhibition or class of cinematograph exhibitions from any of the provisions of this Act or of any rules made thereunder."

Rule 7 (2) (c) of the Rules reads as follows:

"Subject to sub-rule (5) of this Rule the location of cinema buildings in terms of distance from each other or from any other building shall be as specified below:

(a) xx xx

(b) xx xx

(c) 800 metres between a permanent theatre and a temporary theatre."

5. It is argued that since the petitioner (first respondent?) has not filed any petition before the Government under Section 12 of the Act, claiming exemption from Rule 7 (2) (c) of the Rules, the Government have no power to issue the impugned notice. It is also argued that the Government cannot, suo motu issue the notice under that section.

6. So far as Section 12 of the Act is concerned, it is silent as to whether the Government could exercise the power to

exempt, on an application made by a party or suo motu. Therefore, I am of the opinion, that the Government can exercise the power under that section either suo motu or on an application made by a party. In fact, a reading of that section shows that the Government can exercise the power under that section suo motu. In this case, it is not disputed that the Government have issued the notice on their own accord, but not on the application filed by the petitioner (first respondent?). So, I do not consider that the notice is bad on the ground that the Government cannot issue it suo motu.

7. The next question is whether the notice is illegal because it does not give any reasons or particulars.

8. Under Section 12 of the Act, the Government could grant exemption from any of the provisions of any rule. Therefore, the Government has power to grant exemption with respect to Rule 7 (2) (c). But, under Section 12 of the Act, the Government could grant such an exemption provided, in the opinion of the Government, reasonable grounds exist for doing so. So, it means that there must be grounds and they must be reasonable to grant an exemption. The fact that reasonable grounds should exist in the opinion of the Government means that the matter is left to the subjective satisfaction of the Government; but that subjective satisfaction must be based on an objective consideration of the material before them.

9. As stated by the Supreme Court in *M. A. Rasheed v. State of Kerala*, AIR 1974 SC 2249:—

"Where powers are conferred on public authorities to exercise the same when 'they are satisfied' or when 'it appears to them' or when 'in their opinion' a certain state of affairs exists; or when powers enable public authorities to take 'such action as they think fit' in relation to a subject-matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated.

"Where reasonable conduct is expected the criterion of reasonableness is not subjective, but objective. Lord Atkin in *Liversidge v. Anderson*, 1942 AC 206 at pp. 228-229 said 'if there are reasonable grounds the Judge has no further duty of deciding whether he would have formed the same belief, any more than, if there is reasonable evidence to go to a jury, the

Judge is concerned with whether he would have come to the verdict'. The onus of establishing unreasonableness however, rests upon the person challenging the validity of the acts.

"Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the courts' own opinion of what is reasonable to the criterion of what a reasonable body might have decided. The Courts will find out whether conditions precedent to the formation of the opinion have a factual basis." Therefore, the subjective satisfaction of the Government is certainly subject to scrutiny by courts.

10. It is not disputed by learned Government Pleader or the counsel for the first respondent that if the Government wants to grant exemption with regard to distance under Rule 7 (2) (c) of the Rules, they should give a notice to the other theatre owners who are thereby affected. In fact, in this case the Government have given such a notice on 30-7-75. But, it simply says that the question of granting exemption in favour of the first respondent from the operation of Rule 7 (2) (c) of the Rules is under the consideration of the Government and the petitioner was requested to send his representation, if any, within thirty days from the date of receipt of that notice. No grounds or particulars on the basis of which the Government proposed to grant exemption in favour of the first respondent, are mentioned in that notice. If so, how could the petitioner show cause against the grant of exemption in favour of the first respondent? So, the so-called notice is, in effect, not a notice at all. It is also fairly conceded by the learned counsel for the first respondent that the Government should have given particulars on the basis of which they proposed to grant exemption in favour of the first respondent.

11. I, therefore, hold that the notice dated 30-7-1975 given by the Government to the petitioner is defective for it does not give any particulars on the basis of which they proposed to grant exemption in favour of the first respondent,

so that the petitioner could submit an effective representation to that notice. Hence, I quash the notice dated 30-7-75 issued by the Government to the petitioner. But, it does not preclude the Government to issue a fresh notice to the petitioner giving necessary particulars so that the petitioner could submit his explanation.

In the result, this writ petition is allowed. But in the circumstances of the case, without costs. Advocate's fee Rs. 100. Petition allowed.

AIR 1976 ANDHRA PRADESH 312

VENKATRAMA SASTRY, J.

A. Ganga Raju, Appellant v. Municipal Council, Palacole, Respondent.

Second Appeal No. 209 of 1974, D/- 24-10-1975.*

(A) Andhra Pradesh Municipalities Act (1965) S. 88 — 'Choultry' — Meaning — Shops belonging to choultry leased out for business purposes — Rent realised exclusively used for charitable purposes — Shops whether be treated as part of choultry entitled to exemption from property tax.

A choultry is a place which is used as a shelter or resting place for travellers. It should be meant entirely for that purpose, namely, for the purpose of providing shelter or resting place for the travellers or pilgrims whoever they may be.

(Para 8)

The exemption from property tax is intended only for choultries as such and not for any other buildings which are not choultries. The second portion of S. 88 (.) specifically deals with the occupation of the choultries as such and not any shops or buildings belonging to choultries. If rent is charged for the occupation of a choultry and if such rent is exclusively used for charitable purposes, then the choultry can claim exemption. But if the choultry has got some other shops or buildings situate within the same precincts of the choultry which are not put to the use of a choultry but which are separately rented out with a view to make profits, though the rents may be utilised for the same charitable purposes within the choultry, that would not make those

shops which are not used as choultries, to come within the exemption provided under S. 88 (1). Since the shops are not intended to render any incidental or subservient service to the visitors or pilgrims to the choultry, they cannot be treated as part of the choultry entitled to exemption. AIR 1974 SC 521; (1963) 1 Andh LT 202 and (1959) 2 Andh WR 323, Followed.

(Paras 7, 16)

Cases Referred: Chronological Paras
AIR 1974 SC 521 = (1974) 3 SCR 294

6, 8, 10
(1968) 2 Andh WR 404 = (1969) 1 Andh LT 36 6, 15
(1963) 1 Andh LT 202 = ILR (1964) Andh Pra 379 6, 13, 16
(1959) 2 Andh WR 323 = 1959 Andh LT 778 6, 14
AIR 1941 Mad 908 = 1941-2 Mad LJ 544 9
AIR 1933 Mad 782 = (1933) 65 Mad LJ 878 9

P. P. Surya Rao, for Appellant;
N. Rajeswara Rao, for Respondent.

JUDGMENT:— The plaintiff, whose suit and appeal have been dismissed by both the Courts, has come up with this Second Appeal.

2. The plaintiff is a choultry at Palakol represented by its Executive Officer. According to the allegations in the plaint, there are dining hall, kitchen, central hall and other rooms used for lodging purposes in the choultry. No rent is charged from any lodger for the occupation of the rooms. Only electricity consumption charges are collected from them. Free boarding is arranged for travellers and poor students. The choultry regularly provides free boarding for the poor students. The plaint schedule mentions four rooms. They are abutting the road and are situate in the choultry. They have been leased out by the plaintiff to Gandhi Medical Hall, Venkateswara Ayurveda Nilayam, Mahalaxmi Cut Pieces and Prabhat Sudha Khaddar Vastralayam, which have separate assessment numbers respectively as 4879, 4876, 4875 and 4874. The rents realised from the tenants in these shops are exclusively utilised for the above charitable purposes. The respondent-municipality issued a notice on 5-3-1969 demanding property tax for the suit schedule four rooms also. According to the plaintiff, they are exempt from levy of any property tax under Section 88 of the Andhra Pradesh Municipalities Act, 1965, (hereinafter referred to as the Act). The Municipality

*(Against decree of Sub-J., Narasapur, in Appeal Suit No. 29 of 1973.)

has also assessed surcharge under Act XIII of 1958 for the said shops. The levy of house tax and the demand of surcharge are illegal. Hence the suit has been filed for a declaration that the levy and demand of house tax and surcharge for the half year ending with 31-3-1969 for the plaintiff schedule buildings (the four rooms mentioned in the schedule), is illegal and void and for consequential injunction restraining the respondent from collecting the same and for costs.

3. The defendant-municipality resisted the suit. According to it, the plaintiff schedule properties do not constitute a choultry or a part of a choultry to claim exemption under Section 88 of the Act. They have been let out for the purposes unconnected with the object of the choultry and hence the assessments in dispute are not at all illegal.

4. On the aforesaid pleadings the trial court framed appropriate issues. The main issue in the case was issue No. 1. It related to the question whether the plaintiff schedule properties form part of the choultry as understood in Section 88 of the Act and whether those properties are used for purposes contemplated by the said section. The second issue related to the question of exemption from the levy of property tax. On a consideration of the evidence the trial court held on issue No. 1 that the plaintiff schedule four rooms do not form part of the choultry as they do not come within the definition of the word 'choultry'. At the same time it found that the rent collected from these properties is used for charitable purposes. In view of this finding that the four rooms do not form part of the 'choultry' the trial court found on issue No. 1 that the plaintiff is not entitled for exemption in respect of the said four rooms. The claim of the plaintiff in regard to surcharge was allowed and it is no more in dispute in this second appeal. In the result, the suit for declaration and injunction was decreed only in respect of surcharge relief and dismissed in respect of the relief of levy of property tax.

5. The plaintiff went up in appeal before the Sub-Court, Narasapur. The learned appellate Judge also held that these four shops are not used for the convenience of those people who use the choultry either free of rent or for rent and hence they ceased to be a choultry within the meaning of the Act. It was therefore held that the appellant could not claim any exemption for the suit

schedule property from levy of property tax. The appeal was therefore dismissed.

6. In this Second Appeal Mr. P. P. Surya Rao, the learned counsel for the appellant has again reiterated the same contentions. He has also placed some decisions which will be considered presently. According to the learned counsel, the four shops are situated within the same precincts of the choultry though they are abutting the road. The mere fact that they have got separate assessment numbers is immaterial. As the income derived from those shops is utilised for charitable purposes, what is all required by the statute is satisfied to claim exemption under Section 88 of the Act. The finding of the lower courts that they cannot be treated as choultry is erroneous. The learned counsel placed strong reliance upon the decision of his Lordship Obul Reddi J. as he then was, reported in Vijayawada Municipality v. S. K. V. G. P. Choultry, (1968-2 Andh WR 404). On the other hand, Mr. Rajeswara Rao the learned counsel for the respondent has argued that the shops are unconnected with the pilgrims and travellers and they are not intended to provide any amenities for the pilgrims or travellers using the choultry. Hence the findings of the lower courts that the four shops cannot be treated as choultry are perfectly correct and cannot be assailed. He also further urged that merely because the income from the shops is used for charitable purposes it is immaterial so long as the shops themselves do not come within the purview of the expression 'choultry' under Section 88. He has placed reliance upon the decisions reported in Sri K. P. Annasatram v. Vijayawada Municipality (1959-2 Andh WR 323) and Anjaneyulu v. Eluru Municipality (1963-1 Andh LT 202). Both the counsel have also invited my attention to the decision of the Supreme Court reported in Tirupathi Municipality v. T. T. Dewasthanam (AIR 1974 SC 521).

7. Before I consider the authorities, it is necessary to extract the section itself.

"88. (1) The following buildings and lands shall be exempt from the property tax:—

xx xx xx
(b) choultries for the occupation of which no rent is charged and choultries the rent charged for the occupation of which is used exclusively for charitable purposes."

xx xx xx

Sub-section (1) (b) which applies to this case, grants exemption only to choultries for the occupation of which no rent is charged or choultries where rent is charged but which rent is used for charitable purposes. It is clear from wording of the statute that the exemption is intended only for choultries as such and not for any other buildings which are not choultries. The second portion of this sub-clause specifically deals with the occupation of the choultries as such and not any shops or buildings belonging to choultries. If rent is charged for the occupation of a choultry and if such rent is exclusively used for charitable purposes, then the choultry can claim exemption. But if the choultry has got some other buildings which are not put to the use of a choultry but which are separately rented out though the rents may be utilised for the same charitable purposes within the choultry, that would not make those rooms which are not used as choultries to come within the exemption provided under this clause.

8. In this connection we have to see what is the meaning of a 'choultry'. A choultry is not defined in the Act. Their Lordships of the Supreme Court in Tirupathi Municipality v. T. T. Dewasthanam (AIR 1974 SC 521) have relied upon the definition of a choultry in the Law Lexicon and other dictionaries. The Law Lexicon defines the word 'choultry' as follows:

"Choultry; Chatram. A choultry is a corruption of chavadi. It means a shelter or resting place for travellers. A chatram (corruption of the Sanskrit Sathram) is a house where pilgrims and travellers are fed."

In the Shorter Oxford English Dictionary, choultry is described as an Anglo-Indian word 'being corruption of Telugu Chawdi' and its meaning is given as 'A caravan-serai'. In Wilson's Glossary of Judicial and Revenue terms, the word is given in different forms such as Chawati or chauti, corruptly choltry or choultry and the meaning is given as 'A public lodging place, a shelter for travellers'. It is, therefore clear that a choultry is a place which is used as a shelter or resting place for travellers. It should be meant entirely for that purpose, namely, for the purpose of providing shelter or resting place for the travellers or pilgrims whoever they may be.

9. In Kothandaram Pillai v. Municipal Council, Trichinopoly, (1933) 65 Mad LJ 678 = (AIR 1933 Mad 782) Kri-

shnan Pandlai, J. also held that the essence of a choultry is that it is used as a resting place for travellers. Somayya J. in Pandarasannadhi, Tiruvannamali Adhnam v. Corporation of Madras, 1941-2 Mad LJ 544 = (AIR 1941 Mad 908) also observed as follows in this connection:

"The choultry may be run in one building and in another locality there may be other buildings which are not at all used as rest houses for pilgrims and which are let out to tenants for occupation or to shop-keepers for use as shops the rents derived from them may be used exclusively for running choultry. In such a case the building which is used as a rest house for travellers will alone be exempted and not the other buildings, the rent of which is being used for the running of the choultry. If the buildings themselves are not used as rest houses which is the central idea underlying the expression 'choultry', they are not exempt from payment of a tax."

10. Dealing with the question as to whether any shops or buildings which are adjuncts to the choultry but which are used for the benefit of the pilgrims come within the meaning of choultry, their Lordships of the Supreme Court have observed in Tirupathi Municipality v. T. T. Dewasthanam, AIR 1974 SC 521 as follows:

"Choultry is indeed an ancient institution and is principally meant for lodging of pilgrims and travellers. It is conceivable that in 1884, when the first municipal legislation was passed in Madras, such institutions were some humble sheds and other structures to enable the pilgrims to stay for a short while when they came to visit temples and other religious places. The institution, like similar others elsewhere, has come to stay as a symbol of religious and charitable disposition of human mind translated into physical manifestation in the shape of safe shelter for the pilgrims. As man advanced and ideas grow and expand, with his ever increasing desire for comfort and convenience, the shape of the choultry must needs also change. It is, therefore, only to be expected that with the growing funds of the Devasthanams such choultries will be constructed in a modern way catering to the needs and requirements of the pilgrims and visitors of all classes in a self-contained unit or complex. It would be necessary to look at the institution from the point of view of the predominant intention which guides the building

up of the complex as a whole. The object for which a choultry is built is advanced and facilitated by making provisions for so many incidental conveniences which the visitors and pilgrims coming from far and wide may need in order to make their short stay in the neighbourhood of the temple comfortable and convenient from all points of view so that they are not required to go to and fro and face difficulties. The concept of a choultry today may, therefore, be completely different from that with which one may be familiar a hundred years ago. There must, however, be no idea of profit motive in running or administering a choultry. Besides the expenditure for running a choultry with amenities should not be made with an idea to realise it from the visitors using the same. In other words, the choultry must in truth and reality bear the hall-mark of a charitable institution and should not partake of the character of a hotel run for profit. The appellant concedes that the first floor as well as the ground floor of the building which are used for lodging of the pilgrims may be exempted from tax and indeed tax has not been realised in respect of the rooms on the ground floor of the choultry. The appellant, however, submits that the offices, shops and other concerns some of which are located in the choultry and others within the campus, cannot be considered as part and parcel of the choultry and, therefore, are not exempt from tax. We have examined the entire evidence in this essence and have given careful consideration to the findings of the High Court with regard to the same and are clearly of opinion that the choultry cannot be divorced from the other offices, shops and concerns which are mainly located within its precincts in order to render much-needed and other necessary services to the pilgrims coming to pay homage to the Holy Shrine of Sri Venkateswara Swami. In the absence of a precise definition of the word 'choultry' in the Act excluding such offices, shops and concerns in the precincts, we are unable to restrict the term 'choultry' in the context of the economic development and improved standard of living of our people to only that portion of the building which is directly used for lodging of visitors and pilgrims. We are, therefore, of the view that the High Court is right in holding that the appellant is not entitled to charge tax on the choultry as claimed."

As seen from the above authoritative pronouncement of their Lordships a choultry

cannot be divorced from the other offices, shops and concerns which are mainly located within its precincts in order to render much needed and other necessary services to the pilgrims. It means, if the shops owned by the choultry are used for purposes intended to render any service for the pilgrims who use the choultry, then the mere fact that some rent is charged for them would not matter. But, otherwise, if those shops are used for deriving some rents with a view to make profits, then those shops cannot be made part of the 'choultry'. In another place their Lordships have observed:

"Even then a line will have to be drawn to distinguish between what is incidental or sub-servient to the main object and purpose of the choultry and the oblique motive of profit-making to deprive the Municipality of its rightful dues."

The core of the decision, therefore, appears to be that if the rents are derived with a view to make profits and not to make the shops render incidental and sub-servient use to the pilgrims, then the shops cannot claim exemption. In the case before the Supreme Court their Lordships were dealing with the Tirumala Tirupathi Devasthanam New Choultry. It consisted of also other shops used for firewood stores, transport office, workshops, garages, the galvanised Iron Sheet sheds for parking the transport vehicles, the Railway Booking office, the Mysore Government Transport Office, the Devasthanams Sanitary Inspector's office, the Enquiry Office, garage for cars, shed for water pump, laundry, haircutting saloon, the post office and free medical dispensary. But they were all used for the benefit of pilgrims using the choultry as such. There was only one shop which was used by the Brass Co-operative Stores which was paying a monthly rent of Rs. 30. Their Lordships held that the new Choultry with its expanding beneficial complex as established by evidence was not viable by itself but maintained in a substantially large measures out of the Devasthanam funds predominantly in the interest of numerous visiting pilgrims from far and wide and therefore, were exempt from tax under Section 83 (1) (b) (corresponding to Section 88 in the new Act). Dealing with the rent of Rs. 30 derived from the Brass Co-operative Stores. Their Lordships hold that as the rent was exclusively used for the purpose of the choultry, which is

indeed a charitable purpose, there was no bar from claiming any exemption.

11. Applying the above test to this case we have to see whether the four rooms that are now in question are really intended to provide any necessary amenities or incidental or sub-servient use to the pilgrims or travellers who are lodging in the choultry. The trial court considered the evidence of P.W. 1 the principal witness for the plaintiff, who clearly admitted that these four shop rooms were let out for business purposes and they are not used for the purpose of travellers. P.Ws. 2 and 5 who happen to be some of the tenants of these shops have also deposed that the rents were paid by them for their own business which had nothing to do with the use of the choultry as such. It cannot, therefore, be said that the four rooms are merely adjuncts to the choultry which are put to the same use as that of the choultry itself. Hence in these circumstances the finding given by both the courts that the four rooms are not part of a choultry has to be accepted as correct.

12. If the four rooms are not really part of the choultry, the fact that the income from the said four rooms was utilised for charitable purposes, namely for providing free food to travellers and poor students within the choultry, would not make any difference in regard to its liability for tax under Section 88. The provisions of Section 88 (1) (b) cannot be said to have been satisfied because those four rooms cannot be called a choultry within the meaning of that provision and the rent derived from them is not a rent charged for the occupation of a choultry as such. The finding of both the lower courts that the use to which the rents from these shops was put would not enable the plaintiff to claim exemption, also is correct and has to be upheld.

13. In *Anjaneyulu v. Eluru Municipality*, 1963-1 Andh LT 202, their Lordships Chandra Reddy, C. J. and Chandrasekhara Sastry, J. were dealing with the case where a portion of the choultry was used for shops, as in this case, which were let out. Their Lordships held that those four shops were not entitled to exemption from tax by observing as follows:

"This part of the clause, in our opinion, is attracted only to cases where rent is charged in regard to a building used as a choultry i.e. where rent is collected from persons who temporarily occupy the rooms, such as pilgrims and travellers,

and it has no application to cases where the building is not used as choultry."

Their Lordships laid stress on the use of the building as choultry as a necessary condition for claiming exemption.

14. In *Sri K. P. Annasatram v. Vijayawada Municipality*, (1959-2 Andh WR 323) Seshachalapathi J. was considering the case wherein ten buildings were involved, which were situated outside the precincts of the choultry. The learned Judge held that they cannot come within the definition of a 'choultry' and therefore, are not entitled to exemption.

15. In *Vijayawada Municipality v. S. K. V. G. P. Choultry* (1968-2 Andh WR 404) Obul Reddi, J. as he then was also dealt with a similar case. After calling for a finding from the lower court it was held that the choultry was not entitled to exemption as the income from the rooms was not being used exclusively for charitable purposes. On the basis of that finding the Second Appeal was allowed. His Lordship did not consider the question now under consideration, as to whether those rooms are really part of the choultry within the meaning of S. 88 or not. I do not, therefore think that that decision can be of any avail to the appellant herein.

16. Their Lordships of the Supreme Court considered the decision of the Bench in *Anjaneyulu v. Eluru Municipality* (1963-1 Andh LT 202) and did not specifically overrule the same. The principle laid down in the said decision also, in my opinion, applies to this case. In any event, as per the test laid down in the decision of the Supreme Court, since these four rooms are not intended to make any provision for any incidental conveniences for the visitors and pilgrims to the choultry or to render any other services to them, they cannot be treated as part of the choultry entitled to exemption under Section 88 of the Act. In this view I am satisfied that the decision of the lower Courts is correct and the Second Appeal has to be dismissed. It is accordingly dismissed with costs. No leave.

Appeal dismissed.

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A. SAMBASIVA RAO, Acg. C. J.

Yeramati Ramakrishnaiah, Appellant
v. Vijapeyajula Venkateswarlu, Respondent.Second Appeal No. 115 of 1974, D/-
29-8-1975.***(A) Limitation Act (1908), Art. 11 (1) and Art. 120 — Scope of Art. 11 — Inapplicable to order passed on attachment before judgment — Art. 120 applies.**

Either by a plain reading of Article 11 or by the legal precedents, Article 11 does not apply to orders passed on attachments made before judgments. It must necessarily follow that the residuary Article 120 is applicable. AIR 1964 Andh Pra 99, Foll., AIR 1945 Cal 449 and AIR 1934 Pat 580, Rel. on; AIR 1921 Mad 163 (FB) and AIR 1918 Mad 26 (FB) and AIR 1949 Mad 114, Dist. (Para 9)

(B) Civil P. C. (1908), O. 21, R. 62 — Necessary parties to suit under — Judgment-debtor not a necessary party.

The judgment-debtor is not a necessary party in a suit under Order 21, Rule 62. That apart, in the instant case, even before the attachment was effected before the judgment, the ostensible owner had relinquished his right to the property to the plaintiff. So he could not subsequently turn round and question the relinquishment. Further, when he was made a party to the claim proceeding he kept quiet without setting up any particular defence against the plaintiff's claim. Therefore, there was no question of his being a necessary party to the suit. AIR 1934 Mad 587, Rel. on. (Para 12)

Cases Referred: Chronological Paras
AIR 1964 Andh Pra 99 = (1963) 2 Andh LT 274 5

AIR 1949 Mad 114 = (1948) 2 Mad LJ 85 10

AIR 1945 Cal 449 = 79 Cal LJ 181 6

AIR 1934 Mad 587 = 67 Mad LJ 585 12

AIR 1934 Pat 580 = 16 Pat LT 304 7

AIR 1921 Mad 163 = ILR 44 Mad 902 (FB) 5, 7, 8, 10

AIR 1918 Mad 26 = 35 Mad LJ 231 (FB) 9

K. B. Ratnasastri, for Appellant; V. S. N. Sarma, for Respondent.

JUDGMENT:— The principal question of law that has to be answered in this case is whether Art. 11 of the Limitation Act of 1908 would apply to a suit

*(Against decree of 1st Addl. Sub-J., Kakinada, in Suit No. 158 of 1961, D/- 28-2-1972.)

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brought to challenge an order dismissing a claim petition made to an attachment directed before judgment. Since the suit, out of which the present Second Appeal arises, was instituted in 1960, it is the Act of 1908 that is applicable to it.

2. Now, I will refer to the parties as they were arrayed in the suit O. S. No. 275/60 in the District Munsif's Court at Kakinada. The defendant in the suit, filed O. S. No. 349/55 against one Venka Bhaskararao for recovery of money and pending the suit he got attached some properties in the name of the said Bhaskararao in I. A. No. 26/56. The plaintiff then filed I. A. No. 908/56 to raise the order of attachment. His contention was that the property really belonged to him but stood in the name of Bhaskararao only benami. Bhaskararao was made a party to the claim petition. It may also be mentioned that Bhaskararao had earlier executed a deed of relinquishment in favour of the plaintiff. Bhaskararao did not take any interest in the claim proceeding and despite the plaintiff's participation in it, it was rejected on 30-8-1958. The suit was decreed exactly one year later on 30-8-1959. The present suit to set aside the order dismissing the claim petition on 30-8-1958 was filed on 5-8-1960.

3. There were three principal defences to the suit. They are: (1) It was barred by limitation because it was filed more than one year after 30-8-1958, (2) The suit was not maintainable because the judgment-debtor was not made a party to it and (3) The plea of benami was false. All these three objections did not find acceptance at the hands of both the lower courts. They repelled the question of limitation as well as the one relating to maintainability and on a consideration of the evidence, found that the property stood really benami in the name of Bhaskararao though it belonged to the plaintiff. In that view, the suit was decreed by both the courts. Hence the present second appeal by the defendant.

4. Shri Ratna Sastry, in a very forceful argument first, maintains that the suit is hopelessly barred by limitation since it was not filed within one year after 30-8-1958, on which date the claim petition was dismissed. This is a case to which Article 11 of the old Limitation Act applies and so, the suit should have been filed within one year from the date of the dismissal of the claim petition. In order to test this contention, let me read that Article in its entirety, including clauses (1) and (2) of Article 11:

Description of suit.	Period of limitation.	Time from which period begins to run.
11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order: (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of property attached in execution of a decree; (2) Order under Section 28 of the Presidency Small Cause Courts Act, 1882."	One year	The date of the order.

The orders referred to in paragraph (2) of the Article have no relevancy to the present discussion. What is sought to be applied is only paragraph (1), namely, "order under the Code of Civil Procedure 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree". It is not the case of the defendant (appellant) that there was another attachment after the decree was passed and it was only thereafter the execution proceeded. Going by the language of the Article, it applies only to orders on objections made to the attachment of properties which are attached in execution of a decree. There is no attachment in the present case in execution of a decree. So, going by the language of Article 11, it should be held that it has no application to the present order passed on an objection raised to an attachment before judgment. There is, however, Rule 11 of Order 38 which is relied on by Sri Sastry. It merely says that property attached before judgment need not be attached in execution of a decree. So, a plaintiff who had already got the property attached during the pendency of the suit and who has been successful in obtaining a decree thereon, need not get the property reattached for proceeding against it in execution of its decree. This is provided by the Code itself. But, does this provision make it an attachment in execution of a decree? At any rate, the language of Art. 11 does not by itself lend support to this extension of its meaning.

5. I may here refer to a decision of a Division Bench of this Court in *Eswarappa v. Krishna Reddy*, 1963-2 Andh LT 274 = (AIR 1964 Andh Pra 99). In that case also there was an attachment before judgment of five items of property. A claim was put forward to items 1, 2 and 5 on the ground that they were separate

properties of the 2nd defendant. The claim was accepted and attachment was raised. The aggrieved plaintiff carried the matter in appeal to the District Court, Kurnool. The appellate court allowed the appeal and made the attachment of the disputed items absolute, observing that it was open to the 2nd defendant to establish his absolute rights to the properties by a separate suit. Nevertheless, the 2nd defendant did not file any suit to establish his rights to these properties before the passing of the decree. The plaintiff, after securing a decree, sought to proceed against all the five items attached. At that stage, the 2nd defendant filed an execution application under Section 47, claiming all the items of property as his own. The executing court negatived his contention and the 2nd defendant preferred an appeal to the Subordinate Judge's Court at Kurnool. The appellate Court however held that they were the separate properties of the 2nd defendant and so, none of the items could be attached. A Civil Miscellaneous Second Appeal was filed and a Division Bench considered it in this judgment. The principal contention raised was that since the suit was not filed within one year from the date of the order in the C. M. A. the plaintiff's application under Section 47 was not maintainable. The learned Judge took the view that since the 2nd defendant did not file a suit within one year of the order in the C. M. A. the execution could proceed against items 1, 2 and 5 also. Against the single Judge's decision, an L. P. A. was filed. In support of the appeal, it was contended that the view of the learned single Judge was erroneous as it was based on the misunderstanding of the Full Bench decision in *Arunachalam Chetty v. Periasami Servai*, [LR 44 Mad 902 = (AIR 1921 Mad 163) (FB)]. Chandra Reddy, C. J., speaking for the Division Bench held that

the observations relied on by the learned Single Judge from Arunachalam Chetty v. Periasami Servai, ILR 44 Mad 902 = (AIR 1921 Mad 163) (FB) were not relevant in the context of the case before them. Since in the case the execution was levied after the decree was passed and within a short time thereof objections were formulated under Section 47, C.P.C. questioning the right of the judgment-creditor to proceed against these properties, the view taken by the Full Bench did not apply. It was further observed that a plain reading of Art. 11 of the Limitation Act would make it clear that it would not apply to a claim made under Order 33, Rule 8, C.P.C. If Article 11 is not attracted to the case of attachment before judgment and not in execution of the decree, there was no other specific Article in the Limitation Act and as such Art. 120 would spring into operation. It is exactly the view I am inclined to take and which has been taken by the courts below.

6. —There are two other decisions which support this view. A Division Bench of Calcutta High Court in Dhan Bibi v. Mrinalini Ghosh, AIR 1945 Cal 449 held:

"Where a claim to a property attached before judgment is made by legal representatives of defendant and rejected before the decree is passed, the question relating to the title to the property cannot be raised under Section 47. The unsuccessful claimant would have to file a suit for establishing his right to the property. It is immaterial whether the objection was dismissed without investigation on merits. To such a suit, neither Art. 11 nor Art. 13 but Art. 120 would apply and the unsuccessful claimant would have six years' time from the date of the adverse order passed on the claim." The learned Judges of the Division Bench discussed the entire case law while coming to this conclusion.

7. A Division Bench of Patna High Court also held in Mr. Babbal Kumari v. Mulchand, AIR 1934 Pat 580, thus:—

"Although the provisions of Rules 58 to 63, Order 21 may be applied to claims or objections made in attachment before judgment, no period of limitation is prescribed by Rule 63, Order 21, and the Rule in Art. 11 of the Schedule to the Limitation Act is expressly limited to claims or objections made to the attachment of property attached in execution of a decree.

No special provision is made for suits of this nature arising out of objections to attachment before judgment so that Article 120 of the Limitation Act, must be held to apply to such suits."

In coming to this conclusion, it is significant to note that the Division Bench relied on the Full Bench decision of the Madras High Court in Arunachalam Chetty v. Periasami Servai, ILR 44 Mad 902 Cor. to 41 Mad LJ 252 = (AIR 1921 Mad 163) (FB).

8. I will here refer to the Full Bench decision in Arunachalam Chetty v. Periasami Servai, ILR 44 Mad 902 Cor. to 41 Mad LJ 252 = (AIR 1921 Mad 163) (FB). Wallis C. J. speaking for himself and for Napier and Krishnan JJ. observed:

"I was at first disposed to think that even an attachment before judgment might be regarded as an attachment 'in execution of a decree' within the meaning of the new Article (Art. 11) seeing that it is a step taken purely for purposes of execution and that we should best give effect to the real intention of the Legislature by so holding. On a further consideration of the subject I think that such a construction is inadmissible in view of the fact that Section 246 of the Code of 1859 referred to property 'which may have been attached in execution of a decree or under any order for attachment passed before judgment and that Section 86 which has been reproduced in the subsequent Codes and now appears as Order 38, Rule 8 provided that claims to property attached before judgment should be investigated in the same manner as claims to property attached in execution of a decree. As it is well settled that the Limitation Act and the Code are to be read together, I have reluctantly come to the conclusion that we should not be justified in laying down generally that property attached before judgment is attached 'in execution of a decree', within the meaning of the present Article 11."

Spencer J. with whom Kumaraswami Sastri and Ramesam JJ. agree, in his separate judgment took notice of the fact that in the appeals before them, the claims preferred by the 1st defendant in each suit were put in after the properties were brought to sale in the execution proceedings. Then the learned Judge observed: "I find no difficulty in classing such a claim under the heading 'Of a claim preferred to property attached in execution of a decree', which are the words of Art. 11 of the 1st Schedule, Indian Limi-

tation Act". It was only in those circumstances, the learned Judges held that Art. 11 was applicable.

9. Therefore, either by a plain reading of Article 11 or by the legal precedents, I am inclined to hold that Article 11 does not apply to orders passed on attachments made before judgments. Since it is not the case that any other Article would apply, it must necessarily follow that the residuary Article that is 120, which prescribes six years as the period of limitation should govern. Since the present suit was filed on 5-8-1960 within six years of the dismissal of the claim petition on 30-3-1958, I am of the opinion that the suit was filed in time. I must however take note of two or three decisions placed before me by Shri Shastri. The first of them is the Full Bench decision of the Madras High Court in *Arunachalam Chetty v. Periasami Servai*, ILR 44 Mad 902 = (AIR 1921 Mad 163) (FB) to which I already referred. The other decision is in *Y. Mallikharjuna Prasada Naidu v. M. Virayya*, 35 Mad LJ 231 = (AIR 1918 Mad 26) (FB) where another Full Bench had to consider the question: 'does Rule 63 of Order 21, C.P.C. apply to orders on claims preferred to property attached before judgment?' The Full Bench answered the question in the affirmative. So, from this it emanates that an aggrieved person can challenge the order on his claim preferred to property attached before judgment only under the provisions of Order 21, Rule 63, C.P.C. There is no dispute about this rule laid down by the Full Bench in *Y. Mallikharjuna Prasada Naidu v. M. Virayya*, 35 Mad LJ 231 = (AIR 1918 Mad 26) (FB). The plaintiff himself filed the present suit on the assumption that Order 21, Rule 63, C.P.C. applies to his case. But that does not advance the contention of the defendant because Order 21, Rule 63, C.P.C. in itself does not contain any period of limitation. Whether a suit filed under that provision comes within the scope of Art. 11 or not is the question. If it is in respect of an order passed on the objection made to property attached in execution of a decree, then, Art. 11 applies. Otherwise, it does not. So, the principle laid down in *Y. Mallikharjuna Prasada Naidu v. M. Virayya*, 35 Mad LJ 231 = (AIR 1918 Mad 26) (FB) does not advance the case of the defendant.

10. Sri Ratna Sastry also relies upon a Bench decision in *Andalamma v. Natesan*, AIR 1949 Mad 114; *Rajamanar*, Officiating C. J. speaking for the

Court said that no question of applicability of Art. 120 arises when the suit is under Order 21, Rule 62, C.P.C. to set aside an order passed in a claim petition. But, there the attachment was in execution of a decree. When, the claim petition was filed, the questions which arose before the Division Bench were in respect of sham and nominal character of the sale deed relied on by the claimant, and adverse possession and acquisition of title by prescription. The Division Bench held that even then Art. 11 alone would apply and not Art. 120. The facts of that case speak for themselves. It was clearly a case of attachment in execution of a decree and so it has no bearing on the case which is now on hand.

11. I am therefore of the opinion that the decisions relied on by Shri Ratna Sastry do not help in his contention. I, consequently, uphold the view taken by the courts below that Art. 11 does not govern the case and when it does not, it is only Art. 120 that applies. So, the suit is in time.

12. The 2nd question is that since the judgment-debtor was not made a party to the suit, it was not maintainable. Relying on the Single Judge's decision in *Suppan Asari v. Alima Bibi*, AIR 1934 Mad 587, the courts below held that the judgment-debtor was not a necessary party, in a suit under Order 21, Rule 62, C.P.C. That apart, in this particular case, the judgment-debtor is not at all a necessary party in view of the peculiar circumstances. Even before the attachment was effected before the judgment, the ostensible owner has relinquished his right to the property to the plaintiff. So, now, he cannot turn round and question the relinquishment. Further, when he was made a party to the claim proceeding, he kept quiet, without setting up any particular defence against the plaintiff's claim. Therefore, there is no question of his being a necessary party to the present suit. So, this contention also is repelled.

13. The last and third contention that is raised on behalf of the appellant is that the oral evidence is not at all considered by the appellate court and so this vitiates the judgment, particularly in view of the remand order passed by this court on the earlier occasion. On a reading of the judgment under appeal, I find that a very careful scrutiny of the documentary evidence has been made. Gathering the tenor of the oral evidence from its discus-

sion by the trial court, I find that it is nothing more than supporting the documentary evidence. In other words, the oral evidence has no significance de hors the documentary evidence. I find that all the material and relevant documentary evidence has been considered by the appellate Court while agreeing with the trial court's view. I am not, therefore, prepared to find fault with the judgment of the appellate court on this score.

14. Thus, all the three contentions raised before me fail and the Second Appeal is dismissed. Having regard to the circumstances of the case, I direct the parties to pay their own costs in the second appeal. No leave.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 321

MADHAVA REDDY AND
JAYACHANDRA REDDY, JJ.

Machiraju Parthasarathy, Appellant
v. The Tobacco Export Promotion Council
and others, Respondents.

A. A. O. No. 391 of 1973, D/- 30-7-1975.*

(A) Civil P. C. (1908), O. 33, R. 5 (d) — Cause of action — A, B and C alleged in the plaint, to have influenced Y to terminate the temporary services of Z — No allegation in the plaint or proof of conspiracy to get Y to commit breach of the contract of service with Z — There is no cause of action for damages against A, B and C. (Para 8)

(B) Civil P. C. (1908), O. 33, R. 5 (d) — Suit in forma pauperis against X, A, B and C — No cause of action against A, B and C — If plaint can be rejected against A, B and C, and accepted only against X. 1968 All LJ 1102, Dissented from.

The intendment of Order 33, Rule 5, Cl. (d) is to allow the petitioner to sue only such persons against whom he can show some cause of action and not to allow him to have the luxury of litigating at the cost of the State even against those defendants against whom he is unable to show any cause of action whatsoever.

The principles that apply to a case falling under Order 7, Rule 11 (a) will also apply with equal force to a case falling under Order 33, Rule 5, Cl. (d).

*(Against order of Prl. Sub-J., Guntur, in O. P. No. 40 of 1971, D/- 21-4-1973.)

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In cases therefore where no cause of action is disclosed in respect of some of the defendants, under Order 33, Rule 5 (d) the petitioner cannot be permitted to sue them. 1968 All LJ 1102, Diss. from.

(Para 9)

(C) Tort — A, B and C prejudicing Y against Z and influencing Y to terminate the temporary services of Z. — No allegation or proof of conspiracy between A, B and C to get Z's services terminated — No tort is committed by A, B and C. (Para 5)

(D) Civil P. C. (1908), O. 41, R. 33 — Appeal against order under O. 33, R. 5 (d).

In an appeal against an order allowing a petition in forma pauperis, the High Court will not take into consideration the possible defences open to the respondent on the merits of the petitioner's claim nor make an elaborate enquiry into the question of fact or law. (Para 10)

(E) Andhra Pradesh Shops and Establishments Act (36 of 1947), Ss. 2 and 42 — Does not apply to a claim for damages.

Section 42 of the Act does not cover a case of damages. The definition of 'wages' in Section 2 also is not comprehensive enough to include damages which one may claim for breach of contract of service. (Para 11)

(F) Specific Relief Act (1877), S. 42 — Suit for declaration of illegality of termination of service and for damages — Not barred by the section. (Para 12)

Cases Referred: Chronological Paras
1968 All LJ 1102 = ILR (1968) 2 All 814

9

(1968) 2 QB 762 = (1968) 2 All ER 63 6
AIR 1965 Andh Pra 266 = (1965) 1 Andh
WR 351 12

AIR 1962 SC 941 = 1962 Supp (2) SCR 675 4

AIR 1954 Mad 537 = (1954) 1 Mad LJ 26 9

AIR 1951 Nag 419 = ILR (1949) Nag 560 9

(1936) 1 All ER 863 = 80 SJ 613 8

(1919) 1 KB 244 = 88 LKKB 628 7

P. M. Gopal Rao, for Appellant; A. Hanumantha Rao (for Nos. 2 to 4 and 1), for Respondents.

JAYACHANDRA REDDY, J.:— The appellant was appointed as Market Information Officer on 15-11-1966 in the Sub-Office of the Tobacco Export Promotion Council (1st respondent) at Guntur on a salary of Rs. 210 for a period of one year and served continuously for 5 years. Respondents 2 to 4 are the Secretary, Chair-

man and Vice-Chairman of the Tobacco Export Promotion Council (1st respondent). On 15-2-1971 the Administrative Committee passed a resolution authorising the 3rd respondent to take action against the appellant and the appellant's services were terminated with effect from 1-4-1971 in pursuance of a notice issued on 26-2-1971. The appellant filed O. P. No. 40 of 1971 against respondents 1 to 4 herein to permit him to file the suit in forma pauperis and for declaration that the order terminating his services is illegal and inoperative. He also claimed damages against the respondents to an extent of Rs. 93,705 being the total amount of his salary for 12 years and also further damages of Rs. 100 against respondents 2 and 4. It is his case that he served the 1st respondent-Council to the best of his ability and secured good name for the Council and this became an eyesore to respondents 2 and 4 and they prejudiced the mind of the 3rd respondent against the appellant and managed to get a resolution passed on 15-2-1971 in pursuance of which his services were terminated. According to him there was no reasonable cause for termination of his services and in view of Section 41 of the Andhra Pradesh Shops and Establishments Act the respondents have no right to terminate the services of the appellant. Hence he was entitled for damages as prayed for.

2. The respondents filed a counter stating that respondents 3 and 4 are merely representatives of the 1st respondent, that the 4th respondent has no power except to preside over the meetings in the absence of the Chairman and that they cannot be impleaded in their individual capacities and they are not liable for any damages.

3. The learned Subordinate Judge after considering the rival contentions, held that the petitioner, has no cause of action against respondents 2 to 4 as contemplated under Order 33, Rule 5, Cl. (d), C.P.C. and consequently he directed the numbering of the pauper petition as a suit only against the 1st respondent and dismissed it against respondents 2 to 4. The present Civil Miscellaneous Appeal is filed by the petitioner against this order of the Court below, and no appeal is preferred by the 1st respondent.

4. Sri P. M. Gopal Rao, the learned counsel for the appellant contends that a reading of the averments in the plaint

would show that there is sufficient cause of action for the appellant against respondents 2 to 4. According to him a contention in which respondents 2 and 4 in particular played the key-role in getting the resolution passed by prejudicing the mind of the 3rd respondent and so they are liable for damages as prayed for in the original petition. The conduct of respondents 2 and 4, according to the learned counsel was malicious and that resulted in the termination of the services of the appellant and tortious act of the respondents rendered them liable for damages. Relying on a decision of the Supreme Court in *Vijai Pratap v. Dukh Haran Nath* (AIR 1962 SC 941) the learned counsel contends that if the allegations in the petition filed under Order 33, Rule 5 (d) C.P.C. prima facie show a cause of action the court cannot embark upon an enquiry as to whether the allegations are true or whether the petitioner would succeed in the claims made by him.

5. In the light of the above decision of the Supreme Court, the averments in the plaint in this case may be examined. Even the learned counsel conceded that in view of the plaint averments, there is absolutely no cause of action for the plaintiff against the 3rd respondent. Now coming to respondents 2 and 4, as already noted, the 2nd respondent is the Secretary of the 1st respondent-Council and as can be gathered from the cause title the 1st respondent council is represented by him. The 4th respondent is the Vice-Chairman of the 1st respondent-Council. The main allegation against these two respondents is that they grew jealous of the appellant who became extremely popular by rendering meritorious service in raising the image of the council. The further averment in the plaint is that as the appellant a petty employee earned high reputation among the world tobacco dignitaries, respondents 2 and 4 have been trying to send him away out of the office and thus put an end to his popularity. But having failed in their efforts they were successful in prejudicing the mind of the 3rd respondent by carrying tales against the appellant-petitioner. Ultimately the two respondents manoeuvred to get a resolution moved and prevailed upon the 3rd respondent to get the same passed in the Administrative Committee held at Guntur on 15-2-1971 authorising the 3rd respondent to take action against the appellant-petitioner. In pursuance of this

resolution his services were terminated. Even if all these plaint allegations against respondents 2 and 4 are taken to be true we are not able to see as to how they are directly responsible for the termination of the services of appellant-petitioner. It is the Administrative Committee that authorised the 3rd respondent by its resolution to take action. Respondents 2 and 4 are only statutory heads of the 1st respondent-Council. It is the decision of the Administrative Committee that was put into effect. It is not the case of the appellant-petitioner that respondents 2 and 4 are directly responsible for passing the resolution or the termination order. If the petitioner is aggrieved by the resolution and the termination orders, he can undoubtedly proceed against the 1st respondent-Council which is its employer for wrongful termination of his services and claim damages, but we are not able to understand how respondents 2 and 4 could be held responsible. Assuming that respondents 2 and 4 had influenced the 3rd respondent and prejudiced him against the appellant-petitioner, that by itself cannot amount to a tort. There are no averments in the plaint which render the act of respondents 2 and 4 tortious and expose them to pay damages.

6. The learned counsel for the appellant relied on *Daily Mirror Newspapers Ltd. v. Gardener*, ((1968) 2 QB 762) and argued that respondents 2 and 4 who procured breach of contract of the appointment between the appellant and the 1st respondent, committed an unlawful act. In that case the plaintiff-company, publishers of a national daily newspaper sued the defendants who were the officers and the executive members of the retailers' federation, a trade union and who instructed their members to boycott the newspaper for a week and that they would not be liable for supplies delivered by the wholesalers despite the 'stop' notice. The Court of Appeal held that the retailers committed breach of the contract without sufficient cause and thus committed an unlawful act. It may thus be seen that the officers of the retailers' federation, the respondents therein were directly involved in instructing their members to boycott the newspapers and thus committed a breach of the contract directly. In the instant case it is the 1st respondent that appointed the appellant-petitioner. Even according to the appellant-petitioner, respondents 2 to 4 are not directly responsible for the resolution of the Adminis-

trative Committee. Further it is not in dispute that the services of the appellant-petitioner are to be renewed every year by the 1st respondent. The petitioner was not holding a permanent post. If at all there was any breach of the contract, the 1st respondent would alone be directly liable and not the others. The above mentioned decision relied upon by the learned counsel is therefore of no assistance to the appellant.

7. In this regard reliance is also placed on *Pratt v. British Medical Association*, (1919) 1 KB 244. In this case also the defendants were directly involved in the unlawful act complained of and hence were found to be liable for damages for their misconduct. This case also does not lend support to the appellant's plea, that respondents 2 and 4 are liable for damages.

8. The learned counsel for the appellant next contended that the averments in the plaint go to show that respondents 2 and 4 entered into a conspiracy to get the services of the appellant-petitioner terminated and as such they committed a tortious act rendering themselves liable for damages. The learned counsel in the context referred to certain passages in 'Law of Torts' by S. Ramaswamy Iyer (Sixth Edition). In a passage at page 303 it is pointed out by learned author that—

"The principle that persons combining with the object of injuring another should be liable in a civil action though apart from combination their methods are not illegal and they are not guilty of a crime, rests on grounds of policy and may be useful to penalise forms of wrong doing and oppression which may otherwise escape the law. Though the principle appears to be simple and intelligible there have been difficulties in applying it. It can and need be invoked only when a single individual is not liable for the conduct complained of."

But we are unable to see as to how such a conspiracy can be spelled out from the circumstances of the case and the averments in the plaint. It is not the case of the appellant that respondents 2 and 4 derived any benefit by getting the services of the appellant terminated; nor is it his case that they in their individual capacity had any direct say in passing the resolution or in the ultimate order of termination of his services. Admittedly the appellant was appointed on a contract basis and his services were being extended only year after year. It was not in-

cumbent on the Council to continue him unless it so desired. It is also not averred in the plaint that the respondents entered into a conspiracy as such. There is absolutely no whisper of any malicious conduct of the 3rd respondent much less an unequivocal allegation to that effect. On the other hand what all that is stated is that respondents 2 and 4 became jealous of the appellant and manoeuvred to get the resolution adopted. In this context it may be noticed that the appellant was drawing a salary of only Rs. 210 and respondents 2 and 3 are occupying very high positions in the Council. Having regard to all these circumstances and even after taking the averments in the plaint to be true, it is not possible to spell out an allegation of conspiracy between respondents 2 and 4 to commit a wrongful act so as to cause wrongful harm or loss to the appellant. In support of the contention that where there is a conspiracy to wrongfully terminate a contract of service, persons so conspiring render themselves liable, reliance was placed on *De Jetley Marks v. Greenwood* (Lord) ((1936) 1 All ER 863). In that case the company was incurring losses and the respondents-Directors at a Board meeting thinking that the plaintiff the Managing Director was responsible for the poor financial position of the company, suspended him from his duties pending investigation. The plaintiff filed a case against the respondents for non-payment of salary and for damages for wrongfully conspiring to procure a breach of contract. His Lordship Porter, J. held that a conspiracy to cause a breach of contract is not in itself a good cause of action, that the plaintiff did not make out a case for damages against the Directors and that the plaintiff can complain of his alleged dismissal and nothing else. No doubt in this case it is pointed out that the action of those who induced others to break their contracts can only be justified where such action is taken as a duty. It is on this observation reliance is placed for further contending that when there is an allegation of conspiracy against respondents 2 and 4 that they induced the 3rd respondent to break the contract of service, then there is a case for damages. As already observed while conspiracy as such is not alleged, the averments in the plaint are so vague that even if they are taken to be true, it is impossible to spell out even a remote case of conspiracy. Thus we are clear in our mind that no cause of action is made out against respondents 2 to 4.

9. The Court below has permitted the appellant to sue as pauper against the 1st respondent only and dismissed the petition as against respondents 2 to 4 holding that there is no cause of action against them. Relying on *State of Punjab v. R. P. Kapoor* (1968 All LJ 1102) the learned counsel for the appellant contended that the Court has no power to split up the petition under Order 33, Rule 5, C.P.C. in that manner. So the next important question that falls for consideration is whether under Order 33, Rule 5, Cl. (d) C.P.C. the petitioner-pauper can be permitted to sue all the defendants though cause of action is disclosed only against some of them, or whether the permission can be limited only in respect of such of the defendants against whom there is cause of action and not others. Order 33, Rule 5, Cl. (d), C.P.C. reads thus:

"5. The Court shall reject an application for permission to sue as a pauper—

(a) to (c) xx xx xx

(d) where the allegations do not show a cause of action."

The express terms of Order 33, Rule 5 (d) require the court to ascertain whether the allegations made in the petition disclose a cause of action and to satisfy itself that the allegations made in the petition, if accepted to be true, entitle the petitioner to the relief he claims. What then would happen in a case where a plaintiff vexatiously and frivolously adds some defendants against whom there is absolutely no cause of action, along with some others against whom there is some cause of action? So far as the latter category of defendants is concerned, the Court can allow the pauper petition, if other requirements are satisfied. But does it necessarily follow that the pauper petition should be allowed even with respect to the other defendants against whom there is no cause of action whatsoever? We are clear in our mind that the intendment of Order 33, Rule 5, Cl. (d) is to allow the petitioner to sue only such persons against whom he can show some cause of action and not to allow him to have the luxury of litigating at the cost of the State even against those defendants against whom he is unable to show any cause of action whatsoever. In this connection it is useful to note that under Order 7, Rule 11 (a) a plaint can be rejected when it does not disclose a cause of action. A Division Bench of the Nagpur High Court in *Shankarrao Balaji v. Shambihari* (AIR 1951 Nag 419) held that under Order 7,

Rule 11 the court after examination of the plaint can discharge some of the defendants against whom no cause of action is disclosed and have their names struck off from the plaint. We see no reason why this principle cannot be applied to a case falling under Order 33, Rule 5, Cl. (d) where there is no cause of action against some of the respondents-defendants. At this juncture we may notice Section 141, C.P.C. which states that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. Having regard to this general provision, we are of the view that the principles that apply to a case falling under Order 7, Rule 11 (a) will also apply with equal force to a case falling under Order 33, Rule 5, Cl. (d). In *Ramakrishna Chetti v. Govindammal*, (AIR 1954 Mad 537), it is pointed out that a person who applies for leave to institute a suit or prefer an appeal in forma pauperis must act with the utmost good faith. So it is axiomatic that in cases where no cause of action is disclosed in respect of some of the defendants, under Order 33, Rule 5 (d) the petitioner cannot be permitted to sue them. In *State of Punjab v. R. P. Kapur* (1968 All LJ 1102) the Division Bench of the Allahabad High Court held:

"If the allegations made by the pauper disclose cause of action, though not against all the defendants, permission to sue as a pauper cannot be refused."

This proposition cannot be disputed; but during the course of the judgment the learned Judges held that "it does not appeal to reason that the petitioners should be permitted to sue as paupers some of the defendants in the case while the petitioners should be called upon to pay court-fee as against the other defendants to the same cause", and also disagreed with the view expressed by the Nagpur High Court in *Shankarrao Balaji v. Shambihari* (AIR 1951 Nag 419). But with great respect, we are unable to agree with this view of the Allahabad High Court in view of our aforesaid discussion about the scope of Order 33, Rule 5 (d). We therefore hold that the lower Court was right in permitting the appellant-petitioner to sue in forma pauperis only the 1st respondent and not respondents 2, 3 and 4.

10. The learned counsel for the respondents next contended that this Court while exercising its powers under Order 41, Rule 33 which are very wide,

can give suitable relief to the 1st respondent also, though no appeal is preferred on its behalf, as according to him even against the 1st respondent no cause of action is disclosed. We see no substance in the contention. In the plaint it is clearly averred that the 1st respondent is liable for damages as it wrongfully terminated the services of the appellant-petitioner. At this stage we can neither take into consideration the possible defences open to the 1st respondent on the merits of the petitioner's claim nor can we make an elaborate enquiry into the question of fact or law.

11. The learned counsel for the respondent relying on Sections 2 and 42 of the A. P. Shops and Establishments Act also contended that a specific remedy is provided under those provisions for the appellant in a case of illegal termination of service. We have examined Section 42 of the said Act and find that it does not cover a case of damages. The definition of 'wages' in Section 2 also is not comprehensive enough to include damages which one may claim for breach of contract of service. However, it is unnecessary for us to express any considered opinion in this regard; this is also a question which has to be decided in the suit as such.

12. The learned counsel for the respondents relying on the decision in the *Guntur Tobacco Market Committee v. Narasaiah*, (AIR 1965 Andh Pra 266) further contended that a suit for declaration and reinstatement is not maintainable under Section 42 of the Specific Relief Act as the services of the appellant could be terminated by the 1st respondent-Council as per the terms of the contract. We see no force in this contention. The observations made in the aforesaid judgment of this court have no relevance to the facts of this case. That was a case where a suit was filed under Section 42 of the Specific Relief Act for a declaration that he still continued in service. In the instant case the suit is filed only for a declaration that the order of termination of services is illegal and for award of damages and other reliefs. The granting of these reliefs is not prohibited under Section 42 of the Specific Relief Act. We are unable to agree with this contention of the learned counsel for the respondents. Further, these are all matters which have to be decided in the suit itself as it is not shown prima facie that the suit is not maintainable.

13. For all the aforesaid reasons, the Civil Miscellaneous Appeal is dismissed with costs.

Appeal dismissed

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GANGADHARA RAO, J.

The Visakhapatnam Ex-Servicemen Co-operative Motor Transport Society and another, Appellants v. Subbavarapu Ramayamma and others, Respondents.

A. A. O. No. 130 of 1974, D/- 28-7-1975.*

(A) Motor Vehicles Act (1939), Section 110-B — Factors to be considered in making an award — Gratuity paid by employer of deceased should not be deducted from compensation amount. AIR 1973 Guj 216 and 1975 ACJ 56 (Delhi), Rel. on. (Para 5)

(B) Motor Vehicles Act (1939), Section 110-B — Factors to be considered in making an award — Lump sum payment of compensation — Deduction on account of uncertainties of future.

It cannot be laid down as an absolute rule that in every case some deduction should be made out of the total compensation amount on the ground of uncertainties of future and also on the ground that the entire compensation amount is paid in a lump sum. (Para 5)

In this case, the accident took place on 8-11-1968. No interest was awarded on the compensation amount by the Tribunal in the original petition pronounced on 11-5-1973. In the appeal, the High Court granted an interim stay and it was made absolute on 29-11-1974, on condition that the owner of the vehicle should deposit nearly half of the compensation amount. Thus till the disposal of the appeal, the claimants not only lost interest on the compensation amount, but received only half of that amount. In these circumstances, there is no justification to make a deduction out of the compensation amount payable to the claimants. 1968 ACJ 24 (Mad); AIR 1969 Delhi 183; 1969 ACJ 444 (Delhi); 1971 ACJ 31 (Punjab) and 1971 ACJ 324 (Delhi), Rel. on; AIR 1964 Mys 113, Distinguished. (Para 6)

*(Against order of 1st Addl. Dist. and S. J., Visakhapatnam, O. P. No. 9 of 1969, D/- 11-5-1973.)

ET/FT/B607/76/MBR

Cases Referred: Chronological Paras

1975 ACJ 56 = 1975 Rajdhani LR 172	5
AIR 1973 Guj 216 = 13 Guj LR 920	5
AIR 1971 SC 1624 = 1971 (Supp) SCR 20	7
1971 ACJ 324 (Delhi)	7
1971 ACJ 31 = 72 Pun LR 932	5
AIR 1969 Delhi 183 = 1968 ACJ 141	7
1969 ACJ 444 (Delhi)	5, 7
1968 ACJ 24 (Mad)	7
1967 ACJ 550	5
AIR 1964 Mys 113	5
AIR 1962 SC 1 = (1962) 1 SCR 929	5
AIR 1961 Punj 400	5

S. Venkata Reddy, for Appellants; C. N. Babu, for Respondents.

JUDGMENT:— The Visakhapatnam Ex-Servicemen Co-operative Motor Transport Society and the Co-operative General Insurance Company have filed this appeal against the order of the 1st Additional District and Sessions Judge, Visakhapatnam in O. P. No. 9/69.

2. S. Gurumurthy was working as a crane driver in the Port Trust, Visakhapatnam. At about 10-45 P.M. on 8-11-1968 while he was returning home from his office the City Bus A. P. V. 933, owned by the 1st appellant-Society dashed against him. He was admitted in the hospital and he died at 2 P.M. on the next day. So his legal representatives filed a petition under Section 110 of the Motor Vehicles Act claiming compensation of Rs. 40,000. Their case was that the driver was rash and negligent in driving the bus and thereby the accident has happened. The appellants herein contended that the driver was not rash or negligent and even otherwise the deceased was guilty of contributory negligence.

3. The learned Additional Sessions Judge on an appreciation of the evidence came to the conclusion that the accident had happened as a result of the negligent driving of the driver. He has also found that the deceased was guilty of contributory negligence. He held that the claimants were entitled to a compensation of Rs. 27,859-00 but in view of the contributory negligence of the deceased, he awarded half of that sum i.e. Rs. 13,930 as compensation by his order dated 11th May, 1973.

4. The learned counsel for the appellants has contended before me that first, the driver was not guilty of rash and negligent driving, secondly the gratuity of Rs. 6,000 granted by the employers of the deceased should have been deducted out of the compensation payable and

thirdly, some deduction should have been made out of the total amount of compensation awarded by the Tribunal in view of the uncertainties of the future and since the amount is paid in a lump sum.

5 I have perused the evidence and I am satisfied with the finding of the Tribunal that the driver was rash and negligent in driving his vehicle and therefore, the accident has happened and the deceased died. On the second question whether the gratuity is liable to be deducted or not, the learned counsel has relied upon *Ram Saran v. Shakuntala Rai*, AIR 1961 Punj 400; and *Jogindernath v. Shanti Devi*, 1967 ACJ 550. In those two cases the Provident Fund contribution was disallowed. The learned counsel for the claimants have referred me to the decisions in *Life Insurance Corporation v. Kasturben*, AIR 1973 Guj 216, and *Jaswant Kaur v. Ratti Ram*, 1971 ACJ 31 (Punj) and *Bhagwan Devi v. Ish Kumar*, 1975 ACJ 56 (Delhi). In *Life Insurance Corporation v. Kasturben* it was held that collateral benefits like insurance money and the amount of death-cum-retirement gratuity could not be deducted from the compensation amounts the reason being that the deceased had bought with his own money. It was a benefit derived by way of prudent savings effected for his own benefit under a contract by the injured party whose benefit could never go to the tort-feasor. It is only a like which can be deducted from the like and, therefore, intrinsic nature of the payment must be considered before any such deductions can be made. That is why any pension amount or retirement-cum-gratuity benefit which had the insurance element could never be deducted. It was only that pension which was earned after the contributions had ceased that it assumed the character of wages and which alone could be deducted, when computing the economic loss of future earnings or loss of wages. In *Bhagavanti Devi v. Ish Kumar* a decision of the High Court of Delhi Mr. Justice H. L. Anand has reviewed the case law on the subject and held as follows:

"It thus appears that there is considerable judicial authority both in England and in this country in favour of exclusion of benefits received by the legal representatives on account of life insurance policy, pension, gratuity, provident fund and other such benefits from consideration in determining the amount of compensation which appeared to the Tri-

bunal to be just on account of loss of pecuniary benefit arising out of death and this exclusion would appear to be to be just and reasonable because these are benefits for which the deceased had paid. These benefits are in the nature of *Quid Pro Quo* and have relation to the savings effected by the deceased besides having their genesis either in the contract or in the past service and good conduct and these benefits could not be said to be benefits arising out of the death of a person in the sense in which the action for damages or inheritance could be related to such an event. There would be no justification, therefore, to give the benefit of these payments to the wrongdoer who, by his negligent act, has caused the death of a person. Such a conclusion would be justified even if the principles enunciated by the Supreme Court in the case of *Gobald Motor Service Ltd. v. Veluswami* (AIR 1962 SC 1) were to regulate the determination of compensation under the Act because even on the application of the aforesaid principles, it appears to me that there is a clear distinction between benefits received on account of death and those that are merely payable on the death of a person. The former arise out of death and would not have been available without it, while the latter are benefits which are available independently of death but are payable on death. The deduction made by the Tribunal on these counts must, therefore, be ignored in computing the compensation to which the dependent would be entitled."

I agree with the reasoning of both these decisions and I hold that the appellants cannot contend that the gratuity of Rs. 6,000 paid by the employers of the deceased should be deducted from out of the compensation amount. On the third question, it is true that in *State of Mysore v. Gowri Vithal*, AIR 1964 Mys 113 the total compensation amount was reduced by 10 to 15% having regard to uncertainties of life and the fact that the amount was payable in a lump sum on the death of the deceased. That case arose under the Fatal Accidents Act, 1855. The learned counsel for the respondents has placed before me *Khidni v. Dayal Singh*, (1969 ACJ 444) (Delhi); *Jaswant Kaur v. Ratti Ram*, (1971 ACJ 31) (Punj) in order to show that there is no absolute rule that in every case a deduction should be made because a lump sum amount is paid. In *Khidni v. Dayal Singh* the Delhi High Court held that though as a rule a deduction is made when the pay-

ment of the whole claim is accelerated and made in a lump sum, still in that case since the deceased was killed on 7-5-1959 and ten years had elapsed by the time the payment of the claim was made to his dependants, the learned Judge did not make any deduction from the total claim on account of the accelerated payment. In *Jaswant Kaur v. Batta Ram*, a decision of Punjab and Haryana High Court the learned Judge held that there was no absolute rule that in every case, deduction must be made on account of uncertainties of life or the fact that the amount is to be paid in lump sum. In his opinion, the circumstances of each case have to be taken into consideration. In that case the accident took place on 6th October, 1966, compensation of Rs. 94,400 was awarded on 8th March, 1968. The payment of compensation to the extent of one-half was stayed by the High Court on 8th August, 1968. Holding that if the full amount of compensation was made available to the claimants, on 8-3-1968 they could have deposited the same in some bank, and secured interest at the rate of 6% per annum. The learned Judge in the circumstances of that case refused to make any deduction. Similarly in *Bhagwanti Devi v. Ish Kumar*, a decision of the Delhi High Court it was held as follows:

"The only other question that remains to be considered is the deduction of Rs. 6,500 made on account of the fact that instead of periodic benefits, the dependents would be getting the amount of compensation in lump sum thereby obviating various uncertainties and is a deduction which is supported by considerable authority, but, though based on sound principle, is not a rule universally applicable and has to be applied in the context of such counter balancing factor as may be present in a particular case, such as increasing cost of living and proportional devaluation of the rupees, the time lag between the death and the award as well as between the award and the actual payment."

I agree that it cannot be laid down as an absolute rule that in every case some deduction should be made out of the total compensation amount on the ground of uncertainties of future and also on the ground that the entire compensation amount is paid in a lump sum.

6. In this case the accident happened on 8-11-1968. The judgment in the

original petition was pronounced on 11-5-1973. No interest was awarded on the compensation amount by the Tribunal. In this appeal this court granted an interim stay and it was made absolute on 29-11-1974, on condition that the appellants should deposit Rs. 7,000 which is nearly half of the compensation amount. Thus till to-date the claimants have not only lost interest on the compensation amount, but received only half of that amount. In these circumstances I do not find any justification to make a deduction out of the compensation amount payable to the claimants.

Before I conclude I should refer to one submission made by the learned counsel for the respondents. As stated already, the learned counsel for the appellants has relied upon *State of Mysore v. Gowri Vithal* and contended that the compensation amount should be reduced by 20% having regard to the uncertainties of life and the fact that the amount was payable in a lump sum. That was a case decided under the Fatal Accidents Act, 1855. The learned counsel for the respondents has contended before me that the provisions governing the determination of compensation under the Fatal Accidents Act do not apply to the cases arising under the Motor Vehicles Act, 1939. I find some force in this contention. Under Section 110-B of the Motor Vehicles Act, the Claims Tribunal may make an award determining the amount of compensation which appears to it to be just. Thus it has a wider ambit than the words used in Sections 1 and 2 of the Fatal Accidents Act. In *Sheikhupura Transport Co. v. N. I. T. Ins. Co. Ltd.*, (AIR 1971 SC 1624) a case arising under the Motor Vehicles Act, a similar question was raised and the Supreme Court observed as follows:—

"Under Section 110-B of the Motor Vehicles Act, 1939, the Tribunal is required to fix such compensation which appears to it to be just. The power given to the Tribunal in the matter of fixing compensation under that provision is wide. Even if we assume (We do not propose to decide that question in this case) that compensation under that provision has to be fixed on the same basis as is required to be done under Fatal Accidents Act, 1855 (Act 13 of 1855), the pecuniary loss to the aggrieved party would depend upon data which cannot be ascertained accurately but must necessarily be an estimate or even partly a conjecture. The

general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever sources come to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained."

Thus the question was left open. The Madras High Court in Chinnaponnu Ammal v. T. N. Moona Pillai, (1968 ACJ 24) (Mad) and the Delhi High Court in Iswari Devi v. Union of India, 1968 ACJ 141 = (AIR 1969 Delhi 183) have also taken the view that the considerations in determining the compensation under the Fatal Accidents Act are different from the Motor Vehicles Act. In W. S. Bhagsingh & Sons v. Omprakash Kaith (1971 ACJ 324) (Delhi) the Delhi High Court held that the Claims Tribunal may apply the principles laid down in the decisions under the Fatal Accidents Act if they, in the opinion of the Tribunal, would serve as a proper measure of what is 'just' compensation in the facts and circumstances of the case in hand. I agree with the reasoning of that decision.

8. In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

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FULL BENCH

S. OBUL REDDI, C. J., PUNNAYYA
AND GANGADHARA RAO, JJ.

Tenugu Pedda Narsimlu and others,
Appellants v. Gram Panchayat, Velpur,
Respondent.

Writ Appeal No. 145 of 1975, D/- 3-3-1976.*

(A) Andhra Pradesh Gram Panchayat Act (2 of 1964), Sch. II, Rules 7 and 8 — Levy of house tax by Panchayat — Preparation of assessment Books under R. 7 — Executive authority should give public notice to rate payers as contemplated by R. 8 before finalising assessment — Individual notice not necessary.

The executive authority of the Gram Panchayat should give notice to the rate payers before finalising assessment under Rule 7. But, it is not necessary to give individual notice to each rate payer. It is

*(Against judgment of this Court in W. P. No. 2161 of 1973, D/- 28-1-1975.)

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sufficient if he gives a public notice as contemplated by Rule 8. (Scheme of Act for levy of house tax discussed in paras 6, 7 & 9). (Para 19)

Under R. 7 preparation of assessment books becomes final only after an opportunity is provided to the rate payers. But there is no provision in the rules that each rate payer should be given individual notice before finalising the assessment. Rule 3 contemplates only a public notice by beat of drum in the village, and of the place or places where the books may be inspected. So only a general notice as mentioned under Rule 8 should be given. AIR 1973 SC 205 and AIR 1973 SC 389, Ref.; (1971) 2 Lawyers Ref 420 (A. P.), Partly Overruled. (Paras 13, 14)

Cases Referred: Chronological Paras

1974 AC 40	18
AIR 1973 SC 389 = (1973) 3 SCR 22	18
AIR 1973 SC 205 = (1972) 1 SCA 555	18
(1971) 2 Lawyers Ref. 420 (A. P.)	2,
	4, 12
AIR 1967 SC 1269 = (1967) 2 SCR 625	18
(1967) 2 QB 617 = (1967) 2 WLR 962	18
(1949) 2 All ER 109 = 93 SJ 132	18

B. Sivareddy for Mr. R. Narasimha-reddy, for Appellants; Govt. Pleader for Panchayat Raj on behalf of Respondent.

GANGADHARA RAO, J.:— Two questions are raised in this Writ Appeal. Whether it is obligatory for the Executive Officer of the Gram Panchayat to give notice to the rate payers before preparing the assessment books relating to house tax, under Rule 8 of Schedule II of the Andhra Pradesh Gram Panchayat Act, 1964. If it is, whether a public notice is sufficient or an individual notice should be given to the rate payers?

2. The appellants are owners of houses in Velpur Gram Panchayat in Armour Taluk, Nizamabad District. Previously, the Gram Panchayat was levying property tax on the annual rental value. In 1973, the Gram Panchayat undertook quinquennial revision of the assessment of house tax. According to the appellants house tax was enhanced from two to eight times and no notice was issued to them calling for objections before revising the assessment and enhancing the taxes. In support of their contention, that no notice was given to them they relied upon the Bench decision of this court in Ramachandra Rao v. Govt. of Andhra Pradesh, (1971-2 Lawyers' Ref 420) (Andh Pra).

3. The writ petition was dismissed by our learned brother Raghuvir J. hold-

ing that the particulars of enhancement had not been given by the appellants and, so, it was not possible to give any relief in the writ petition. But, he observed that it would not prevent them from taking appropriate proceedings by filing objections before the authorities or taking suitable proceedings as and when demand notices were served upon them.

4. In the appeal filed against that judgment, the correctness of the Bench decision in *Ramachandra Rao v. Govt. of A. P.*, (1971) 2 Lawyers' Ref 420 (Andh Pra) is questioned by the learned Government Pleader.

5. In the counter-affidavit filed by the Executive Officer of the Gram Panchayat in the writ appeal, it is stated that the previous revision was made during the year 1967-68, and after the expiry of five years action was initiated to revise the house tax on the basis of the capital value, as provided under Section 69 read with Section 70 of the Andhra Pradesh Gram Panchayat Act, 1964, and accordingly the impugned action was taken by the Executive Officer. In accordance with Rule 8 of the Rules, notices have been published by beat of tom tom on 24-1-1973 and copies of the notification were published in three conspicuous places in the village, viz., one in village Chavadi, another at Venkatapur Chavadi and the third on the notice board of the Gram Panchayat, and it was also intimated through beat of tom tom of the aforesaid affixture of notices. The appellants did not file any objections before revising the assessments of the house tax and as a consequence, the Revision Officer was constrained to make final assessment of the house tax on the basis of the capital value of the buildings after going to each house and making capital value thereof as contemplated under Section 70 of the Act. It is also stated that the appellants did not prefer any appeal to the Gram Panchayat under Rule 27, or a revision to the Government. The Government through Memo No. 713, Panchayat Raj (Ptd. III) dated 4-10-1971, have communicated to the Panchayat to give an opportunity to the tax payers to file their objections to the Executive Authority against the provisional assessments within fifteen days from the date of publication of the assessment books, and if any objections are filed, they may be disposed of as early as possible, providing a right of appeal under Rule 27. It is stated that after the receipt of the said Memo from the Government, it was again

published by beat of tom tom, but none of the appellants, had filed any objections before the Executive Authority, nor availed themselves of the statutory right of redressal provided to them. Lastly, it was contended that the Revision Officer has scrupulously adhered to the Rules in making assessment of the house tax on the capital value.

6. In order to appreciate the questions raised in this appeal, it is necessary to refer to the relevant provisions of the Act and the Rules. Under Section 69 of the Act, a Gram Panchayat shall levy in the village a house tax. Under Section 70 (1) the house tax shall subject to the rules in Schedule II and to such other rules as may be prescribed, be levied on all houses in the village on any one of the following basis namely: (a) annual rental value, or (b) capital value, or (c) such other basis as may be prescribed. Under sub-section (3) of Section 70 the house tax shall be levied every year. It shall be levied at such rates as may be fixed by the Gram Panchayat, not being less than the minimum rates, prescribed in regard to the basis of levy adopted by the Gram Panchayat. Under sub-section (4) of Section 70, the Government may make rules providing for the manner of ascertaining the annual or capital value of houses or the categories into which they fall for the purposes of taxation. Under Section 71, the Government, may by order published in the Andhra Pradesh Gazette, for special reasons to be specified in such order direct any gram panchayat to levy the house tax referred to in Section 69 at such rates and with effect from such date not being earlier than the first day of the year immediately following that in which the order is published, as may be specified in the order. When such an order has been published the provisions of the Act relating to house tax shall apply as if the gram panchayat had, on the date of publication of such order, by resolution determined to levy the tax at the rate and with effect from the date specified in the order, and as if no other resolution of the gram panchayat under Section 69 determining the rate at which and the date from which the house tax shall be levied, had taken effect. A gram panchayat shall not alter the rate at which the house tax is levied in pursuance of an order of the Government or abolish such tax except with the previous sanction of the Government.

7. Schedule II enumerates the Rules relating to taxes. Under Rule 1, the

executive authority shall determine the tax to which each person or property is liable. As soon as may be after the tax payable by a person is determined for the first time under the Act, such person shall be served with a notice in the prescribed manner and thereupon he shall be liable to pay the tax year after year on or before the prescribed date without any fresh notice thereof. Rule 2 says that if, at any time, it appears to the gram panchayat that any person or property has been inadequately assessed or inadvertently or improperly omitted from the assessment book relating to any tax or that there is any clerical or arithmetical error in the said books, it may direct the executive authority to amend the said books in such manner as it deems just and necessary; provided that no such direction shall be given, where it involves an increase in the assessment, unless the person concerned has been afforded a reasonable opportunity to show cause to the gram panchayat why the assessment books should not be amended as proposed. Rule 4 says that when the gram panchayat has resolved to assess houses for the purpose of house tax either on their annual or their capital value, the rates fixed by the gram panchayat may either be proportionate to the value of each house, or may advance in systematic progression with the value of the house; but shall in no case decrease as the value of the house increases. Under Rule 5 when a proportionate rate has been adopted by the gram panchayat, it may group the houses in the village into classes to simplify the calculation and the collection of the tax. When a progressive rate has been adopted by the gram panchayat it shall prescribe principles of classification and settle the precise number and limits of each class. The Gram Panchayat shall not in either case so arrange the classes as to affect substantially the principle of taxation whether proportionate or progressive, and the number of classes shall in no case be less than six. Under Rule 6, the Karnam or Patwari having jurisdiction over any area comprised in the village shall, on the requisition of the executive authority, prepare and furnish to him a list of all houses within such area and shall enter in the list the names of owners and occupiers of such houses. Under Rule 7, the executive authority shall, on the receipt of the lists mentioned in Rule 6 cause assessment books to be prepared. Such assessment books shall show in distinct

columns the name of the owner and of the occupier of each house, the class, if any under which such house is taxed, the amount of the tax due on the dates on which the tax is payable. Under Rule 8, as soon as the assessment books are prepared, the executive authority shall, by beat of drum in the village, give public notice thereof and of the place or places where the books may be inspected. Under Rule 9, the executive authority may amend the assessment books at any time between one general revision and another. In every case in which between one general revision and another the executive authority assesses any house for the first time or increases the assessment on any house otherwise than in consequence of a general enhancement of the rates at which the house tax is leviable, the executive authority shall intimate by a special notice to the owner or occupier of such house that a petition for revising the assessment will be considered, if it reaches the gram panchayat office within sixty days from the date of service of such notice in the case of the State or Central Government or a company and within thirty days from the date of service of such notice in other cases. Under Rule 10 any person may, at any time not being less than thirty days or more than sixty days before the end of a year, move the executive authority by revision petition to reduce the tax to which he is liable for the forthcoming year on the ground that the annual or capital value, as the case may be, of the house in respect of which the tax is imposed, has decreased since the assessment of the house was last made or revised. That revision shall be disposed of under Rule 11. Under Rule 12, the executive authority shall not be bound to cause new lists or assessment books to be prepared every year, but may adopt those of the preceding year with such amendments as have been made or may be made for the preceding year; provided that a general revision of assessment books shall be made once in every five years. Public notice of such amendments and general assessment shall be given in the manner provided in Rule 8. Rule 13 provides for the appointment of a revision officer to conduct the general revision of assessment books. He may be appointed for a specified period and he shall exercise the powers, discharge the duties and perform the functions of the executive authority under these rules in so far as such powers, duties, functions relate to the revision of assessment books

under Rule 12. Rule 27 gives a right of appeal to the gram panchayat in respect of the assessment and imposition of the house tax under Rules 7 and 12, and the orders of the executive authority under Rule 11 upon a revision petition. Rule 29 empowers the gram panchayat to cancel or modify any order passed by the executive authority reducing or remitting a tax. Under Rule 30, the assessment books shall be corrected in accordance with any order passed by the gram panchayat on appeal; in the event of the amount of any tax being reduced or remitted by the gram panchayat, the executive authority shall grant a refund accordingly. Rule 31 says that the assessment of any tax when no appeal is made as hereinbefore provided, and when such an appeal is made, the adjudication of the gram panchayat thereon, shall subject to the revisionary powers of Government, be final provided that where any assessment is not in accordance with the assessment books, nothing in this rule shall be deemed to prohibit a fresh assessment or demand of the tax being made in accordance therewith.

8. In G. O. Ms. No. 282, P. R. dated 12th March 1975, the Government have framed rules relating to levy of house tax. They prescribe the minimum and maximum rates, the method and manner of determining the annual or capital value of houses, manner of assessments etc.

9. A reading of these provisions shows that the gram panchayat can levy the house tax on capital value of a house. It shall be levied at such rates as may be fixed by the gram panchayat, not being less than the minimum rates and not exceeding the maximum rates prescribed under the Rules. The Government may make rules for ascertaining capital value of a house and such rules have been made by the Government. The Government can also, by an order, direct a gram panchayat to levy the house tax at such rates and with effect from such date, not being earlier than the first day of the year immediately following that in which the order is published. Rules in Schedule II provide that when the gram panchayat has resolved to assess houses for purposes of house tax on their capital value, the rates fixed by the gram panchayat may either be proportionate to the value of the house, or may advance in systematic progression with the value of the house; but shall in no case decrease as the value of the house increases. It may also put the houses into classes to simplify the calculation and the collection

of the tax. When a progressive rate has been adopted by the gram panchayat, it shall prescribe the principles of classification and also settle the precise number and limits of each class. The karnam or the patwari of the village shall on the requisition of the executive authority, prepare and furnish to him, a list of all the houses within such area and shall enter in the list the names of owners and occupiers of such houses. On receipt of those lists the executive authority shall cause assessment books to be prepared. Such assessment books shall show in distinct columns the name of the owner and of the occupier of each house, the class if any, under which such house is taxed, and the amount of the tax due on the dates on which the tax is payable. As soon as the assessment books are prepared, the executive authority shall by beat of drum in the village, give public notice thereof and of the place or places where the books may be inspected. The assessee has a right of appeal to the gram panchayat against an assessment and imposition of house tax.

10. Thus the rate payer does not seem to have any say in the matter with regard to the basis on which the house tax can be levied or the rate at which it can be levied. The reason may be that the gram panchayat decides those questions and he speaks through his elected representative in the gram panchayat. Equally, the rules do not say that he should be heard before the assessment books are prepared by the executive authority under Rule 7 in Schedule II. Only he is given a right of appeal to the gram panchayat under Rule 27. Still the question is whether he should be heard and if so, what kind of notice should be given to him.

11. It is contended by the learned Government Pleader that before preparing the assessment books under Rule 7, there is no provision for giving notice to rate payers and the only obligation on the executive authority is to give a public notice as prescribed under Rule 8 by beat of drum in the village and of the place or places where the books may be kept for inspection. But, the learned counsel for the appellants contends that Rule 7 is silent with regard to giving of the notice to the rate-payer, but that does not mean that notice need not be given. He argues that assessment involves a liability and, therefore, notice should be given to the rate-payers, and they should be heard

before assessments are finalised under Rule 7.

12. In this connection, he placed strong reliance upon the Bench decision of this Court, in *Rama Chandra Rao v. Govt. of A. P.* ((1971) 2 Lawyers Ref 420). In that case a similar question had to be considered by the Bench. That was also a case of general revision of property tax after five years. It was contended by the petitioners in that writ petition that after the assessment books were prepared no notice was served upon them informing them that the property tax, which they were paying till then, had been increased and, consequently, they had no opportunity to show as to why and how the increase made in the rateable value was unreasonable and unjustified. Consequently, it was argued that the assessment of tax was bad and the demands could not be enforced against them. After referring to the relevant sections and the rules, the learned Judges observed as follows:—

"At first glance everybody is likely to carry the impression on a reading of Rules 7 and 8 that the assessment books caused to be prepared by the executive authority are tentative and provisional. This impression gets strengthened when one reads Rule 8 which enjoins upon the executive authority to publicly notify the contents of the register and of the place or places where the books are kept for inspection. These rules however do not show as to what is to happen after the books which are kept for inspection, are inspected, by the owners or occupiers of the houses. The said rules do not call upon the owners or occupiers of the houses who are aggrieved by the assessment made, to prefer objections to the executive authority, nor do they specifically empower the executive authority to consider and dispose of those objections. When Rule 8 directed the books to be kept for inspection, there must be some purpose behind the said rule. The only purpose cannot be to inform the owners and occupiers of the houses the real position in regard to their house tax but provide them an opportunity to make representation if they are not satisfied with the assessment made in regard to their house tax. Rules 7 and 8, however, are not express in this behalf. It is however, seen from a reading of R. 27 of the Rules, that it contemplates an appeal against 'the assessment and imposition of house tax under Rule 7'. Rule 7 does not in express language speak of assessment and imposition. If these provi-

sions therefore are to be read together and are to be given some sensible meaning, then Rules 7 and 8 will have to be interpreted in the manner which will make the picture of finalising the assessment books complete. Unless the following sentence appearing in Rule 7 "the executive authority shall cause assessment books to be prepared," is interpreted to divide the process into two stages, the first stage being the stage of unilaterally preparing the assessment books tentatively or provisionally and then after providing an opportunity to the rate-payers to represent their grievances and after those grievances are disposed of to finalise the assessment books, it would not be possible to postulate an order under Rule 7 of "assessment and imposition" of the tax on any house owner or occupier as an order of assessment and imposition of tax, against which an appeal under Rule 27 (a) of the Rules can be preferred. Thus the abovesaid words of Rule 7 necessarily imply the said two stages.

"It is now well settled that if the rule-making authority omits while making a rule some essential aspect of the matter without which the rule will not be complete and effective, it is permissible for the Courts to judicially interpret the rule by supplying the omission with a view to make the rule workable." The learned Judges further observed as follows:

"Thus unless Rule 7 is given a meaning by which after the provisional assessment books are prepared, opportunities are provided to the owners and occupiers of the houses, and the executive authority is empowered to dispose of those objections, culminating in the finalisation of the assessment books by which the assessment and imposition of tax will be deemed to have been finalised, Rule 7 would make no sense and will not complete the picture.

On a careful reading of the entire set of rules we are satisfied that the rule-making authority did not intend that no opportunity should be provided to the house owners or occupiers to represent their case after inspection of the provisional assessment books to the executive authority or that the executive authority should not consider and dispose of such objection before the provisional assessment book is finalised. In this connection it is pertinent to note that in all cases where the finalised assessment book is to be modified or amended during the two

general revisions, the rules require service of a special notice on those house-owners or occupiers whose house tax is proposed to be enhanced. If the rules require such a special notice in regard to enhancement between the two revisions, we fail to see why a separate rule should have been intended to apply to cases of general revision which result in enhancement of house tax."

When it was contended before the learned Judges that Rule 7 although authorises the executive authority to prepare provisional assessment book Rule 27 empowers the Gram Panchayat, in appeal to make a provisional assessment book final, it was held as follows:—

"We are not impressed by this argument. When once it is conceded that Rule 7 has the effect of causing provisional assessment books only and not the final books, then it would be unreasonable to alter Rule 27 with a view to make the appellate authority really a primary authority so that the provisional assessment books can be made final. The appeals contemplated by Rule 27 of the Rules are appeals preferred to Gram Panchayat by individual assesseees and not a general appeal against all the assessment books which admittedly are provisional according to Rule 7 of the Rules. The interpretation therefore which is sought to be given by the learned counsel appearing for the Gram Panchayat cannot be accepted. Reliance on Rule 31 in that behalf does not help him either. It merely declares as to when assessment of any tax shall be final. The difficulty is not at the appellate or revisionary stage. The difficulty is only at the initial stage and that is at the stage after the provisional assessment book is prepared. Unless there is a specific provision under which assessment books are finalised after hearing the objections the assessment and imposition of tax will not be effective. Admittedly except Rule 7 there is no other provision. It becomes therefore incumbent to read Rule 7 so as to make it effective. We are therefore satisfied that Rule 7 empowers the executive authority to prepare a provisional assessment book, publish its contents and made known to the house-owners and occupiers, the place or places where the books would be available for inspection. What must necessarily flow from this preliminary step is that it empowers the executive authority to receive objections from those who are not satisfied with the entries of the provisional

assessment books. By necessary implication, the executive authority is empowered to dispose of these objections and thus finalise the assessment book postulated by Rule 7. It is only then that Rule 7 read with Rule 8 would finalise the assessment books. The final assessment books would assess and impose the house tax on those whose names are entered in the assessment books. It is against such assessment and imposition of house tax, entered into the finalised assessment books that an appeal by individual house-owner or occupier of houses can lie to the Gram Panchayat.

"Rule 31 of the Rules makes the assessment book final where no appeal is filed, and if filed, it will be final only when the final order is passed by the Gram Panchayat in appeal. It is by such wholesome reading of these rules that a complete and workable picture can be evolved. Any other interpretation as stated earlier would make the rules incomplete and absurd."

Finally, on the facts of that case, the learned Judges held as follows:—

"Admittedly before the finalisation of the entries in regard to the assessment and imposition of the house tax on the petitioners, notices were not given to them. They had therefore no opportunity to file their objections. The entries relating to them are therefore bad in law. Any demand notices based on such entries cannot be enforced against them."

We agree with their reasoning and the interpretation of Rule 7.

13. We are also of the opinion that though Rule 7 is silent, still, no assessment could be finalised under that Rule without giving notice to the house owner. Assessment involves a liability and how can he be assessed without hearing him? If the State enjoins giving him a notice well and good, otherwise, he is entitled for a notice on the ground of natural justice. This question can be viewed from another angle also. No two houses are generally alike. The capital value of a house depends upon a number of factors like its total and plinth area, its age, its nature and design, the material used for its construction, etc. With all the guidelines laid down under the Rules, the executive officer can only make an estimate but that may not be real from the stand point of the rate payer who has actually constructed the building. Some times the values of both of them may differ so widely. So, it is but fair that he should

be heard before the assessment is finalised. There is also another aspect to this question. Under Rule 27, the rate-payer has a right of appeal against the assessment and imposition of house tax made under Rule 7. It means the assessment under Rule 7 is final. But, does it mean, the rate payer need not be heard before the final orders passed, but he would be heard only in an appeal? It will be like saying 'you will not be heard before you are convicted, and conviction is certain, but you have a right of appeal against your conviction'. It is a poor consolation to the convicted. Similarly, it is a poor comfort to the rate payer. In fact, we have many tax laws like income-tax, sales tax etc. in our country and no person is assessed without giving him a notice. So, we hold that under Rule 7, preparation of assessment books becomes final only after an opportunity is provided to the rate payers.

14. But, we do not agree with the learned Judges (if they meant that) that individual notice should be given to each rate payer before finalising the assessment under Rule 7. There is no provision to that effect under the Rules. Rule 8 contemplates only a public notice by beat of drum in the village, and of the place or places where the books may be inspected. This also becomes evident from a reading of Rule 12, which says that the executive authority shall not be bound to cause new lists or assessment books to be prepared every year, but may adopt those of the preceding year with such amendments as have been made or may be made for the preceding year; provided that a general revision of assessment books shall be made once in every five years, and public notice of such amendments and general assessments shall be given in the manner provided under Rule 8. It is also in consonance with the realities of the situation. In a case of general revision once in five years all the rate payers are affected. Therefore, a general notice is sufficient. Wherever an individual notice is to be given it is prescribed by the rules themselves. Under R. 2, if, at any time, it appears to the gram panchayat that any person or property has been inadequately assessed or inadvertently or improperly omitted from the assessment books relating to any tax or that there is any clerical or arithmetical error in the said books, it may direct the executive authority to amend the said books in such manner as it deems just or necessary provided that

no such direction shall be given, where it involves an increase in the assessment, unless the person concerned has been afforded a reasonable opportunity to show cause to the gram panchayat why the assessment books should not be amended as proposed. Similarly under Rule 9 (3), in every case in which between one general revision and another the executive authority assesses any house for the first time or increases the assessment on any house otherwise than in consequence of a general enhancement of the rates at which the house tax is leviable, the executive authority shall intimate by a special notice to the owner or occupier of such house that a petition for revising the assessment will be considered, if it reaches the gram panchayat office within sixty days from the date of service of such notice in the case of the State or Central Government or a company and within thirty days from the date of service of such notice in other cases.

15. It is common knowledge that the resources of many gram panchayats in our State are meagre. If they were to give individual notice to each rate payer under Rule 7, then how is it to be given? Should it be by registered post with acknowledgment due, or, should it be by ordinary post, or by serving individually through a messenger. If a notice is sent through a messenger a rate payer may not be present at home or refuse to receive it. If it is to be sent by registered post with acknowledgment due, then it involves lot of money; apart from the fact that some rate payers may not receive them or may get an endorsement made that they are not in houses, in which case, another notice had to be sent, which means delaying matters. So, we think that only a general notice as mentioned under Rule 8 should be given.

16. It is argued by the learned counsel for the appellants that a panchayat may not give a general notice but may produce an endorsement saying that they had given such a notice, in which case, rate payers would have no opportunity to make their representations. But, if this is proved, then there is no valid assessment at all. Therefore, on the ground that some panchayats may do it, we cannot hold that that individual notice should be given to each rate payer under Rule 7.

17. The learned Government Pleader has also argued that the executive authority is only acting in a ministerial

or an administrative capacity and is not exercising any quasi-judicial function while preparing the assessment books under Rule 7, and therefore there is no need to give any notice before preparing them. The question is not whether he is functioning in an administrative or quasi-judicial capacity. The question is whether his order will involve civil consequences for a citizen. If it does, he must give notice.

18. In this connection, we can do no better than quote the Supreme Court. In *D. F. O. South Kheri v. Ram Sanehi*, AIR 1973 SC 205, the Supreme Court observed that:—

"Granting that the order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property. This court in the case of *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269 held in dealing with an administrative order that 'the rule that a party to whose prejudice the order is intended to be passed is entitled to a hearing applied alike to judicial Tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set up that every citizen is protected against exercise of arbitrary authority by the State or its officers.'

The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rule of natural justice." In the same volume at pages 389 and 393. viz. in *Kesava Mills Co. v. Union of India*, AIR 1973 SC 389 at page 393, the Supreme Court observed as follows:—

"The second question, however, as to what are the principles of natural justice that should regulate an administrative act or order is a much more difficult one to answer. We do not think it either feasible or even desirable to lay down any fixed or rigorous yard-stick in this manner. The concept of natural justice cannot be put into a strait-jacket. It is

futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the observations of Lord Parker in *In re H. K. (an infant)*, 1967-2 QB 617. It only means that such measure of natural justice should be applied as was described by Lord Reid in 1974 AC 40 as 'insusceptible of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances'. However, even the application of the concept of fair play requires real flexibility. Everything will depend on the actual facts and circumstances of a case. As Tucker L. J. observed in *Russell v. Duke of Norfolk*, (1949) 2 All ER 109,

"The requirements of natural justice must depend on the circumstance of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with and so forth."

19. In the result, we hold that the executive authority of the Gram Panchayat should give notice to the rate payers before finalising assessment under Rule 7. But, it is not necessary to give individual notice to each rate payer. It is sufficient if he gives a public notice as contemplated by Rule 8.

20. In this case in the counter-affidavit filed by the executive officer, it is stated that he has given a public notice on 24-1-1973, and even subsequently, pursuant to the orders of the Government, he has given another public notice, but, the appellants did not make any representations. Therefore, we do not find any infirmity with the assessments made by the Gram Panchayat.

21. So, we dismiss this appeal with costs. Advocate's fee Rs. 100.

Appeal dismissed.

Cases Referred:	Chronological	Paras
(1969) Civil Revn. Appln. No. 210 of 1969, D/-5-3-1969 (Bom)		21
AIR 1968 SC 1413 = 71 Bom LR 48		5, 12, 13
AIR 1954 SC 5 = 1953 SCJ 621	3, 12, 13	
AIR 1949 Bom 141 = 51 Bom LR 58		22
AIR 1946 PC 34 = ILR (1946) Kar PC 17	40	
AIR 1916 PC 132 = 43 Ind App 127	40	

M. R. Parpia with A. M. Salik and M. A. Hainday, Advocates, for Appellant; H. A. Solkar, Asst. Govt. Pleader, (for No. 1), V. P. Tipnis, (for No. 2) and A. N. Maniyar, (for Nos. 3 and 4), for Respondents.

VAIDYA J.— It is rather unfortunate that the above First Appeal arising from Civil Suit No. 39 of 1953, cannot be disposed of, in the facts and circumstances of the case, so as to put an end to the litigation which was actually started in 1946 relating to the management of the Public Trust known as "Haji Malang Bawa Darga" situated on a hill Taluka Kalyan of Thane District.

2. This litigation started between the respondent Gopal Krishnaji Ketkar on the one side and Mahomed Jaffer Mohomed Hussein and another on the other side in the course of which Ketkar claimed the sole right to manage the Dargah. It is the Dargah of a 13th Century legendary and renowned Arab Pir or saint. It is worshipped along with another tomb of a Hindu princess whom the said Pir is said to have treated as his daughter.

3. The litigation ended its first course with the judgment of the Supreme Court in Gopal Krishnaji Ketkar v. Mahomed Jaffer AIR 1954 SC 5.

4. The Supreme Court laid down in paragraph (31) of its judgment at page 8 as follows:—

"It is evident from the case of both sides that the Darga is not private property. It was in existence some 700 years before the plaintiffs' ancestors came on the scene and a Muslim was in management in 1817. After this length of time and after what happened, and especially, as a Hindu princess was buried beside the Muslim saint, it might be legitimate to infer that there was some lawful origin, of which the traces are now lost, for management by a Hindu; and it may be fair and proper that whoever manages should be permitted to retain a portion of the offerings for himself. But it is quite evident that the property was not handed over to the plaintiffs' ancestors as a personal gift, nor of course would the Collector have had power to do that."

All he did was to settle a dispute and, with or without authority, to decide that

Kashinath Pant had the right to manage; and that was all that Kashinath Pant claimed. Ever since, until the notice of 4-4-46, no adverse right even to the offerings, has ever been set up. Then comes the admitted fact that the public have taken an interest in the place and that a dharamshala and so forth were built by 'members of the public including a Parsee; also that the place is very largely visited, particularly during the Urus time. This being so, we think it undesirable that things should be allowed to drift in this uncertain way, no one knowing where the legal rights of management lie or of what they consist: no one knowing how the rights are to devolve or how the large charitable offerings which are collected are to be distributed and used."

The Supreme Court has also referred to a statement made by the Solicitor General before them that a suit under Section 92 of the Code of Civil Procedure was under contemplation, and in view of that statement certain directions were given in the judgment regarding the collection and disposal of the offerings and it was also further stated—

"If no such suit is instituted within the said six months, then the second plaintiff, as the person in 'de facto' management of the Darga from 13-11-1938, the date of his adoption, till the date of suit, 7-10-1946 will be entitled to receive the offerings now lying in deposit in the Treasury for and on behalf of the Darga and for its benefit and in future to collect all the offerings all the year round for and on behalf of the Darga and for its benefit until he is displaced by a person with better title or authority derived from the Courts." The six months' period referred to therein was to commence from the date of the judgment of the Supreme Court which was May 22, 1953.

5. During the pendency of the said suit and the consequent litigation which went up to the Supreme Court, the Bombay Public Trusts Act, 1950 was passed. It came into force on January 21, 1952. Ketkar made an application under that Act, under protest, for registering the Darga as a Public Trust of which he was the sole trustee. The application was filed by him under protest as, according to him, the Dargah was not a public trust, to which the provisions of the Bombay Public Trusts Act, 1950 applied. In the course of these proceedings there was a dispute relating to the land bearing Survey No. 134, and it was ultimately held by the High Court and the Supreme Court that the Trust was a Public Trust within the meaning of the Bombay Public Trusts Act. The judgment of the Supreme Court is reported in: Gopal

Krishna v. Mohamed Haji Latif 71 Bom LR 48 = (AIR 1968 SC 1413).

6. The Charity Commissioner filed Civil Suit No. 39 of 1953, on November 16, 1953, as per the directions contained in the earlier judgment of the Supreme Court, in the Court of the District Judge of Thana, not under Section 92 which was repealed in the meanwhile but under Section 50 of the Bombay Public Trusts Act, as it stood before its later amendments at the time when the Charity Commissioner filed the suit. Sec. 52 of the Act without the later amendments read as follows:—

“52. Notwithstanding anything contained in the Code of Civil Procedure, 1908, the provisions of Sections 92 and 93 of the said Code shall not apply to the public trusts.”

The suit was, therefore, filed for framing a scheme for the management of the Trust and for other reliefs which were incidental or consequential to the framing of the Scheme and the management of the public-trust under Section 50 of the Bombay Public Trusts Act, 1950 as it stood then. Under that section the Charity Commissioner or two or more persons having an interest in the trust and having obtained the consent in writing of the Charity Commissioner in the manner provided by the Act could file a suit, inter alia, for the settlement of a Scheme or variations or alterations in a scheme already settled as stated in clause (g) of Section 50 as it stood then and which was altered to clause (j) when Section 50 was later on amended.

7. The suit had a protracted career before the Court of the District Judge from 1953 till February 3, 1970 on account of various interlocutory orders and proceedings and also in view of certain stay orders. On that day that is February 3, 1970, however, the Charity Commissioner filed his draft scheme which was recorded at Exhibit 620 with as many as 38 paragraphs. A pursis was filed by the defendant Ketkar opposing the Scheme mainly on the ground that the Scheme should have declared him to be the sole managing trustee of the Trust and he should have been further declared as the hereditary trustee having regard to the history of the management of the Dargah by his family.

8. The learned District Judge by his order, made on March 17, 1970, directed publishing of the Scheme and invited objections from persons interested in the Dargah. The Scheme was directed to be published on the Notice-Board of the Court; further a bailiff of the Court was deputed to go to the spot where Darga was situated and to publish the Scheme by beat of drum. All persons interest-

ed were required to appear before the learned District Judge on March 30, 1970 when the framing of the Scheme was to be considered.

9. On March 30, 1970 three intervenors, viz., (1) Shri Ishak Baba Kadwaikar (2) Moula Miya Mukhtyar Miya and (3) Fakir Mohommed Abdul Razak appeared through their Advocates. Mr. A. N. Maniyar appeared for intervenor No. (2) Moula Miya Mukhtyar and intervenor No. (3) Fakir Mohammad Abdul Razak, and Mr. Udaipuri appeared for intervenor No. 1.

10. It must be noted here that paragraphs 6, 7A, 9 and 33 in the draft Scheme (Ex. 620) are the only paragraphs now in dispute and they were as follows:—

“6. Number of Trustees: The number of trustees shall be not less than five and not more than seven provided that one of the trustees shall always be the lineal major male descendant of the family of Shri G. K. Ketkar, and in the absence of such lineal major male descendant, any other major person from his family (male or female) as the Court may appoint.

7A. First Trustees: The following persons shall be the First Trustees of the said trust under the Scheme:

- i. Shri Gopal krishnaji Ketkar,
- ii.
- iii.
- iv.
- v.

x x x x
9. The trustees except the hereditary trustee shall retire by rotation two at a time every third year beginning with 1st April 1971 (sic). The first two to retire will be trustees at S. Nos. 2, 3 and then 4 and 5 and so on.

Three months before such retirement, the remaining trustees shall move the Charity Commissioner for appointment of new trustees in place of the retiring trustees with due recommendations, if any. Thereupon, the Charity Commissioner shall make such appointments. The retiring trustee shall be eligible to be appointed. In case of sudden or casual vacancies, the Charity Commissioner shall fill up such vacancy on recommendations, if any, from the trustees.

x x x x
33. The hereditary trustee shall be entitled to be paid an amount of Rs. 250/- p. m. as remuneration from the trust amount for having the religious ceremonies of the Dargah performed according to custom and tradition.

The hereditary trustee shall not be entitled to offerings or donations either in cash or kind before the Dargah whether put in a sealed collection box or not.”

Thus in paragraph 6 of the Scheme defendant Ketkar was mentioned as entitled to be one of the trustees; paragraph 7A mentioned him, therefore, as trustee No. 1 leaving the other blank. The notice (Ex. 625) called upon the members of the public to put in their statements before the Court if they were interested in the Dargah, with respect to what was stated in Exhibit 620. All the intervenors filed objections to the continuance of defendant Ketkar as hereditary trustee as provided in paragraphs 6 and 33 of the draft Scheme.

11. Immediately after these objections were filed, the learned District Judge adjourned the suit for hearing on the next day, and what happened on that day is rather very surprising. Replies of Ketkar to the objections raised by the intervenors were recorded. Suddenly a list of trustees was proposed by the defendant, which is at Exhibit 638. Thereafter, the learned District Judge recorded what appears to be the statements of Advocates appearing for the plaintiff, defendant and intervenors Nos. 2 and 3. No such statement was recorded of the advocate for intervenor No. 1. The statements are not signed by the Advocates.

12. The learned District Judge has merely stated in Exhibit 640 that the Advocate Mr. G. K. Dabke, for the Charity Commissioner, states as under:—

“(1) In view of the decisions by the Supreme Court in the litigations going to it in this connection reported in AIR 1954 SC 5, (Gopal Krishna v. Mohamed) and 71 Bom LR 48 = (AIR 1968 SC 1413), the controversy between the parties is now extremely limited. The Charity Commissioner does not want to contest the defendant's claim to be included as one of the Trustees in the scheme to be framed by this Court. In view of the rights which have been declared by the Supreme Court in these litigations, the Charity Commissioner also would not contest his claim to be appointed as a Managing Trustee in the panel of Trustees to be appointed by this Court.

(2) So far as the other first Trustees are concerned, I have instructions to say that the Trustees should be as per the list submitted by me at Ex. 632. The list includes respectable persons of all communities and the Charity Commissioner would very much want this Court to have this list wholly accepted. The name of the defendant Gopal Krishna Ketkar should be included as a Managing trustee.”

13. As Exhibit 642 he recorded the statement of Mr. Oke, Advocate for the defendant, Gopal Krishna Ketkar, which sounds rather very objectionable as it purports to impose a condition on the Court. Although there was nothing in the judg-

ment of the Supreme Court in AIR 1954 SC 5, or in the later judgment in 71 Bom LR 48 = (AIR 1968 SC 1413) to show that the Supreme Court considered Ketkar as the Managing Trustee or a hereditary trustee or a trustee who ought to be included in the board of trustees to be appointed under the Scheme of Management, the statement was as follows:—

“In view of what has been stated by Shri Dabke and in consequence of the previous litigations which are decided by the Supreme Court, this defendant agrees that most of the issues framed in this suit at Exhibit 131 do not survive for decision. If the defendant Ketkar is made a Managing Trustee in the panel of trustees to be finalised by this Court as per the scheme proposed by the Charity Commissioner, he would not press his contention that he should be made the sole Trustee.

(2) So far as the panel of Trustees proposed is concerned, the defendant would very much like the same to be properly reviewed by this Court so as to include Shri Homi Rustomji, a Parsee gentleman of some repute, and Shri Hamid Dalwai, a nationalist Muslim, in the panel of new Trustees. The defendant would not object to Prof. N. S. Gorekar and Advocate Shri N. K. Patil from the list of the Charity Commissioner as also Shri Mahamadmiya Akbarsaheb from this list to be included in the panel of Trustees. As regards the remuneration of this defendant Ketkar proposed by the Charity Commissioner in his scheme, he would like to pray that the remuneration should be fixed on the basis of percentage rather than a fixed sum of Rs. 250/- per month. I would like to add that during the past several years the gross income of the Trust was never more than Rupees 40,000/- per year and if remuneration is fixed at the rate of 7 1/2 per cent. on the gross income, my client would not get anything more than Rs. 250/- per month. I would insist upon the remuneration to be fixed on this percentage basis of 7½ on the gross income I would also submit that liberty should be reserved to my client as also to the persons interested to apply for variation in the percentage of remuneration so fixed.

(3) As to the accounts referred to in issue No. 15 at Exhibit 131, the matter should be left to be examined by the Charity Commissioner for such period as the Court would deem fit. Liberty

should also be reserved to my client Gopal Krishna to have his previous remuneration settled by the Charity Commissioner while settling these accounts. 31st March, 1970."

After this the learned District Judge recorded the statement of Mr. Maniyar on behalf of the intervenors as of intervenors Nos. (1) Shri Maulamiya Mukhtar Miyan and (2) Fakir Mohamed. It runs as under:—

"In view of what Shri Dabke and Shri Oke, Advocates, have stated above, my clients would not object to the framing of the Scheme and appointing a panel of Trustees which would include the defendant Gopal Ketkar as a managing trustee. They would not press their contentions in their objections at Exs. 629 and 631 respectively that the defendant Ketkar should have no connection whatsoever with the management of the Trust. So far as the panel of first Trustees is concerned, my clients would very much press for the inclusion of Shri Zari Advocate along with themselves. So far as the names aforesaid stated by Messrs. Dabke and Oke are concerned, my clients would not have any objection to the inclusion of Prof. N. S. Gorekar, Shri Nakul Kundalik Patil, Advocate, Shri Mahomedmiya Akbarsaheb, Shri Homi Rustumji Munshi and Shri Hamid Dalwai, I pray that Advocate Shri Zari should also be included along with them if possible. 31st March, 1970."

14. Having recorded these statements, it is shocking to find that the learned District Judge proceeded straightway to pronounce his judgment on that very day and passed a decree accepting the scheme with modifications, substantially as required by the defendant Ketkar, thus under the decree paragraphs 6, 7-A, 9 and 33 read as follows:—

Number of Trustees:— "6. The number of Trustees shall be not less than five and not more than seven provided that one of the trustees shall always be the lineal major male descendant of the family of Shri G. K. Ketkar and, in the absence of such lineal major male descendant any other major person from his family (male or female) as the Court may appoint.

First Trustees:— 7-A. The following persons shall be the first trustees of the said trust under the scheme:—

1. Shri Gopal Krishnaji Ketkar, landlord, residing at Wadi Bandhan Taluka Kalyan.

2. Shri Mohamed Gause Zari, Advocate Supreme Court, 8/8, Rehanabad, Spence Road, Byculla, Bombay No. 8.

3. Professor N. S. Gorekar, Bunder Road, Kalyan.

4. Shri Nakul Kundalik Patil, Advocate, of old Dombivali, District Thana.

5. Shri Mamudmiya Akbarsaheb Majid of Kalyan, Bazar Peth, Kalyan District Thana.

6. Shri Homi Rustumji Munshi, Supervisor, Bank of India, Flora Fountain, Bombay No. 1.

7. Shri Hamid Dalwai, Nityanand Nagar, Vibhag 4, Building No. 4, Room No. 55, Government Housing Colony, Andheri, East.

* * * * *

9. The Trustees except the hereditary trustee shall retire by rotation two at a time every third year beginning with 1st April, 1973. The first two to retire will be trustees at S. Nos. 2, 3 and then 4 and 5 and so on.

* * * * *

33. The hereditary managing trustee shall be entitled to be paid 7 1/2% on the gross income of the trust for his services to the Dargah or having the religious ceremonies of the Dargah performed according to custom and tradition. The hereditary trustee shall not be entitled to any offerings or donations either in cash or kind before the Dargah whether put in a sealed collection box or not. The hereditary trustee and his successor as also persons interested otherwise shall be entitled to apply to this Court for a variation in the percentage depending on the circumstances then prevailing."

15. Feeling aggrieved by the said judgment dated March 31, 1970, intervenor No. 3, Fakir Mohamed Abdul Razak has filed the above First Appeal, firstly, on the ground that his Advocate Mr. Maniyar had only stated that there would be no objection if Ketkar was appointed as one of the Trustees and that he did not use the words 'Managing Trustee', but the learned District Judge had, mis-heard or mis-understood the statement of Mr. Maniyar. Mr. Maniyar has appeared before us and made a statement at the Bar that he was agreeable to Ketkar continuing as a trustee, but he had never agreed to Ketkar being appointed as hereditary trustee or managing trustee, and the learned District Judge had wrongly recorded his statement.

16. Secondly, it is urged in appeal by Mr. Parpia, the learned counsel

appearing for the appellant that, in the absence of any provision in the draft Scheme, which was published or which was ultimately accepted by the Court to appoint Mr. Ketkar as Managing Trustee; the appointment of Mr. Ketkar as Managing Trustee was inconsistent with the whole Scheme.

17. Thirdly, Mr. Parpia submitted that apart from his client supporting what Mr. Maniyar stated before us, the main objection of the intervenors was to the appointment of Mr. Ketkar as a trustee as he had made claims prejudicial to the interests of the Trust from the year 1946. Ketkar had involved persons interested in the Dargah in a host of litigation which has been going on during the last three decades since then. It is, therefore, according to Mr. Parpia, impossible to believe that Mr. Maniyar Adv. would make a statement on behalf of the intervenors Nos. 2 and 3 that he would accept paragraphs 6, 7-A, 9 and 33 of the Scheme as accepted by the learned District Judge.

18. The defendant Ketkar has filed cross-objections in the above First Appeal contending that the learned District Judge erred in constituting a panel of trustees and that he should have been made the Sole hereditary trustee and manager of the Trust, particularly as it was in the interest of the Dargah that he should be appointed the Sole Trustee, having regard to the peculiar nature of the Trust, its history, duties of the trustee, the experience of the defendant and the services rendered by him for many years to the Trust.

19. Mr. Tipnis, the learned counsel for the defendant, urged three preliminary objections to the First Appeal, viz., (1) that the appellant being merely an intervenor could not file an appeal to this Court under Section 96 of the Code of Civil Procedure, read with Section 76 of the Bombay Public Trusts Act, having regard to the well-settled principles of law that it is only a party to the suit who can file an appeal against the decree to the higher Court; (2) that the above First Appeal was not maintainable because the persons who were appointed Trustees, other than Ketkar, were not party-respondents in the First Appeal; and (3) that the appeal was not competent because the decree passed by the learned District Judge of Thana was, in the facts and circumstances of the case, a consent decree passed on the statements

of counsel as recorded by the learned District Judge, Thana.

20. Turning, therefore, first to the preliminary objections, we find no substance in any of these objections raised on behalf of the defendant. We find nothing in Section 96 of the Code of Civil Procedure which is applicable to the proceedings under the Bombay Public Trusts Act in view of Section 76 of the Act which lays down that it is only a party to the suit who can file an appeal. The well-settled position in law appears to be that normally any party to the suit adversely affected by the decree or a transferee of the interest of such party, or even an auction purchaser may appeal. (See Sir Dinsha Mulla's Code of Civil Procedure, Thirteenth Edition at page 421.)

21. Reliance was, however, placed by Mr. Tipnis on the judgment of Chandrachud, J., (as he then was) in Civil Revn. Appln. No. 210 of 1969, decided on 3/5-3-1969 (Bom) where the present appellant's revision application against the order dismissing the application made on October 15, 1968, at Exhibit 580 stating that he was a devotee of the Haji Malang and that he was interested in the welfare of the Trust, and therefore, he should be impleaded to the suit either as plaintiff or as defendant, was rejected. That was an order on an interlocutory application. Normally the Court does not permit outsiders to join as a party. That order refusing to join the intervenor as a party cannot help the defendant in contending that even if he appeared before the lower Court in response to a public notice calling upon the members of the public interested in the Dargah to file objections and make statements, before the Court and filed an objection petition to certain portions of the Scheme he could not file an appeal when he was aggrieved by the order of the District Court.

22. Reference was also made by Tipnis to the decision of Chagla, C. J. and Bhagwati, J. (as he then was) in Province of Bombay v. Western India Automobile Association, 51 Bom LR 58 = (AIR 1949 Bom 141). But that was a matter from the original side, and the appeal was under Clause 15 of the Letters Patent. Moreover, that decision does not help the respondent. All that is laid down in that decision is that ordinarily only a party to the suit has a right of appeal; and a person not a party to the suit but who is affected by the order passed in the suit has no right to appeal, but

the Court of Appeal may in its discretion allow him to prefer an appeal.

23. The intervenor filed the above appeal and the appeal has been admitted. If at all it is further necessary that leave be granted, we would hold that for the ends of justice and having regard to the nature of the suit, we would grant the leave to the appellant to file the appeal as he claims to be a devotee or a person interested in the proper management of the Haji Malang Dargah, and he has submitted before the lower Court and it is submitted even before us that he opposes the appointment of the defendant Ketkar as one of the Trustees as Ketkar has been acting in a manner prejudicial to the best interests of the Trust from 1946 till now. The first preliminary objection is, therefore, overruled.

24. So far as the second objection is concerned, it was conceded by both the parties before us that when the above appeal was admitted by this Court on July 8, 1971, the Trustees appointed under the Scheme as framed by the lower Court had ceased to be in the management or possession of the Dargah on account of certain other litigations which are pending. The Trustees had thus not applied in the lower Court to be made parties or intervenors in the litigation. The appellants intervenors could not have asked the Court to join them as parties in the suit for framing the scheme and for other reliefs which were asked for in the suit. Though their names were suggested by the parties before the learned District Judge, none of them, had made any application to the lower Court for being added as parties.

25. We must, therefore, hold that the contention made on behalf of the respondent that the appeal was not competent because the intervenor-appellant had not joined the trustees appointed under the Scheme, is untenable as they were not parties to the litigation in the lower Court and did not apply to be made parties. Further this Court is bound to take notice of subsequent events and circumstances in which they have undisputedly ceased to be in possession and management of the suit Dargah.

26. So far as the third preliminary objection is concerned Mr. Tipnis forgets that the decree cannot be called a consent decree because there is nothing on record to show that any of the parties had agreed to any consent decree. The parties and their Advocates have not

signed any consent terms. The statements which the learned Judge is shown to have recorded on March 31, 1970, are only the statements of Advocates for the parties, the advocate for intervenors Nos. 2 and 3, Mr. Maniyar, and the Advocate for the defendant. There is nothing in the said statements, which are quoted above, to show that every one of the Advocates had agreed to what the other Advocates had stated especially with regard to the acceptance of the disputed provisions of the Scheme relating to the appointment of the defendant as the Managing Trustee.

27. Apart from the fact that Mr. Maniyar made a statement before us at the Bar that he did not make a statement agreeing to the appointment of the defendant as the Managing Trustee and the statement as recorded by the learned District Judge does not reflect what he actually stated before the learned District Judge, it is patent that the learned District Judge did not care to record any statements on behalf of the first intervenor Ishak Babamiya Kadwaikar. He had also filed an objection petition. He was represented by another Advocate. His objection petition is at Exhibit 634. There is nothing in the Roz-Nama maintained by the lower Court to show that his Advocate was absent when these statements were supposed to have been made by the Advocates for the parties and intervenors Nos. 2 and 3. The judgment of the learned District Judge does not show why he ignored the intervenor Ishak Baba Kadwaikar Paniwala and his Advocate Mr. Udaipuri.

28. Besides, we are surprised that it is contended on behalf of the defendant that it was a consent decree, though the consent that was given by the defendant himself was a conditional consent imposing a sort of a condition on the Court that if the defendant Ketkar was made a Managing Trustee, in the panel of Trustees to be finalised by the Court, as per the Scheme proposed by the Charity Commissioner, he would not press his contention that he should be made the sole trustee. As already stated above, the defendant himself has filed cross-objections in the First Appeal contending that the decree passed by the learned District Judge was wrong, because he alone should have been appointed as Sole Trustee. In view of these facts and circumstances of the case, we find that there is nothing on the record to show that there was anything which was agreed to by all the

parties to the litigation, in the same sense which could be described as consent which alone could be the basis of a consent decree.

29. The preliminary objections raised on behalf of the respondent must, therefore, fail.

30. So far as the merits of the First Appeal and the Cross-objections are concerned, we find it necessary to set aside the judgment and decree passed by the learned District Judge in so far as he modified the Scheme proposed by the Charity Commissioner regarding paragraphs 6, 7-A, 9 and 33 as the learned District Judge has followed what appears to be an unprecedented and extraordinary procedure of hearing a suit, pending for 17 years, one day after the objection petitions had been filed on the basis of what the learned District Judge has recorded as statements of Advocates for the parties and two of the intervenors, ignoring the other intervenor and his advocate.

31. We do not think that such a procedure is either consistent with the principles of natural justice, which should be uppermost in the mind of any Judge hearing a matter even assuming that there is no particular procedure prescribed by law, and also the provisions of the Code of Civil Procedure, which, as already stated, are made applicable by Section 76 of the Bombay Public Trusts Act, Section 76 runs as follows:—

"76. Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court under this Act."

On the pleadings, the Charity Commissioner and the intervenors were at issue with the defendant as the defendant wanted to be the Sole Trustee. The Charity Commissioner wanted him to be one of the Trustees and not the Managing Trustee or hereditary trustee; and the intervenors did not want him to be a trustee, at all. The normal procedure which ought to have been followed by the learned District Judge in view of these pleadings was first to order examination of the parties under Order X of the Code of Civil Procedure.

32. If he wanted to rely on what he regarded as statements of Advocates he ought to have taken the signatures of the Advocates, if not the signatures of the parties, and intervenors themselves.

Issues should have been thereafter determined under Order XIV of the Code of Civil Procedure with regard to the rival contentions of the Charity Commissioner, the defendant and the intervenors. Parties were at issue before the learned District Judge with regard to the proposed contents of paragraphs 6, 7-A, 9 and 33 of the Scheme. Having regard to this position, we find it rather shocking that the learned District Judge instead of giving a fair opportunity to the parties and intervenors to lead evidence in support of their pleadings and contentions fixed the hearing of the matter on the very next day.

33. Under Order XV, Rule 3 of the Code of Civil Procedure where the parties are at issue on some questions of law or of fact, and issues have been framed by the Court as hereinbefore stated, if the Court is satisfied that no further argument or evidence than what the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, irrespective of whether the summons has been issued for the settlement of issues only or for the final disposal of the suit. Order 15, Rule 3 (2) further lays down that where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

34. We find it shocking that there is no entry in the Roz-nama to show that any of the parties stated that there was no evidence to be led. There is nothing in the judgment of the learned District Judge to explain as to why he did not follow the normal procedure of giving time to the parties to lead evidence, except placing his reliance on the so-called statements of their Advocates one of which is wholly challenged before us by Mr. Maniyar. There is nothing in the record to show that the learned District Judge applied his mind to the credentials of the persons who have been actually appointed as the first trustees under paragraph 7-A of the Scheme. Having rightly stated in paragraph 23 of his judgment that the paramount considerations for settling a Scheme of this nature and appointing new trustees, which have to

weigh with the Court, are the interest and welfare of the Trust in question, the learned District Judge completely ignored the welfare and interest of the Trust by not placing anything on the record to show that the appointment of these persons as trustees was in the welfare and interest of the Trust.

35. It is well settled that in suits like the suits for settling the Scheme, the Court has a duty once it is found that it is a Trust for public purposes, to consider what is best in the interests of public. Settling a scheme is one of the most important reliefs relating to the administration of public trust. The primary duty of the Court is to consider the interest of the public for whose benefit the trust has been created. It has large powers to frame suitable schemes in cases where trust property has been diverted from its proper purposes, and the objects of the trusts are not being carried out and the persons in management are not properly accounting for the realization from the trust property or otherwise misconducting themselves. Further in settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers, the Court is bound to secure persons whom it regards as suitable. A Court cannot abandon its duties lightly relying on mere statements of Advocates without placing any material on record to show who is who and what is what as was done by the learned District Judge in the present case.

36. We find nothing on the record to show as to what are the credentials of the trustees, other than two of the Trustees who are Advocates and one who is a Professor, as to what they are doing in actual life, as to whether they deserve to be appointed as trustees of such a well known, historic and renowned trust like Haji Malang Trust. It is true that none of the parties appear to have placed any material on record to show what those persons were. The Court should have asked those persons who were considered fit as to whether they were willing to act as trustees knowing what their responsibilities would be. Appointing trustees is not like appointing sub-committees in association dealing generally with public affairs. The Court is called upon to appoint such trustees men who can apply their mind to the management of the Trust and to find out whether those persons have got necessary physi-

cal and intellectual capacity and social standing which would justify their appointment as trustees of the public trust. We find nothing on record to indicate that the learned District Judge applied his mind to this aspect of the case when appointing the first trustees of the trust with respect to which there has been this protracted litigation right from the year 1946.

37. The Court has further to consider in settling the Scheme the past history of the institution and the way in which the management of the trust has been carried on till the settlement of the scheme and the appointment of the trustee. The Court has also to find out whether the persons who are interested, and particularly the devotees of the religious institutions like a Dargah, are satisfied with the new scheme of management which the Court proposes. There is nothing in the judgment of the learned District Judge to indicate that he had applied his mind even to this aspect of the matter. There are serious allegations made by the intervenors against the defendant which are required to be considered by the learned District Judge on the basis of evidence which they should have been called upon to produce.

38. It is admitted that there is another suit filed by the Charity Commissioner with regard to the amendment of the Scheme settled by the learned District Judge during the pendency of this appeal. It was not open to the learned District Judge to close his eyes to all the allegations and to shut out further inquiry into the matter and pass an order accepting the Scheme as suggested by the Defendant's Advocate relying merely on the consent of the Charity Commissioner's Advocate when there was nothing on record to show that the Charity Commissioner himself had signed statement agreeing to the appointment of the defendant as a Managing Trustee.

39. It is true that the learned Charity Commissioner has not filed any appeal against the decree. It is not said before us that although Mr. C. K. Dabke, the learned counsel appearing for the Charity Commissioner had made a statement which the learned District Judge has recorded, he had no instructions from the Charity Commissioner to concede that the defendant may be appointed as the Managing Trustee. But it was the duty of the Court to ascertain what was in the best interests of the Trusts in the facts and circumstances of the case, particular-

ly having regard to the fact that Haji Malang Dargah was visited every week by thousands of people belonging to all communities. It was necessary to make sure that the trustees appointed will make proper arrangements for the management of the trust and for the proper utilisation of the offerings of the millions of devotees visiting the Dargah.

40. In *Mahomed Ismail Arief v. Ahmed Moolla Dawood*, 43 Ind App 127 = (AIR 1916 PC 132), the Privy Council laid down the principle that the Court has complete discretion in settling a scheme of management; it may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but its primary duty is to consider the interests of the general body of the public for whose benefit the trust was created, it may vary any rule of management which it finds either not practicable or not in the best interest of the institution. Mr. Ameer Ali J. who delivered the judgment observed at page 136 as follows:—

"The present case, however, in their Lordships' opinion, illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves Panchayat or Jamat. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which should be in the discretion of the judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias, and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisory functions that may appear necessary to confide to them and for filling up vacancies on their body subject to his control."

These principles were followed by the Privy Council in *Ram Dularey v. Ram Lal*, AIR 1946 PC 34.

41. We find that so far as the present suit is concerned, the learned District Judge has not at all considered the interest of the worshippers. At least three of them were before him. It was his duty to ask Mr. Udaipuri as to what

he had to state about the matter. The learned District Judge should not have proceeded to pronounce the judgment without recording his statement or pursis that he had nothing to say.

42. There is nothing on record to show that the parties were given any opportunity to lead evidence with regard to the disputed paragraphs 6, 7-A, 9 and 33 in the Scheme proposed by the Charity Commissioner at Exhibit 620. There is also nothing on the record to show that the learned District Judge had given any notice to the members of the public with regard to the amendments in the Scheme which had far-reaching effect as they proposed to make the defendant a managing hereditary trustee though he was in the first instance claiming that the trust was not a public trust; in the second instance that he was the sole trustee; and in the third instance that one of the lands belonging to the Trust was his private property.

43. Mr. Parpia, although he is appearing for the intervenor, has drawn our attention to the prayer in the plaint in which the Charity Commissioner asked for an order against the defendant Ketkar to render accounts of all the properties and the offerings and other income come to his hands for the period of his de facto management of this public Trust. As the Charity Commissioner has not filed any appeal against the decree, we cannot allow the intervenor who only came in to object to the Scheme to challenge the decree on the ground that the learned District Judge has not passed any order with respect to this relief which was claimed by the Charity Commissioner.

44. However, the learned District Judge ought to have considered the objections raised by the intervenors in the course of which several allegations with regard to the manner of keeping accounts and the conduct of the defendant Ketkar, were made. Even if we were to ignore the objection petitions of the intervenors for whom Mr. Maniyar Advocate appeared, there were objections filed on behalf of Ishak Baba at Exhibit 634.

45. Ishak Baba Kadwaikar is a permanent resident of Survey No. 134, Haji Malang Dargah. He was doing business of supplying well water to businessmen and residents of the Haji Malang Dargah. He has also made arrangements for hot and cold water baths for pilgrims visiting the Dargah. He too had made

several allegations against the High handed conduct of the defendant Ketkar.

46. Although his occupation of supplying water at Haji Malang Dargah, which is situated at a height, sounds humble, he describes himself as a man with a name and fame who had sometimes with him a cash of Rs. 60,000/-. He had four employees with him and he claimed to have installed an electric meter at his own cost and expenses at the heights of Haji Malang Dargah. He has submitted that the defendant Ketkar has created terror, fear and intimidation in the minds of residents at Haji Malang Dargah, and he has given his own narrative of his own experience in the course of his petition with regard to the manner in which the defendant Ketkar asked him to go away and to hand over his well from which he was taking out water to one Smt. Akhtari Begum Jani Miyan. He further stated in the petition that the defendant Ketkar had deprived him of his well, dismantled his home at Survey No. 134, destroyed his hamams, and has brought his ruin and downfall. He had no means of earning his bread and butter and he was compelled to earn his livelihood by begging and staying under a tree at Haji Malang Dargah. All these are allegations made against the defendant with a view to prevent the defendant being appointed as Managing Trustees or a trustee. The learned District Judge has not recorded a single sentence to show why he has ignored them.

47. Moreover, even the objections made by the other intervenors had to be taken into consideration by the learned District Judge because they were the only intervenors who had come in response to the public notice. The appellants had submitted objection to the appointment of the defendant contending that the defendant should not be appointed in the interests of the public trust. The learned District Judge appears to have ignored them. He took into consideration only what he described as the statement made by Advocate Mr. Maniyar before him which Mr. Maniyar and his clients disown before us.

48. We would like to observe that the Court of justice must follow the procedure prescribed by law. They should not adopt a procedure like the one which was adopted by the learned District Judge in the present case of deciding the matter on the basis of statements of three of the Advocates appearing before the Court in contested and protracted litigation

like the present one. These statements were not signed by the parties or their advocates. I do not think the public expects Courts to justice to decide the disputes between the parties to the litigation merely on statements of Advocates, particularly in a case like the present one where the suit was pending from 1953. It is difficult to understand why the learned District Judge immediately after the objections were filed thought it necessary to adjourn the case only for one day to dispose of the matter in this extraordinary manner.

49. In these circumstances, notwithstanding all the persuasive submissions made by Mr. Parpia, the learned counsel for the appellant, before us that this Court should put an end to this litigation by settling the Scheme here and now, having regard to the protracted litigation for over nearly three decades, we find it absolutely necessary for the ends of justice to remit the suit for a proper trial of the issues between the defendant, the Charity Commissioner and the intervenors regarding the framing of paragraphs 6, 7-A, 9 and 33 only, as the rest of the Scheme proposed by the Charity Commissioner at Ext. 620 was not opposed by any of the parties or by the intervenors before the learned District Judge or before us.

50. We find that the rest of the provisions of the Scheme are in the best interests and proper management of the trust. We do not find it necessary to set aside the decree as a whole, but the decree, in so far as it modifies the proposed Scheme at Exhibit 620 with regard to paragraphs Nos. 6, 7-A, 9 and 33, must be set aside and the suit must be remanded to the Court of the learned District Judge, Thana for a proper trial of the suit after framing necessary issues and giving opportunity to the parties and the intervenors to lead such evidence as they can produce before the Court in accordance with law and in the light of the observations which we have made hereinabove.

51. But, whatever we have observed hereinabove shall not prejudice the rights and remedies or the contentions which are open to the parties, the intervenors and particularly the statutory powers, rights and remedies which are conferred on the Charity Commissioner or the State Government or other Authorities under the provisions of the Bombay Public Trusts Act as amended from time to time.

52. In the result, the above First Appeal and the Cross-objections are partly allowed by setting aside the decree dated March 31, 1970, passed by the learned District Judge in so far as paragraphs 6, 7-A, 9 and 33 of the Scheme mentioned in the decree are concerned, while confirming all other paragraphs of the said Scheme and the decree in so far as it is based on the said remaining paragraphs, subject to what is stated hereinabove.

53. The suit is remitted to the Court of the District Judge for proper trial in accordance with law and in the light of the observations hereinabove regarding the framing and settling of the Scheme only in so far as paragraphs 6, 7-A, 9 and 33 are concerned.

54. As the suit has been pending from 1953, the suit shall be heard and proceeded with as expeditiously as possible after giving fair opportunities to the parties and the intervenors to lead their evidence, if any, with regard to the settling of the disputed paragraphs of the Scheme in accordance with law, either before the District Judge or any other Judge who is empowered to hear the suit. The parties and the intervenors are at liberty to make such applications to the trial Court for amendment of the Scheme or for such other reliefs as are available to them under law.

55. Nothing herein shall affect the powers of the Charity Commissioner, the State Government or of any other authority to act, in accordance with law, under the amendments of the Bombay Public Trusts Act, which were made during the pendency of the suit.

56. The part of the decree directing the Receiver to hand over charge and to submit accounts does not survive as the Receiver had handed over charge and submitted accounts as per the said decree and no order can be now made setting it aside.

57. The decree in so far as it directed costs is set aside and costs shall abide the ultimate result of the suit.

58. The decree is modified as stated above and the suit is remanded for trial regarding the framing or settling of paragraph 6, 7-A, 9 and 33. The decree in respect of the remaining paragraphs of the Scheme is confirmed.

59. Costs in the appeal and the costs in the suit shall be costs in the suit.
Order accordingly.

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VIMADALAL AND NAIK, JJ.

Totaram Maharu, Appellant v. Ramabai and others, Respondents.

First Appeal No. 320 of 1966, D/- 24-3-1975.*

(A) Succession Act (1925), Sections 59, 61, 63 — Execution of will — Undue influence in execution of will — Onus.

The propounder has to prove both due execution as well as the testamentary capacity of the testator, and that once those were established, the onus which rests on the propounder stands discharged. If, however, there were suspicious circumstances surrounding the execution of the Will, such as, where the signature was doubtful, or the testator was in a feeble state of mind, or the dispositions in the Will appeared to be unnatural, or improper, or the propounder had taken a prominent part in the execution of the Will which conferred substantial benefits on him, the onus was on the propounder to explain satisfactorily those suspicious circumstances before probate could be ordered to issue, for after all, ultimately it was the conscience of the Court that had to be satisfied. The inferences arising from relationships between a testator and a legatee are so dependant on the peculiarities of the society or community to which the testator and the legatee belong, and their habits, customs, and ways of thinking, that it is very difficult to reduce them to a general rule so as to raise a presumption of undue influence from a particular type of relationship, and that the only kinds of relationship giving rise to such presumptions are those contemplated in Section 111 of the Evidence Act. Any other presumption from a relationship must, to be acceptable, be capable of being raised only under Section 114 of the Evidence Act, such presumptions of fact being really optional inferences from proof of a frequently recurring set of facts. AIR 1974 SC 1999, Followed. (Para 5)

(B) Succession Act (1925), Sections 59, 61, 63 — Execution of will — Undue influence — Proof of.

In regard to undue influence, it is not sufficient that the propounder of the Will should have been in a position to exer-

*(Against decision of P. T. Patil, Jt. Civil J., Sr. Division at Jalgaon in Spl. Civil Suit No. 16 of 1965.)

cise such influence or should have the opportunity or chance of practising it, but it is further necessary that there must be evidence to show that such undue influence was, in fact, exercised on the deceased by the person who seeks to propound the will and who may have benefited substantially from it. AIR 1949 PC 272, Rel. on. (Para 5)

(C) Succession Act (1925), Secs. 59, 61, 63 — Execution of will — Will not known to the wife — It is not possible to draw any sinister inference from this fact alone. AIR 1949 PC 272, Rel. on. (Para 5)

(D) Succession Act (1925), Secs. 59, 61, 63 — Execution of will — Undue influence — That propounder was the General Mukhtyar of the testator cannot by itself be said to be a suspicious circumstance. (Para 10)

(E) Civil P. C. (1908), Order 14, R. 1 — Framing of issues — Question of onus of proof of issues should not enter into framing of issues.

The question of onus should not enter into the framing of issues at all but should be dealt with by the Court when taking up the issues for consideration. The form in which an issue is framed should not be determinative of the question of onus. The question of onus is sometimes a complicated question which may also have a bearing on the further question of the right to begin under Rules 2 and 3 of Order 18, and is, therefore, best left to be decided after issues are framed and arguments heard in regard to the same. (Para 12)

(F) Hindu Law — Partition — Separation by metes and bounds of the share of a son or his widow — Has not the effect of separating the share of the mother — Father can as sole surviving coparcener dispose of coparcenary property inter vivos or by will. AIR 1918 Bom 175 and AIR 1936 PC 20, Rel. on. (Para 17)

Cases Referred: Chronological Paras
AIR 1974 SC 1999 = (1975) 1 SCR 687

AIR 1967 SC 272 = (1967) 1 SCR 7 15
AIR 1949 PC 272 = 1950 All LJ 67 4, 5

AIR 1940 Nag 241 = 1940 Nag LJ 268 16
AIR 1936 PC 20 = 63 Ind App 33 14, 16, 17

AIR 1918 Bom 175 = ILR 42 Bom 535 13, 14, 17

(1911) ILR 38 Cal 355 = 38 Ind App 13 (PC) 5, 10

(1868) 9 Suth WR 61 14

M. A. Rane, for Appellant; H. D. Gole, for Respondent No. 1.

VIMADALAL, J.:— This is an appeal filed from the order of Mr. P. T. Patil, Joint Civil Judge, Senior Division, Jalgaon, dated 30th September, 1965, dismissing the plaintiff's suit which was for a declaration of ownership and possession of certain property under the Will of his father Chavdas Dharma Kolhe (hereinafter referred to as 'the deceased'). The Will in question was executed by the deceased on the 4th of August, 1963, and has been tendered as Ex. No. 45 in these proceedings. The deceased died on the 12th of February, 1964, and was, at the time of his death, of the approximate age of 82 or 83 years. The plaintiff's case is that his deceased father originally bore the name of Maharu Dhondur Kolhe, that when the plaintiff was still a child, his father was given in adoption to one Dharma Kolhe, and that thereafter the plaintiff's deceased father changed his name to Chavdas Dharma Kolhe, and the plaintiff was also brought up in the adoptive family. According to the plaintiff, after adoption, his deceased father got a son Bhaskar from his first wife, that Bhaskar died, in 1948 leaving a widow Tulsabai, that Tulsabai filed a suit, being Special Suit No. 29 of 1951, for partition against the deceased and got a decree and got her shares separated, that the plaintiff's mother also died, and that the present first defendant is the second wife of the deceased. The plaintiff's case further is, that after the partition and separation of the share of Tulsabai, the suit property remained as the exclusive property of the deceased, that the deceased had great love and affection for the plaintiff, and that the deceased, therefore, made a Will on the 4th of August, 1963, in respect of the suit property under which the plaintiff received substantial proprietary benefits. The position in regard to the houses belonging to the estate of the deceased at the time of his death was that the plaintiff resided in House No. 32 situate at Asode village, that the first defendant resided in House No. 52 which was also situated in the village of Asode, and that House No. 14 at Asode was in the occupation of Defendants Nos. 2 to 9 as tenants. Under his said Will dated the 4th of August, 1963, the deceased bequeathed the said Houses Nos. 14 and 32 to the plaintiff absolutely, but as far as House No. 52 was concerned, the deceased gave a life interest to his second wife, the first defen-

dant, and directed that after the life interest of the first defendant, the same was also to belong to the plaintiff. As far as the lands belonging to the estate of the deceased were concerned, the deceased bequeathed a life interest in Survey No. 296, situated at Mamurabad to the first defendant and directed that it was thereafter to belong to the plaintiff. Survey No. 477/2 in the same village was bequeathed by the deceased to his daughters who it may be mentioned, are not parties to the present suit, and the said Survey Number is also not a part of the property which is the subject-matter of this suit. All other lands situated in the village of Asode, as well as Survey No. 332/4B situated in the village of Mamurabad were bequeathed by the deceased by his said Will to the plaintiff absolutely. The plaintiff has filed the suit, out of which this appeal arises, in order to enforce his rights to the properties bequeathed to him by the deceased by the said Will dated 4th August, 1963, claiming reliefs by way of declaration, possession and injunction against the defendants.

2. Defendants Nos. 2 to 9 who, as stated above, are tenants in occupation of various portions of House No. 14 in the village of Asode, have not appeared at any stage of this litigation. The first defendant who has, however, contested this litigation, has urged three main contentions in order to defeat the plaintiff's suit. Her first contention was that the plaintiff, who was also the General Mukhtyar of the deceased, had got the deceased to execute the said Will dated 4th August, 1963, by the exercise of undue influence. Her second contention was that the plaintiff used to secure the deceased's signature on blank sheets of paper and had utilised one such paper for making up the Will in question; and her third contention was that, in any event, the deceased had no authority to dispose of the whole of the properties which he purported to dispose of by his Will dated the 4th of August, 1963, in view of the suit filed by Tulsabai in which she had obtained a decree and got the separation of her share.

3. As many as 12 issues were framed by the trial Court but, in my opinion, the only issues which really arise for the consideration of the Court are issues Nos. 1, 2, 4 and 5. Issue No. 1 relates to the question of the due execution of the Will, issue No. 2 to the testamentary capacity of the testator; issue No. 4 to the

first defendant's plea of undue influence; and issue No. 5 to the question as to what was the disposable property which the deceased could bequeath by Will. The trial Court answered Issues No. 1 and 4 relating to the due execution of the Will and to the exercise of undue influence against the plaintiff, but answered Issues Nos. 2 and 5 in favour of the plaintiff and against the first defendant, with the result that it had to dismiss the suit, as it has done, by its order under appeal. Though Issues Nos. 2 and 5 relating to the testamentary capacity of the deceased and relating to the question as to what was the disposable property were answered by the trial Court against the first defendant, the first defendant is, by virtue of the provisions of Order 41, Rule 22 (1) of the Code of Civil Procedure entitled to support the decree on those grounds also, and indeed, the first defendant has chosen to exercise that right before us.

4. It will be convenient for me to deal, at the outset, with the question in regard to the burden of proof in respect of Issues Nos. 1, 2 and 4 relating to due execution, testamentary capacity and undue influence, respectively. Fortunately for us, this question has been dealt with exhaustively by the Supreme Court in its very recent decision in the case of Surendra Pal v. Saraswati, (AIR 1974 SC 1999). The appeal before the Supreme Court arose out of an order granting probate of the Will of one Bhim Sain Arora in favour of his second wife, Saraswati, his first wife having died. The facts of the case were that on the very next day after his marriage with Saraswati, the deceased made preparations to execute the Will and, in fact, executed the same, and the deceased survived for about three years after the execution of the said Will. Saraswati having applied for a grant of probate of the Will *testamento-cum-annexo*, a caveat was filed by Surendra Pal, who was the son of the deceased by his first wife. The grant of probate of the said Will to Saraswati was contested, *inter alia*, on the ground that the Will was not a genuine document, that the signature of the deceased on the Will was not his real signature, that at the time of the execution of the Will the deceased did not know the contents of the document he was signing, and that, in any event, the Will had been procured by fraud, coercion and undue influence. All the issues were answered against the caveator by the trial Court which ordered Probate to issue, and that decision was confirmed by a Division Bench of the

High Court. On further appeal to the Supreme Court, the only grounds on which the Will was sought to be attacked were, first, that the Will had not been properly attested in so far as attestation had subsequently been appended to the Will, and secondly, that the Will had been procured by undue influence exercised on the deceased by the first respondent, Saraswati "as a condition for their marriage", both those contentions having already been rejected by the trial Court as well as the lower Appellate Court.

5. On those facts, the Supreme Court laid down the law in regard to the onus of proof by stating (paragraph 7) that the propounder has to prove both due execution as well as the testamentary capacity of the testator, and that once those were established, the onus which rests on the propounder stands discharged. The Supreme Court, however, laid down a limitation on that proposition in so far as it stated that if, however, there were suspicious circumstances surrounding the execution of the Will, such as, where the signature was doubtful, or the testator was in a feeble state of mind, or the dispositions in the Will appeared to be unnatural or improper, or the propounder had taken a prominent part in the execution of the Will which conferred substantial benefits on him, the onus was on the propounder to explain satisfactorily those suspicious circumstances before probate could be ordered to issue, for after all, ultimately it was the conscience of the Court that had to be satisfied. The Supreme Court also laid down that where, however, the caveator alleged undue influence, fraud or coercion having been practised on the deceased in regard to the execution of the said Will, the onus was on the caveator to prove the same, and if the caveator did not discharge the burden which rested upon him in that regard, probate of the Will must necessarily be granted, if due execution and testamentary capacity have been established by the propounder of the Will. There is one other point arising in this case on which also the judgment of the Supreme Court in *Surendra Pal's case* (AIR 1974 SC 1999) has a bearing, and that is, that the Supreme Court has observed (paras. 14-15) that inferences arising from relationships between a testator and a legatee are so dependant on the peculiarities of the society or community to which the testator and the legatee belong, and their habits, customs, and ways of thinking, that it is very difficult

to reduce them to a general rule so as to raise a presumption of undue influence from a particular type of relationship, and that the only kinds of relationship giving rise to such presumptions are those contemplated in Section 111 of the Evidence Act. The Supreme Court has further observed that any other presumption from a relationship must, to be acceptable, be capable of being raised only under Section 114 of the Indian Evidence Act, such presumptions of fact being really optional inferences from proof of a frequently recurring set of facts. The Supreme Court laid down that the correct legal position is that a suggested inference of undue influence would therefore be a matter of proof on the particular facts of the case before the Court. It is true that the decision of the Supreme Court in *Surendra Pal's case* was in regard to a matter relating to the testamentary jurisdiction of the Court before which an application for the grant of probate was made which, if ordered, would be a judgment in rem within the terms of Section 41 of the Indian Evidence Act and may, therefore, be said to possess a greater solemnity and effect than an ordinary judgment inter partes. No such question can arise in the present case because, in view of the provisions of Section 213 read with Section 57 of the Indian Succession Act, probate is not required in respect of the Will in the present case, and the question had arisen in an ordinary suit filed for an appropriate declaration, as well as orders for possession and injunction in order to enforce the provisions of the Will of the deceased. All the same, in my opinion, the same principles, as have been laid down by the Supreme Court in *Surendra Pal's case*, must apply to the present case also. The Supreme Court has in *Surendra Pal's case* laid down the law in regard to the onus of proof of the various issues that arise in a litigation relating to a Will in such exhaustive terms that it is really unnecessary to go to any other decisions on the subject. I would, however, prefer to refer briefly to two decisions of the Privy Council which, apart from the high authority of the Privy Council, are still good law in so far as they deal with a slightly different fact of the problem before us. The first of them is the decision of the Privy Council in the case of *Bur Singh v. Uttam Singh*, ((1911) ILR 38 Cal 355 at pp. 366-367) (PC) in which, after laying down the fundamental proposition that the onus of proving the testamentary capacity of the deceased lay on those by whom the Will was

propounded, the Privy Council dealt with the question of proof of undue influence and stated that, as far as the charge of undue influence was concerned, all that had been shown on the part of those attacking the will before it was, that there was motive and opportunity for the exercise of such influence by the defendants and that some of them had in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. With regard to that, the Privy Council observed that circumstances of that character might sometimes suggest suspicion, and would certainly lead the Court to scrutinise the evidence with special care, but in order to set aside the will, there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property. The same proposition was reiterated by the Privy Council in its later decision in the case of *Gomtibai v. Kanchhedilal*, (AIR 1949 PC 272 para 28). Incidentally, it may be pointed out that one of the contentions urged before the Privy Council in *Gomtibai's* case was the very contention which was urged in the course of the arguments before us, and that was that it was unnatural that the testator's wife did not know anything about the will. In regard to that contention, it was observed by the Privy Council in its judgment in *Gomtibai's* case (para 27) that it was unable to draw any sinister inference from the circumstances that the wife did not know anything about the will. The additional proposition which emerges from these two decisions of the Privy Council, therefore, is that in regard to undue influence, it is not sufficient that the propounder of the Will should have been in a position to exercise such influence or should have the opportunity or chance of practising it, but it is further necessary that there must be evidence to show that such undue influence was, in fact, exercised on the deceased by the person who seeks to propound the will and who may have benefited substantially from it.

6. I will now proceed to discuss the evidence in regard to issues Nos. 1, 2 and 4, which relate to due execution, testamentary capacity and the plea of undue influence, in the light of the legal position laid down by the highest Courts which has been set out in the preceding paragraphs. Before I do so, I may at once state that, in my opinion, the provisions

of the Will dated 4th August, 1963, are perfectly natural in so far as the first defendant who was the second wife of the deceased had born no children by herself, and it appears from the record in the present case that she had already been gifted certain land at the time of her marriage with the deceased. In view of those two facts, the provision of a house for her residence during her lifetime, and the bequest of Survey No. 296 at Mamurabad admeasuring 5 acres and 20 gunthas to her for life were perfectly natural provisions, and I would not expect the testator to provide anything more for her in those circumstances. The principles which require the Court to exercise a close scrutiny on the evidence in the case of wills and dispositions in wills which are unnatural and improbable can, therefore have no application to the present case. Dealing first with the evidence with regard to due execution, the plaintiff, Totaram, has deposed to the same briefly in his examination-in-chief in which he has said that the Will was written on the verandah of the store room of the District Court at Jalgaon to which place the deceased had gone for that express purpose. In his cross-examination the plaintiff, Totaram, has, in my opinion told certain unnecessary lies, but I do not think that the same can detract wholly from the probative value of his evidence, as far as the question of due execution or testamentary capacity is concerned, in regard to which his evidence stands corroborated by other evidence to which I will presently refer. For instance, Totaram was certainly deposing falsely when he said that he stood 10 or 12 feet away from the deceased when instructions were being given by the deceased to the scribe, that he did not read the rough draft of the Will which was prepared there, and that he did not read the Will after it was handed over to him or think it necessary to question the deceased in regard to the provisions made by him by that Will. His evidence in the course of cross-examination that he opened the envelope containing the Will after the *Kriyakarma* of his father is also somewhat improbable. His evidence in cross-examination that the deceased told him of his intention to execute the Will only when they were in the Court premises on the 4th of August, 1963, is also one which is hard to believe. These statements made by Totaram in cross-examination appear to me to have sprung from an over anxiety to sustain the validity of the Will, but the same do not re-

late to the question as to whether the deceased put his signature to the Will, or to the question as to whether the attesting witnesses put their signatures thereon at that time, on both of which not only is there no material infirmity in his evidence, but his evidence stands corroborated by the evidence of the scribe as well as of the two attesting witnesses. The scribe, Narhar Narayan, has stated that he had known the deceased for about 7 or 8 years before his death, as the deceased used to visit a neighbour of his, and that the deceased had seen him two days prior to the 4th of August 1963 at Jalgaon Kacheri and had requested him to meet him at the bus stand at Jalgaon as he wanted to get some documents written by him on Sunday the 4th of August 1963. Narhar Narayan is a professional Petition Writer of long standing, and there is, therefore, nothing unnatural in the deceased having approached him for writing of his Will. He has deposed that he accordingly met the deceased at the bus stand at Jalgaon and both of them proceeded to the Court premises where three other persons, whom he did not know, arrived 15 or 20 minutes later. His evidence that he did not ask the deceased as to why he was taking him to the Court premises on a Sunday when the Court was closed appears to be somewhat improbable, but he has not been shaken at all in regard to his evidence about the instructions given to him by the deceased, to his having written out a rough draft of the Will, and to the reading out of that draft by him to the deceased. He has also stated that the plaintiff was present when the Will was signed by the deceased, and that the deceased thereafter put the Will in an envelope and handed it over "to one of the three persons". Narhar has stated in his cross-examination that the deceased had brought the 7-12 extracts and extracts of the assessment list of the Gram Panchayat with him there, though he had not brought the copy of the "decrees". He has denied the suggestions which were put to him to the effect that he wrote out the Will on a paper which already bore the signature of the deceased, or that he did so without the knowledge of the deceased. There is nothing in the cross-examination of the scribe, Narhar, to discredit his testimony, though I may state that there are certain discrepancies as between his evidence as compared with the evidence of the other witnesses with which I will deal later.

7. That brings me to the evidence of the two attesting witnesses. The first

of them, Shankar Chavdas, was the son of the deceased's wife's sister and therefore a first cousin of the plaintiff. He has deposed very briefly to the execution and attestation of the Will in his examination-in-Chief. He was cross-examined as to how he happened to come there and he stated that the deceased had told him on the previous day to accompany him to Jalgaon on the next day, and that he started from Asode at about 10 a. m. in the company of the deceased, the second attesting witness Sampat, and the plaintiff. He has then stated that the deceased and the scribe came to the Court premises 15 or 20 minutes after he, Sampat and the plaintiff had reached the same, and that the deceased then announced that he intended to execute a will, and all of them sat in the verandah of the store room of the District Court near each other. There, the deceased gave the necessary instructions to the scribe who wrote out a rough draft of the Will which was read over and heard by all of them, including the plaintiff, and the original of the Will was thereafter written out. He has deposed that they were in the Court premises upto 2 or 3 p. m. There is nothing in the cross-examination of witness Shankar to show that he is not a witness of truth, though the fact that he is a first cousin of the plaintiff must make the Court circumspect in assessing the value of his testimony. The second attesting witness Sampat has also deposed in brief terms to the execution and attestation of the Will. It may be mentioned at once that he is an independent witness, not related to the plaintiff or the deceased. He has deposed that the deceased had given instructions, that a rough draft was then prepared by the Scribe, and that the fair Will was then written out. He has denied the suggestion that the deceased had been sick for about 3 or 4 years before his death and was not in good health, asserting that the deceased was in good health at the time of the execution of the Will. In the course of his cross-examination, he has said that the deceased had told him only when they were in the bus that he desired to execute a will, though he had been told a day earlier that he should accompany the deceased to Jalgaon. He has also stated that he accompanied the other attesting witness Shankar and the plaintiff from the bus stand at Jalgaon to the Court premises, and that it was 10 or 15 minutes after that that the deceased came to the Court premises in the company of the scribe. In cross-examination

he has further deposed that instructions for the preparation of the Will were given by the deceased in a tone which was audible to all of them who were sitting very near to the deceased, and that the rough draft was read over and thereafter the fair Will was written out. He has further stated that the fair Will was read over by the writer, that all of them heard the contents of it, and that after its execution and attestation, the Will was handed over to the plaintiff, the whole transaction having ended at about 2 or 3 p.m. I am quite impressed by the evidence of witness Sampat, and I have no hesitation in accepting his testimony, except, perhaps, his statement that he did not question the deceased as to why he was being taken to Jalgaon, till they were in the motor bus, which appears to be somewhat improbable.

8. As against all this positive evidence in regard to the due execution of the Will, we have the evidence of the first defendant who, admittedly, was not told anything about the intention of the deceased to execute the Will, conduct which appears to me to be perfectly natural on the part of the testator who must have known that his testamentary disposition would not please his wife. The evidence of the first defendant herself, which is the only evidence on her side, appears to me to be nothing more than, what I would call, "a shot in the dark". She has stated in her evidence, "the plaintiff must have taken the signature of my husband on the paper under influence". This is nothing more than a surmise. The very next sentence in her evidence shows that the basis of that surmise is also very slender, viz., that it is because she came to know of the Will only 2 1/2 months after the death of the deceased that she concludes that the Will must have been improperly procured by the plaintiff. She has also stated that the plaintiff used to take "our signatures" on blank paper for the suit which Tulsabai had filed against the deceased and herself, but I do not believe that evidence of the first defendant for the simple reason that if the plaintiff was the general power of attorney holder of the deceased, as she herself has stated in her evidence, there would be no reason for the plaintiff to take the signature of the deceased on blank sheets of paper. In fact, if he were to ask the deceased for such signature, he would be promptly met with the question as to why it was necessary to obtain those signatures, when the plaintiff himself could

sign on behalf of the deceased as his General Mukhtyar. Moreover, we have seen the original of the Will (Ex. No. 45) very carefully, and it is impossible to say that the signature of the deceased could have been obtained first, and the Will written above it afterwards, particularly in so far as the signature of the deceased does not appear to have been taken either at the end of a sheet or a half sheet, but occurs at the place in between, just where the body of the Will terminates. In fact, the first defendant has had to admit in her cross-examination that she does not know where the Will was executed and, under those circumstances, her evidence cannot possibly discredit the positive testimony of the plaintiff, the scribe, and the two attesting witnesses who have deposed to its due execution and attestation.

9. I must, however, deal with what were listed before us as discrepancies between the evidence of the different witnesses for the plaintiff inter se. The first discrepancy pointed out to us was, that whereas according to the scribe Narhar, he and the testator went to the Court premises first, and the plaintiff and the two attesting witnesses followed after 15 or 20 minutes, both the attesting witnesses have deposed that they had, in the company of the plaintiff, reached the Court premises first, and the deceased and the scribe Narhar had come there 10 to 20 minutes later. In my opinion, this discrepancy is not difficult to explain, in view of the fact that the witnesses were deposing in September 1965, in regard to what transpired in August 1963, and they may, therefore, be forgiven if there is a slight lapse of memory on their part in regard to the order in which they reached the Court premises on the day in question. The next discrepancy which was relied upon was on the question as to whether the Will was handed over to the plaintiff there and then. The plaintiff has stated that the deceased gave him the closed envelope containing the Will at about 4 p.m. which would mean that it was handed over to him shortly after its execution and attestation. The scribe, Narhar, has stated that the Will was handed over "to one of the three persons", which would mean, either the plaintiff or one of the two attesting witnesses who, according to him, were the three persons who arrived together at the court premises and have been referred to by him as such. I see no discrepancy at all as between that evidence and the evi-

dence of the plaintiff. The second attesting witness Sampat has also deposed that after the execution and attestation of the Will, it was given by the deceased to the plaintiff. As against that, the first attesting witness Shankar has stated in his evidence that the written will and the draft were with the deceased, and he has not stated that the same were handed over by the deceased to the plaintiff. That again is, in my opinion, not a discrepancy at all, for all that it comes to is that the attesting witness Shankar had not noticed the subsequent handing over of the envelope containing the Will by the deceased to the plaintiff. I, therefore, do not attach any importance to this alleged discrepancy either. The third discrepancy which was pointed out to us was on the question as to whether each of the plaintiff's witnesses knew why they were proceeding to the District Court on the day on which the Will was executed there. It is pertinent to note that all of them profess to deny knowledge of that fact. Attesting witness Sampat deposes that he was told about the purpose of their visit whilst they were in the bus, but attesting witness Shankar has stated that all that he told them when they got out from the bus was that he was "to keep some writing", and scribe, Narhar, has also stated that all that the deceased had told him when he had met with deceased a couple of days earlier was that the deceased wanted some documents written by him, and even on the day in question itself, all that the deceased had told him was that the writing which was to be written out was not one which was required to be registered. The plaintiff himself has in his evidence stated that it was only in the Court premises that the deceased had told him that his intention was to execute a will. It is hard to believe the evidence of any of these witnesses on this point, and I cannot help feeling that each of them has been at pains to make out that he did not know the purpose of the visit to the Court premises. Even so, I am not prepared to regard the evidence of any of these witnesses on this point as suffering from such an infirmity as would require the Court to discard their testimony altogether. The next discrepancy which was pointed out to us was on the question whether the draft will or final will was read over there and then. The plaintiff has stated in his evidence that he did not read the rough draft that was prepared there, and that none of those persons present suggested any corrections

in that draft. He has further deposed that even after the fair will was executed and was handed over to him, he did not read the same. The scribe, Narhar, has stated that he had read out the rough draft to the deceased, and attesting witness Shankar as well as attesting witness Sampat have also stated that the draft was read over, Shankar stating that the reading over of the rough draft was heard by all persons, including the plaintiff, and Sampat stating that the reading over of the fair will by the scribe was heard by all those present there. I am afraid, I do not find anything in the evidence of these witnesses inter se which could be said to be in the nature of a discrepancy, except, perhaps, this that the plaintiff has unfortunately feigned ignorance of the knowledge of the contents of the rough draft as well as the fair will, which he need not have done. The last point on which a discrepancy was sought to be pointed out was as to who put the fair will in the envelope. The plaintiff has stated in his evidence that the will was kept in an envelope which was closed by the deceased and that envelope was given to him by the deceased at about 4 p. m. that day. The scribe, Narhar, has stated in clear terms that it was the deceased himself who had put the will in an envelope and had handed it over to one of the three other persons present there. As against that, neither of the two attesting witnesses referred at all to the will having been put in an envelope. In my opinion, their evidence does not disclose any discrepancy on this point, and in any event, the same relates to something which is so trivial and inconsequential, that I would not attach any importance to it either. The result of this discussion of the alleged discrepancies is that, for the reasons stated by me above, there is nothing at all brought out in the evidence of the plaintiff's witnesses which could possibly be said to detract from the probative value of their testimony.

10. It was next sought to be contended that there are certain suspicious circumstances in the case which it is the duty of the plaintiff to explain and which the plaintiff has failed to explain. The first of those circumstances relied upon was that the will was executed at Jalgaon and not in the house of the deceased at Asode, but in my opinion, there was an obvious reason for the deceased not to execute the will in his house at Asode where he admittedly lived with the first defendant. The provisions of

the will could not possibly have been to the liking of the first defendant, and the deceased was, therefore, in my opinion, perfectly justified in keeping the contents as well as the execution of the will a secret from the first defendant. Having regard to that position, it is, in my opinion, not conceivable that the deceased should have executed the will in his house at Asode which would lead to unpleasant consequences as between himself and the first defendant who was his second wife and with whom he was living in that house. The second suspicious circumstance relied upon was that the will was executed in secrecy without the knowledge of the first defendant in the compound of the District Court on a Sunday. The observations which I have made in regard to the first circumstance relied upon apply to this also, and I have nothing more to say about it, except that an exactly similar contention was held by the Privy Council in Gomatibai's case (AIR 1949 PC 272) (para. 27) which has already been cited by me above, to be not a circumstance from which any sinister inference can be drawn against the propounder of the will. The third circumstance which was characterised as suspicious was that the will was not disclosed by the plaintiff till April 1964, which would be just about two months after the death of the deceased which occurred on the 12th of February, 1964. As far as that is concerned, it is pertinent to note that the plaintiff was already in possession and management of the very properties which were bequeathed to him by the deceased by his will, and he was, therefore, in no hurry to disclose or to rely upon the will till the question of mutation of entries in the revenue records arose a couple of months after the death of the deceased. This circumstance cannot, therefore, be said to be one which can arouse any suspicion in the mind of the Court at all. The next circumstance which was relied upon was that the plaintiff was admittedly the General Mukhtiyar of the deceased, and it was submitted that he was, therefore, in a position to dominate the will of the deceased. As pointed out by the Privy Council, both in Bur Singh's case (1911) ILR 38 Cal 355 (at p. 367) (PC) as well as in Gomatibai's case (para. 28), both of which have already been cited by me above, it is not sufficient for a caveator to show that the propounder of the will had the motive or the opportunity of exercising undue influence, but there must further be clear evidence

to show that undue influence was in fact exercised by the propounder over the deceased. There is no such evidence in the present case, and this circumstance itself cannot therefore be said to be in the nature of a suspicious circumstance at all. Lastly, it was sought to be pointed out that it is somewhat curious that the numbers of the houses and the number of Tulsabai's suit should have been stated in the will, if it was really executed in the circumstances alleged by the plaintiff and his witnesses. As far as that is concerned, the evidence of the scribe, Narhar, shows that the deceased had brought the 7-12 extracts and the extracts of the assessment list from the Gram Panchayat with himself at the time of execution of the will, and it would, therefore, be not surprising if the house numbers and the land numbers were stated in the will, as they have been. As far as the suit number is concerned, it would not be a very difficult problem for the deceased to remember one single number, viz. that of the suit which Tulsabai had filed against him, which might very well have imprinted on his memory since it must have caused him considerable trouble and worry. For the reasons stated above, in my opinion, there is no circumstance relating to the execution and attestation of this will which could be said to arouse any suspicion in the mind of the Court. The result of the discussion of this evidence is that I have no hesitation in coming to the conclusion that due execution of the will has been proved by the evidence led by the plaintiff.

11. As far as testamentary capacity is concerned, all that the first defendant herself has said in her evidence is that the deceased was sick for one year before his death, and what she meant by that sickness is clarified in the very next sentence in somewhat amusing terms in so far as she has said that the deceased had "pimples" on his foot, by which I presume corns or boils, and he could not go out of the house. She has denied the suggestion put to her in cross-examination that the deceased had been ill only for about 15 days or a month prior to his death. She has also deposed that her husband had lost his sight about six months before his death and he was not in a position to sign during that period. That evidence of hers cannot be accepted in view of the categorical evidence of the plaintiff and his witnesses which, for the reasons stated above, I have had no hesitation in accepting. On

the question of testamentary capacity itself, we have the specific evidence of the scribe, Narhar, who has stated that the deceased was in good health at the time of execution of the will, and the plaintiff who has also deposed that the deceased was in good health at the time of execution of the will and was able to walk. The plaintiff has denied the suggestion put to him in the course of cross-examination to the contrary. We have also the unchallenged evidence of attesting witness Sampat who has said that the deceased was in good health at the time when he executed the Will. I have, therefore, no hesitation in holding that the deceased was of sound and disposing state of mind at the time he executed the will dated 4th August, 1963.

12. I will now turn to the evidence on the question of undue influence in regard to which, as already stated above, the onus is on the first defendant. I may state that this question has been dealt with very scrappily and unsatisfactorily in para. 13 of the judgment of the learned trial Judge where he discloses an incorrect approach to the same. Since the onus on this issue is on the first defendant, it would be appropriate to refer first to her evidence. As already pointed out by me earlier whilst discussing the question of due execution, the first defendant's evidence on the point of undue influence is merely in the nature of a surmise when she states, "the plaintiff must have taken the signature of my husband on the paper under influence". That surmise is apparently based on the immediately preceding sentence in her evidence that, according to her, the plaintiff had influence on her husband, as well as the succeeding sentence in which she has stated that she came to know of the Will 2 1/2 months after her husband's death. Not only is that evidence wholly insufficient to discharge the onus which rests upon her of proving that the will was procured by undue influence but, as laid down by the Privy Council in *Bur Singh's* case as well as in *Gomtibai's* case cited above. (AIR 1949 PC 272), the mere fact that the propounder of a will was in a position to influence the deceased is not sufficient, but the caveator must lead evidence that such influence was in fact exercised by the deceased. There is no evidence worth the name led by the first defendant as far as the actual exercise of undue influence by the plaintiff on the deceased is concerned. In that view of the matter, it would be unne-

cessary for me to discuss the evidence led on behalf of the plaintiff which clearly speaks to the contrary. Suffice it to say, that the evidence in regard to the circumstances leading to the execution and attestation of the will clearly shows that the deceased had undoubtedly prepared for the execution of the will and had actually arranged for its execution and attestation as a matter of his own free will and there is, therefore, no question of any undue influence having been exercised on him by the plaintiff or any other person in that behalf. I have, therefore, no hesitation in coming to the conclusion that the first defendant has hopelessly failed to discharge the onus which rests upon her of proving that the will was procured by the plaintiff by undue influence, and in holding that the evidence led by the plaintiff actually negatives the plea of undue influence set up by the first defendant. In my opinion, the conclusion of the learned trial Judge on this point is clearly erroneous and seems to have been the result of putting the onus on the plaintiff, contrary to the clear legal position laid down by the authorities already discussed above. The 4th issue, as framed by him, was correct as far as the question of onus was concerned. In actually dealing with the same, he however appears to have lost sight of the question of onus of proof of that issue. In my opinion, the question of onus should not enter into the framing of issues at all, but should be dealt with by the court when taking up the issues for consideration. The form in which an issue is framed should not be determinative of the question of onus. For instance, issue No. 4 could well have been framed in the following form:—

"Was the will dated 4th August, 1963, obtained by the plaintiff by the exercise of undue influence on the deceased?"

The question of onus could then have been dealt with by the learned trial Judge at the time of dealing with the issues. That has been the practice consistently followed on the Original Side of this Court. Had the learned trial Judge done so, he would not have lost sight of the question of onus of proof in regard to this issue, as he did. The question of onus is sometimes a complicated question which may also have a bearing on the further question of the right to begin under Rules 2 and 3 of Order 18 of the Code of Civil Procedure, and is, therefore, best left to be decided after issues

are framed and arguments are heard in regard to the same. It cannot be fixed by the mere form in which the issues have been framed by the Court.

13. That brings me to a consideration of issue No. 5 which relates to the question as to what was the property which the deceased had the authority to dispose of by will. A consideration of this issue has led us to a consideration of an important and interesting point of Hindu Law which must necessarily be decided by us for the purpose of arriving at our conclusion on that issue. It was sought to be contended on behalf of the first defendant that, in view of the decree passed in the partition suit filed by Tulsabai (Special Suit No. 29 of 1951) under which Tulsabai was given a 1/3rd share in the joint family property, and in view of the fact that Tulsabai had actually got her share separated in consequence of that decree, the first defendant had become entitled to a one-half share in the remaining property, the other one-half share being the property of the deceased. It was, therefore, submitted that the deceased had a disposable interest only in one-half of the suit property and that the will which he purported to make could not operate on the first defendant's moiety of the property by reason of the facts stated above. The interesting question of Hindu Law that arises, therefore, is whether separation by metes and bounds of the share of a son or his widow has the effect of separating the share of the mother also, so as to deprive the father of his right as the sole surviving coparcener to dispose of the entire coparcenary property, inter vivos or by will. For the decision of this question, it is necessary for me to refer to four decisions. The first, and perhaps the most important of them, in chronological order, is the decision of a Division Bench of this Court in the case of Raoji Bhikaji v. Anant Laxman, ILR 42 Bom 535 = (AIR 1918 Bom 175). The facts of that case were that one Bhikaji died leaving a widow, Yeshodabai, and two sons, Raoji and Laxman. Laxman died leaving a son, Anant, who brought a suit for partition and possession of one-half share in the estate of Bhikaji, to which Raoji was joined as the first defendant and Yeshodabai as the second defendant. Raoji contended that the plaintiff was not entitled to one-half share as his mother was also entitled to her share at the time of partition. That plea was upheld by the Court which passed a preliminary decree assigning a one-

third share in the properties to the plaintiff, Anant. Before the final decree could be passed, Yeshodabai died and the plaintiff thereafter made an application to the Court praying that his share should, by reason of the death of Yeshodabai, be held to have increased to one moiety, and the preliminary decree should be amended accordingly. The trial Court granted that application, but from that order Raoji preferred an appeal to the High Court, and in his judgment Batchelor, Acting C. J., stated (at p. 545) (of ILR Bom) = (at p. 177 of AIR) that the share which Yeshodabai would have taken, if an actual partition had been effected, "was never severed from the estate of Bhikaji, and, consequently, remains now an integral part of that estate available for division". In a concurring judgment, Shah, J., pointed out (at pages 546-547) (of ILR Bom) = (at p. 178 of AIR) that Yeshodabai had taken no steps after the preliminary decree to obtain her share, and the estate of Bhikaji was, therefore, divisible between the plaintiff and the first defendant on her death without any reference to her share and the share which Yeshodabai would have taken after an actual partition had been effected "was never severed from the estate of Bhikaji", and, consequently, remained an integral part of that estate available for division. It was further observed in the judgment of Shah, J., that in order that Yeshodabai's share "may become part of her property as distinguished from the estate of her husband, she must take her share". It was held in the said case that Yeshodabai had not taken any effective steps to secure her share, that she had done nothing subsequently during her lifetime to obtain her share and that, therefore, "it was not severed from Bhikaji's estate". It was further stated by Shah, J., in the said case that it was not necessary to define precisely as to when the mother could be said to take her share, as the question must be decided with reference to the facts of each case, but on the facts of the case before him, it was clear that Yeshodabai had not taken her share as contemplated by the text, and that therefore the property of Bhikaji became liable to division on her death in equal shares between the plaintiff and the first defendant. The appeal filed by Raoji was, therefore, dismissed. From the words quoted from the judgment in the said case, it is, in my opinion, quite clear that the severance of the mother's share which was contemplated

both by the Acting Chief Justice as well as Shah, J., in their separate, but concurring judgments, was not merely a severance effected by the coparcener who sought the partition in respect of the property coming to his share, but was the severance of the share allotted to the mother on that partition from the property coming to the share of the father, who, in this case, was Bhikaji.

14. The law, as laid down by the Division Bench in Raoji Bhikaji's case (AIR 1918 Bom 125) has been approved as representing the correct Mitakshara Law on the point by the Privy Council in the case of Pratapmull Agarwalla v. Dhanabati Bibi, 63 Ind App 33 at p. 45 = (AIR 1936 PC 20 at p. 24) and I must now proceed to deal with that decision. I may state at once that Pratapmull's case is considered as the leading authority on the subject now under consideration. In Pratapmull's case, the appellants were money lenders who had lent money to a joint Hindu family on mortgage of joint family property. In a partition suit which had been filed by the son against his father and mother, a preliminary decree for partition was passed in which a one-third share of the joint family property was allotted to the mother, Dhanabati, but it was common ground that no actual division of the property ever took place. About a year later, a suit was brought by the appellants to enforce their mortgages and in that suit a consent decree was passed. The appellants thereafter filed another suit for a declaration that their mortgages were binding upon the defendants, and in particular, upon the defendant Dhanabati, and that it should be declared that the decree in the mortgage suit filed by them was also binding upon her, the appellants' contention being that the partition had been made with the object of saving the share of the mother, Dhanabati, from the mortgages. The trial Court held that when the mortgage suit was instituted, Dhanabati had no rights, except a right of maintenance, and that being so, the question whether the institution of the partition suit amounted to a severance affecting the status of the joint family did not arise, and that all the persons who had any actual interest at the time in the mortgaged property were in fact parties to the mortgage suit. It was, therefore, held by the trial Court that the plaintiffs were entitled to succeed, and the declarations sought by them were granted. On appeal to the

High Court, that appeal was allowed by a Division Bench, but on further appeal to the Privy Council, the judgment of the Division Bench of the High Court was set aside and that of the trial Judge restored, with a slight variation in the form of declaration granted by him. Approving the view taken by Mitter, J., in the case of Sheo Dayal Tewaree v. Judoonath Tewaree, (1868) 9 Suth WR 61, the Privy Council held (at pp. 44-45) that inasmuch as the preliminary decree in the partition suit was not carried out and no actual division of the joint family property was made, Dhanabati had not become the owner of the share mentioned in that preliminary decree. The Privy Council in its judgment quoted a passage from the judgment of Mitter, J., in the said case in which Mitter, J., observed that if the mother had brought an action for arrears of maintenance, it would have been no answer to the same to plead that she was not entitled to be maintained out of the estate "because they were going to make over to her a share of it", as such a plea would be absurd and would mean that she would have to starve until the assignment was actually made. Reference was also made by the Privy Council to the observation of Mitter, J., in Sheo Dayal's case that the mother or the grandmother was entitled to a share when sons or grandsons divide the family estate between themselves, but that she could not be recognised as the owner of such share until the division is actually made, as she had no pre-existing right in the estate, except a right of maintenance. In that view of the matter, the Privy Council confirmed the view taken by the trial Judge and, setting aside the decree passed by the Division Bench, allowed the appeal before it.

15. A third judgment which was cited before us on the point which I am now considering was the recent judgment of the Supreme Court in the case of Satrugan v. Sabujpari, (AIR 1967 SC 272). That was a case in which the widow of one Babuji had instituted a suit for partition and separate possession of a half share in the joint family properties against the collaterals of her husband. The trial Court dismissed that suit, but on appeal to the High Court, the suit was decreed on the ground that on the death of Babuji, his widow, by virtue of the Hindu Women's Rights to Property Act, 18 of 1937, acquired in the property of the coparcenary the same interest which Babuji had, and by the institution of the

suit for partition, that interest became defined, and on her death, it devolved upon the appellants as heirs to the estate of Babuji. On appeal to the Supreme Court, that decision was confirmed. In so far as the said case dealt with the rights of a widow under the Hindu Women's Rights to Property Act, 1937, it is not of any assistance to us for the purpose of the present case, for as the Supreme Court itself has pointed out (para 9), the interest which a widow acquires under Section 3 (2) of the said Act has no analogy with the interest which a female member of a Hindu Joint Family acquires in the property of the joint family allotted to her on a partition between her sons or grandsons. It was laid down in the judgment in the said case that a Hindu widow acquired under Section 3 (2) of the said Act, "even before division of the property", an interest in property, and that interest can be defined as soon as an unequivocal demand for partition was made by her. I am afraid, the decision of the Supreme Court in Satrugan's case is of no assistance to me for the purpose of the present judgment.

16. It was, however, strongly contended by Mr. Gole on behalf of the first defendant that the separation to which the Privy Council refers in *Pratapmull's* case discussed above (AIR 1936 PC 20) is not a separation of the mother's share from the property of the father, but is a separation of the share of the coparceners who had sought the partition in the course of which the mother had been allotted a share. In support of that proposition, Mr. Gole relied on the decision of a Single Judge of the Nagpur High Court in the case of *Nanuram v. Radhabai* (AIR 1940 Nag. 241). The facts of that case were that one Kisan Shende had two wives, and had a son by each of them. The two wives of Kisan filed the two suits out of which the said appeal arose, contending that there had been a partition in the family at the instance of the sons whereby the property had been divided into five shares, and the sons each took a one-fifth share and enjoyed it separately, whilst the plaintiffs who were allotted 1/5th share in lieu of maintenance continued to live with their husband Kisan. It was an admitted position that the shares of the plaintiffs had not been separated by metes and bounds from the share of their husband Kisan. It appears that Kisan disposed of some of the properties to the defendants in those

two suits. Kisan thereafter died sometime in the year 1963, and the contention of the plaintiffs was that Kisan had no authority to dispose of their shares in the said property since all the three of them were in possession as tenants-in-common, and they, therefore, claimed joint possession of the property thus alienated, with the alienees. The plaintiffs succeeded in both the courts below, but one of the defendants preferred an appeal to the High Court. Though the partition was, at one stage of the proceedings, sought to be disputed, it is stated in the judgment of the High Court that it had not been denied before it that there was a partition in the year 1944 in regard to which there was a finding of fact in the Courts below that the intention was that the wives should have a share each. There were as far as the legal position of the plaintiffs was concerned however, two alternative contentions advanced before the High Court. The first was that, as a result of the partition, the father had become the exclusive owner of a three-fifth share, and that the wives obtained no share at all in the partition, alternatively, it was contended that if the wives did obtain a share each, then as a consequence of their continuing to live with their husband, they constituted a joint family, with their husband as manager of their property with the consequent powers of alienation which a manager has. In regard to the first of those contentions, the learned Judge of the Nagpur High Court referred to the decision of the Privy Council in *Pratapmull's* case which has already been discussed by me above and distinguished the said case on the ground that in that case there had been no final division of the coparcenary property to be enjoyed in severalty by the various coparceners. The learned Judge took the view (at page 243, Col. 2) that if the partition proceedings stopped short at a severance of the joint status, the coparceners still remained tenants-in-common, and a wife or a widowed mother had no further claim than that of maintenance out of the family property, and that her title to a share only crystallized when there had been a division among the coparceners by metes and bounds and there was no more joint family or coparcenary property left to which she could look for her maintenance. It was, therefore, held (at p. 244, Col. 1) by the learned Judge that as soon as the division by metes and bounds had taken place, the plaintiffs became entitled to their share, and the fact that the coparceners had not divided their

shares by metes and bounds inter se or from the share of the father was immaterial. In regard to the alternative contention advanced before him, the learned Judge took the view that after the partition, there was no longer any coparcenary property and that all the property had become separate property in the hands of the coparceners and their wives, and there was, therefore, no coparcenary property for the father to manage. The view taken by the learned Judge of the Nagpur High Court was that it was only a joint family consisting of coparceners in an undivided state who could separate; that there could be no separation between a husband and his wives, and that there was in the case before him no coparcenary in existence. It was further held that a manager had only the power of disposition over coparcenary property, and nothing that Kisan did was done by him in his capacity as a manager of joint family property. Since the father and his wives, the two plaintiffs, were holding the property as tenants-in-common in the said case, there was no question of the father having authority as the manager to dispose of the same without the express consent of the plaintiffs, in regard to which there was no evidence before the Court. A third contention in regard to ostensible ownership was also raised, but the same is not relevant for the purpose of the present case. The appeal was, therefore, dismissed and the decree for joint possession in favour of the plaintiffs by both the lower Courts confirmed.

17. The construction which the learned Judge of the Nagpur High Court has placed on the decision of the Privy Council in Pratapmull's case (AIR 1936 PC 20) was strongly relied upon by Mr. Gole before us. However, whatever plausibility that argument of Mr. Gole might appear to have is destroyed by the fact that the Privy Council has, in Pratapmull's case, stated, in the clearest possible terms, that the law as laid down by the Division Bench of this Court in Raoji Bhikaji's case (AIR 1918 Bom 175) represents the correct Mitakshara law on the point which I am now considering. As already pointed out by me above, the words which I have actually quoted from the judgment in Raoji Bhikaji's case show unmistakably that the separation of the share of the mother which was contemplated in that case was not merely a separation qua the coparceners who sought the partition in the course of which the mother was assigned her share, but was

a separation as between the property of the mother and the property of the father. It is further stated in the judgment in Raoji Bhikaji's case that until that separation was effected, the mother could not be said to be the owner of the share which had been assigned to her on partition but merely continued to have a right of maintenance, as she had before the partition. It is only after a partition is effected by her sons or their widows in the course of which the mother is assigned a share, and after a separation of that share is effected by metes and bounds from the property of the father, that the right which the father has as the sole surviving coparcener to dispose of the whole of the remaining property, including the share of the mother inter vivos or by will, ceases.

18. Turning to the facts of the present case, in the light of the above legal position, though there is a plea to be found in paragraphs 5 and 6 of the Written Statement of the first defendant that she had enjoyed separate possession and management of the share which had been assigned to her, there is no evidence whatsoever on record to substantiate the same. Even in her own evidence the first defendant has not made any such statement, and under the circumstances, it must be held that the share of the first defendant in the present case was not separated by metes and bounds from the share of the deceased at any time prior to his death. In the case of a partition effected by a decree, the question as to whether the separation was only a separation of the plaintiffs from the coparceners, or was the separation of all the members of the joint family from each other, must be determined on a construction of the partition decree itself which must be regarded as the sole evidence for that purpose. In a case of partition effected otherwise, the facts and surrounding circumstances may, of course, be looked at, but I am concerned in the present case with a partition which was sought to be effected by the decree passed in Tulsabai's suit, being Special Suit No. 29 of 1951 and, under the circumstances, it is that decree alone which must be looked at for the purpose of finding out whether there was a separation only between Tulsabai and the rest of the family, or whether there was a separation between all the members of the joint family from each other. We have seen the said decree (Ex. 46), which is the preliminary decree as well as the decree (Ex. 47) which is

the final decree. What the former decree pronounces is that there is a partition of Tulsabai's 1/3rd share in the joint family property. Under those circumstances, it is quite clear that there was at no time any separation of property by metes and bounds between the first defendant and the deceased.

19. Having regard to the legal position discussed above, it must follow that the first defendant was, therefore, not the owner of the share which had been assigned to her under the preliminary decree in Special Suit filed by Tulsabai, and the deceased, as the sole surviving coparcener, was therefore entitled to dispose of the whole of the remaining property, which is the suit property, by his Will dated 4th August 1963, as he has done. The 5th issue was therefore correctly answered by the learned trial Judge in favour of the plaintiff. In the result, I would allow the appeal, set aside the order of the learned trial Judge dismissing the plaintiff's suit and pass a decree in favour of the plaintiff.

NAIK, J.:— 20. I agree and have nothing to add.

BY THE COURT

21. The appeal is allowed. The order of dismissal of the suit passed by the trial Court is set aside, and we pass a decree in favour of the plaintiff in terms of prayers (a), (b) and (c) of the plaint. We also make an order for the determination of future mesne profits under the provisions of Order 20, Rule 12 (1) (c) of the Code of Civil Procedure, 1908, as applicable in this State. We also set aside the order for costs passed by the lower Court, and in the circumstances of this case, order that each party should bear its own costs throughout.

Appeal allowed.

AIR 1976 BOMBAY 329

VAIDYA, J.

Mohan, Petitioner v. The State of Maharashtra and another, Opponents.

Special Civil Appln. No. 725 of 1972, D/- 4-12-1975.*

(A) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961),

*(For setting aside order passed by member Maharashtra Revenue Tribunal, at Aurangabad, in case No. 222-A-70, D/- 5-8-1971).

FT/FT/B817/76/JHS

Section 2 (20) (prior to amendment by Act 21 of 1975) — 'Member of family' — Dependant sister of father of holder is not member of holder's family.

(Para 2)

(B) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Section 16 — Retention of land — Reasonable time should be given to holder for selection — Two days' time for selecting 126 acres out of 230 acres is unreasonable — Fifteen days' time ought to be given. (Paras 4, 8)

S. P. Kurdukar, for Petitioner; A. G. Sabnis, Asst. Govt. Pleader, for Opponent No. 1.

ORDER:— Mr. Kurdukar, the learned counsel for the petitioner, in the above Special Civil Application, directed against the concurrent Orders of the Revenue Tribunal and the District Deputy Collector, Bhir, under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, has submitted three neat points of law in support of the petitioner's case.

2. The first contention raised by him was that the two Authorities erred in law in excluding the dependant sister of the father of the holder from the family of the holder. Unfortunately this contention is not tenable having regard to the definition of the word 'member of the family' contained in Section 2 (20) of the Maharashtra Agricultural Land (Ceilings on Holdings) Act, 1961, prior to its recent amendment by Act XXI of 1975 and the two Ordinances. The two Authorities below were, therefore, right in excluding her.

3. The second point of law raised by Mr. Kurdukar was that the two Authorities erred in including in the holdings of the petitioner 42 acres of pot-kharab land. The two Authorities have held, having regard to the definition of the word 'land' contained in Section 2 (16) of the Act, as meaning not only land used for the purposes of agriculture, but also land capable of being used for agriculture that the pot-kharab lands were not really pot-kharab lands, but fallow lands, which were assessed to agricultural assessment. The contention of Mr. Kurdukar cannot be accepted having regard to the definition of the word 'land' in Section 2 (16), rightly relied upon and interpreted by the two Authorities below.

4. The third contention of Mr. Kurdukar is however, one of substance. It relates to the choice under Section 16

of selecting the lands for retention by the holder. Mr. Kurdukar fairly stated that the composite notice under Sections 16 and 17 was served on the land-holder on March 3, 1964; and he was asked to make a choice within 2 days on March 5, 1964. Mr. Kurdukar submitted that the time of only two days granted to the petitioner to make a choice out of 229.22 acres of land, about 126 acres of land, which he wanted to retain was neither fair nor reasonable and he, therefore, argued that the two Authorities ought to have given him a fair opportunity particularly when the Deputy Collector passed the Order after remand only on October 27, 1970, and the Revenue Tribunal modified his order on August 5, 1971.

5. Mr. Sabnis, the Assistant Government Pleader, on the other hand, supported the orders of the two Authorities on the ground that as the final orders were not passed till 1970, it was open to the petitioner to move the Deputy Collector under Section 16, and it was further open to the petitioner to raise this point before the Revenue Tribunal, which he did not do.

6. Mr. Sabnis therefore, submitted that the petitioner should not be allowed the facility of exercising the choice of selection under Section 16 in exercise of the powers of this Court under Article 227 of the Constitution of India. There is some force in the contention of Mr. Sabnis. But, when the Officers and the Tribunal concerned with the Ceiling Act do not act fairly towards the parties and do not care to give a reasonable time for making the choice, as they ought to do, as in the present case, I think the only remedy for such parties is to approach this Court under Article 227 and get the proper remedy.

7. The Ceiling Act was a Revolutionary Act introducing ideas and changes in agricultural laws, to which people are not used, even after decades of enforcement. It is also doubtful whether their legal advisers are in a position to give them proper advice as in some of these proceedings, they are not represented by legal advisers. The Legislature expects the Officers concerned with the implementation of these laws to act promptly, thoroughly and in the spirit of the welfare legislation. Unfortunately in most cases, these Officers commit serious mistakes including the most serious mistake of ignoring the law itself.

8. In the present case, the landholder was found by the Deputy Collec-

tor to be the holder of 229.22 acres. He had to select out of these which 126 acres he would retain. I think that for any prudent and reasonable holder, it would be difficult to choose within 2 days the lands to be so selected. The holder has to consider various economic and non-economic considerations, which accompany land ownership and holding. A holder must be a very extraordinary person if he could make the choice within 48 hours in such matters. It is not as easy as love at first sight to love the lands, which one would like to retain and intimate to the Deputy Collector. At least a fortnight's time ought to have been given by the Officer particularly when the matter was not decided for nearly four years thereafter.

9. In the result, the petition is allowed to the extent of the refusal of the choice under Section 16; and the rest of the orders passed by the two Authorities and as modified by the Revenue Tribunal are confirmed. The case is restored to the file (File No. 68(ICH/5)) of the Deputy Collector, L. Rs., Bhir, who shall give a choice of selection under Section 16 (1) in terms of paragraph 13 of the petition in this court as far as possible.

10. Accordingly Rule is made absolute. No order as to costs.

Order accordingly.

AIR 1976 BOMBAY 330

SHAH AND SAWANT, JJ.

Keshav Ramchandra Malekar, Appellant v. Ramdas Dasharath Malekar and others, Respondents.

Letters Patent Appeal No. 91 of 1973, D/- 30-9-1975.*

(A) Limitation Act (1963), Article 136 — Preliminary decree in partition suit — Execution application by plaintiff in 1954 for determination of shares in house property by metes and bounds and for separate possession — Shares determined and final decree passed in 1955 — Application by defendants (not in possession) for separate possession made in 1972 — Held, application was not barred by time — It was only in continuation of 1954 execution application which was not finally disposed of. F. A. No. 366 of 1973, D/- 2-4-1973 (Bom), Affirmed. (Para 3)

*(Against judgment of Vaidya, J., in F. A. No. 366 of 1973, D/- 2-4-1973.)

ET/ET/B723/76/JHS

R. A. Jahagirdar, for Appellant; L. G. Khare, for Respondents Nos. 1 to 3.

SAWANT, J.:— This letters patent appeal is filed against the decision dated 2-4-1973 of the single Judge in First Appeal No. 366 of 1972.

2. The plaintiff had filed a suit being Suit No. 25 of 1947 in the Court of the Civil Judge, Senior Division, Satara for partition of agricultural and non-agricultural property against his brothers claiming that the property was a joint family property. In that suit, a preliminary decree was passed on 4-8-1949 declaring the shares of the respective parties. Against the said preliminary decree, the matter was carried in First Appeal No. 647 of 1949 which was decided on 29-7-1953, by which decision the preliminary decree was confirmed. Thereafter, the plaintiff filed an application which was styled as Special Darkhast No. 22 of 1954 on 13-4-1954 praying for two reliefs. The first relief was for determination of their shares in the non-agricultural property by metes and bounds and the second relief was for possession of such determined shares. Incidentally, it may be mentioned that the non-agricultural property involved in the suit were houses. On 4-3-1955, the Court passed an order on the said application whereby defendants Nos. 2 to 5 were given 10 khans of structure in the front portion of one house, and Rs. 50/- as compensation to be recovered from defendant No. 6. It was also declared by the said order that defendants Nos. 2 to 5 had one-third share in the well in the property in question. Thereafter on 21-9-1955, the final decree was drawn in terms of the shares which were determined by the order dated 4-3-1955, and it was also directed in the said final decree that the sale deed be drawn on a non-judicial stamp paper. Nothing happened for a long time thereafter. Since the respondents-defendants Nos. 2, 4 and 5 did not get possession of their shares as determined by the order dated 4-3-1955 which was finally incorporated in the final decree dated 21-9-1955, the respondents-defendants Nos. 2, 4 and 5 made an application on 25-2-1972 for separate possession of their shares as were determined earlier. It is this application which has given rise to this appeal. The appellant-heir of original defendant No. 1 who is in possession of the shares which had been allotted to defendants Nos. 2 to 5 objected to this application on the ground that the said application was an application for execution of the final dec-

ree dated 21-9-1955 and the same having been time barred, no execution could proceed. The learned trial Judge by his order dated 12-4-1972 held that the application for execution was in time and rejected the objection of the appellant. Against the said decision, the appellant preferred an appeal being First Appeal No. 366 of 1972 to this Court which was disposed of by the learned single Judge by his impugned order holding that the final decree dated 21-9-1955 did not declare any new rights or interests of the parties. The original application filed by the plaintiff being Special Darkhast No. 22 of 1954 on 13-4-1954 was an application for execution of the preliminary decree. The present application was not an application for execution but an application in the said darkhast proceedings and the respondents-defendants Nos. 2, 4 and 5 were entitled to continue the said darkhast proceedings initiated by the said Special Darkhast No. 22 of 1954 by the present application, and therefore the proceedings were not time barred.

3. Mr. Jahagirdar who appears for the appellant-heir of the original defendant No. 1 in this appeal, urged before us that there could not be execution proceedings before the final decree was drawn up and as such the application made by the plaintiff on 13-4-1954 was not an application for execution and it was wrongly numbered as a Special Darkhast. According to him, the application for execution could be made only after the final decree was drawn up. The first time such an application was made by respondents Nos. 1, 2 and 3 — defendants Nos. 2, 4 and 5 was on 25-2-1972 and the same was clearly time barred and therefore it was not maintainable. We find that to accept Mr. Jahagirdar's said contention will be to place a very narrow interpretation on the expression "application for execution". Whether a particular application is an application for execution or not will depend upon the facts and circumstances of each case. It is also not correct to say that no application for the execution of a preliminary decree can be made in any case, because whether a preliminary decree can or cannot be executed and whether it can be executed partially or fully will again depend upon the direction contained in such preliminary decree. In the present case, admittedly the preliminary decree dated 4-8-1949 had declared the shares of the respective parties in the suit properties

including the non-agricultural properties. The plaintiff had therefore made an application on 13-4-1954 which was numbered as Special Darkhast No. 22 of 1954 praying therein for a partition of the non-agricultural properties by metes and bounds and for separate possession, after such partition. By the order dated 4-3-1955, the Court in terms declared that the various items in the suit properties were put to the shares of the respective parties. Since the final decree was not drawn up till that time, the Court could not grant the second prayer in the said application viz., putting the parties in possession of the items which are allotted to their shares. The final decree was drawn up only on 21-9-1955. Therefore, a part of the prayer in the application dated 13-4-1954 remained to be granted and it could not be said that the said application was finally disposed of by the order dated 4-3-1955. Unless and until their prayer viz., the prayer for separate possession of the property allotted to the shares of the respective parties, was granted, it could not be said that the application dated 13-4-1954 had come to be finally disposed of. In this view of the matter the parties were required to request the Court to grant the second prayer in the said application dated 13-4-1954 and when respondents Nos. 1, 2 and 3 — defendants Nos. 2, 4 and 5, by their application dated 25-2-1972 requested the Court to grant them separate possession of the property allotted to their share by the order dated 4-3-1955, they were doing nothing more than pursuing the second prayer made in the application dated 13-4-1954. We are therefore in agreement with the finding of both the trial Court as well as the learned Single Judge that the application for execution was made on 13-4-1954 when the Special Darkhast No. 22 of 1954 came to be filed and the said Darkhast application was only partly disposed of on 4-3-1955 when the Court declared the specified properties falling to the shares of the respective parties. At that time the Court could not grant the second prayer in the said darkhast application since the final decree was not drawn up which came to be drawn up only after 21-9-1955. The application made by respondents-defendants Nos. 2, 4 and 5 on 25-2-1972 was only in continuation of the said Special Darkhast No. 22 of 1954 requesting the Court to grant them the second prayer which prayer was already made in the said darkhast application. In this view of the matter, it

cannot be said that the proceedings for granting separate possession to the respondents-defendants Nos. 2, 4 and 5, were time barred. We therefore do not find any substance in this letters patent appeal and dismiss it with costs. The record and proceedings in this matter which have come to this Court may be sent to the trial Court forthwith.

Appeal dismissed.

AIR 1976 BOMBAY 332

DHARMADHIKARI, J.

Babarao S/o Rajaram Deshmukh, Applicant v. Sonba S/o Janu Bhai, Opponent.
Civil Revn. Appln. No. 544 of 1974,
D/- 3-9-1975.

(A) Civil P. C. (1908), Order 6, R. 17, Section 115 — Application for amendment of plaint and map in order to clarify certain position — Mere pendency of suit for long period cannot be a ground for rejecting such application — Trial Court in rejecting such application, held acted illegally and with material irregularity. AIR 1969 SC 1267, Rel. on.

(Para 3)

Cases Referred: Chronological Paras
AIR 1969 SC 1267 = (1970) 1 SCR 22 3

V. S. Sirpurkar, for Applicant; G. B. Gandhe, for Opponent.

ORDER:— This revision application has been filed by the original plaintiff against the order passed by the Civil Judge, Junior Division, Darwha, dated 6-12-1974 rejecting his application for amendment of the plaint. Before recording of the evidence the plaintiff filed an application for amendment of the plaint and the map, which was in the nature of clarification. This application was opposed by the defendant and ultimately the learned Judge came to the conclusion that as the suit is long pending and the amendment application is filed at the last stage, it does not appear to be bona fide. He further came to the conclusion that by the amendment the entire pleadings of the plaintiff and the defendant will be required to be changed. According to the learned Judge, proposed amendment as stated in para 5, of the application changes the nature of the suit. In this view of the matter, therefore, he rejected the application. As already observed, it is this order which is challenged in this revision application.

BT/DT/A496/76/SSG

2. Shri Sirpurkar, the learned counsel for the applicant, contended before me that the learned Judge committed an error in holding that the proposed amendment will change the nature of the suit itself. He further contended that the learned Judge was not right in holding that by the amendment the entire pleadings of the plaintiff and the defendant will be required to be changed or the amendment is not bona fide. In my opinion, there is much substance in this contention.

3. From the record it seems that all the necessary allegations were already made in the plaint itself. The plaintiff wanted only to clarify certain position by the proposed amendments. Vide para. 3 of the application, the plaintiff sought permission to file a corrected map and by paras. 4 and 5 of the application he wanted to carry out consequential amendments in the plaint clarifying the positions. In this view of the matter, in my opinion, it cannot be said that the amendments will change the nature of the suit. The said amendment application has been filed before recording of the evidence itself. Therefore, it cannot be said that it is filed at a late stage. Mere pendency of a suit for a long period cannot be a ground for rejecting an amendment application. As observed by the Supreme Court in *Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon*, (AIR 1969 SC 1267):

"The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitation.

Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

In view of this proposition of law as laid down by the Supreme Court, it is obvious that while rejecting the application

for amendment made by the plaintiff the learned Judge has acted illegally and with material irregularity while exercising the jurisdiction vested in him by law.

4. In the result, therefore, the revision application is allowed. The order passed by the learned Judge dated 6-12-1974 rejecting the application filed by the plaintiff for amendment of the plaint is set aside. As a consequence of this, the application filed by the plaintiff for amendment of the plaint is allowed. The defendant will be at liberty to amend his written statement if he so desires. However, in the circumstances of the case there will be no order to costs.

Application allowed.

AIR 1976 BOMBAY 333

VAIDYA, J.

Kopargaon Big Bagayatkar Vividha Karyakari Sahakari Society Ltd., Appellant v. Deorao Sakham Pawar and another, Respondents.

Second Appeal No. 889 of 1972, D/- 6-8-1975.*

(A) Civil P. C. (1908), Order 21, Rule 11 (2); Order 29, Rule 1 — Application for execution by a co-operative society — Verification.

Where the application for execution was signed and verified in Form No. 6, Appendix E to Civil P. C. by the Chairman of a Co-operative Society, this necessarily implies that the Chairman was acquainted with the facts of the case, within the meaning of Order 21, Rule 11 (2) and he was able to depose to the facts of the case, within the meaning of Order 29, Rule 1. It is not necessary that a person, who signs a proceeding on behalf of the corporate body, must be a person properly authorised by a resolution to institute a proceeding. (Paras 5, 12)

A. V. Savant, for Appellant; A. V. Datar for M. V. Sali, for Respondent No. 1.

JUDGMENT:— The appellant in the above Second Appeal is the Kopargaon Big Bagayatdar Vividha Karyakari Sahakari Society Ltd., registered under the Maharashtra Co-operative Societies Act, 1960. The Society obtained a decree against judgment-debtors Nos. 1 and 2 —

*(Against decision of M. S. Vaidya, Extra Asst. Judge, at Ahmadnagar, in Civil Appeal No. 8 of 1971).

FT/FT/B913/76/MBR

respondents Nos. 1 and 2, Deorao Sakham Pawar and Shankar Sakham Pawar, in Regular Suit No. 38 of 1955, on August 31, 1956, for a sum of Rs. 1,683/- and odd. Though almost 19 years have passed, the respondents have not cared to pay a single paisa towards the decree: Darkhast Nos. 354 of 1966, 213 of 1960 and 13 of 1964, filed by the Society, yielded nothing. By their application No. 3 of 1967, the decree was got transferred to Shrirampur Court. The decree-holder applied for execution of the decree, on April 28, 1967, in that Court, by sale of the moveable property belonging to the judgment-debtors, and alternatively, for the arrest of the judgment-debtors. The said Regular Darkhast No. 83 of 1967, was signed and verified by S. K. Raskar, in his capacity as the Chairman of the Society. The execution was sought only against Judgment-debtor No. 1, Deoram Sakham Pawar.

2. In reply to the notice under Order XXI, Rule 31 of the Civil Procedure Code, Judgment-debtor No. 1 filed a written statement at Exh. 16, raising several contentions; and again filed an additional written statement raising several other contentions. The oral and documentary evidence was led before the learned Civil Judge, Shrirampur. By his judgment and order dated November 6, 1970, the learned Civil Judge dismissed the Darkhast, ordering Judgment-debtor No. 1 to pay the costs on the ground that there was no evidence on the record to show that judgment-debtor No. 1 had committed any act of bad faith, as envisaged in Section 51 proviso (a) (ii) of the Civil Procedure Code. The learned Judge also held that there was no evidence worth the name to show that the judgment-debtor No. 1 has, or has had since the date of the decree, the means to pay and refuses or neglects or has refused or neglected to pay the decretal amount as laid down in proviso (b) of Section 51 of the Civil Procedure Code.

3. The Society carried an appeal against the said decision. The learned Extra Assistant Judge, by his judgment and order dated June 14, 1972, dismissed the appeal, although he reversed the finding of the trial Court with regard to the means and capacity of judgment-debtor No. 1 to pay, because he was of the view that the Darkhast was not maintainable, as it was not signed or verified by the properly authorised person, observing as follows, in para 11 of his judgment:

"The evidence on record clearly shows that the judgment-debtor has considerable land standing on his name. The extracts of the record of rights are produced at Exhs. 45 to 50. There is hardly any evidence on record to show that all of these lands stood in the name of judgment-debtor No. 1 in his capacity as the Manager of the joint family. Moreover, if he has contracted the debt in question as the Manager of the joint Hindu family, for the benefit of the family, the lands standing in his name even as the Manager of the joint family could certainly be said to be affording him a source of income. The decree in question is passed more than 12 years ago and had the judgment-debtor really a mind to pay the amount he could have paid the amount by very easy instalments. The fact that the judgment-debtor did not pay even a farthing so far itself speaks volumes for his attitude towards evasion of the payment of the decretal dues."

The Society has filed the above Second Appeal against the concurrent orders passed by the lower Courts.

4. The finding of the learned Assistant Judge that the judgment-debtor No. 1 — respondent No. 1 has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, is a finding of fact, based on appreciation of the oral and documentary evidence on the record. I have carefully considered the findings recorded by the trial Court and the appellate Court, and I find no error in the finding recorded by the learned Assistant Judge, reversing the finding of the trial Court, who had not applied his mind to the evidence on the record show that judgment-debtor No. 1 had the means to pay the amount of the decree and refuses to do the same. The finding of fact will not be disturbed by this Court in second appeal, in view of the limits of the powers of the Court under Section 100 and Section 101 of the Civil Procedure Code.

5. The only question, which survives in the above second appeal is, therefore, whether the learned Assistant Judge was right in dismissing the Darkhast application on the ground that it was not signed and verified by a person, who was expressly authorised by a resolution of the Society. The requirements of signing and verifying of a Darkhast application are laid down in

Order XXI, Rule 11 (2) of the Civil Procedure Code. Amongst other requirements, it says that the application must be "in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case." The rule does not require that it must be signed and verified by a person authorised in writing, as appears to have been assumed by the learned Assistant Judge. If the learned Assistant Judge had only cared to look at Order XXI, Rule 11 (2), he would have found that an application for execution may be verified by any person acquainted with the facts of the case.

6. Where the application is made by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that such a person is "acquainted with the facts of the case". The learned Judge also ignored the provisions of Order XXIX, Rule 1 of the Civil Procedure Code, which lays down: "In suits by or against a corporation any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case."

7. Under Section 36 of the Maharashtra Co-operative Societies Act, 1960, the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all such things as are necessary for the purpose for which it is constituted. Hence, the learned Judge ought to have held that the Chairman of the Society, who is an officer of the society, having verified the application, the application fulfilled the requirements of Order XXIX, Rule 1 of the Civil Procedure Code; even assuming that the Court was not satisfied from the evidence on the record that the Chairman was acquainted with the facts of the case.

8. The facts of the case were very simple. There was a decree, whose certified copy was before the learned Judge, and there was no payment of a single paise towards that decree. There was evidence before the learned Judge, which the learned Judge accepted that the judgment-debtor No. 1 had means to pay, but refused to pay and neglected to pay.

The facts were so simple that the learned Judge could not have inferred from the non-examination of the chairman, who had signed the application, or non-production of the resolution of the Society authorising the chairman again to file the application, that the chairman must not have been acquainted with the facts of the case.

9. The learned Judge has referred to Order XXIX, Rule 1 of the Civil Procedure Code; and has said that it is not proved that S. K. Raskar was a person, who was able to depose to the facts of the case. Here again, it is difficult to understand as to on what basis the learned Judge came to the conclusion that the Chairman was not able to depose to the facts of the case, when he verified the information before filing of the Darkhast and when he was knowing that he was able to depose to the facts of the case.

10. In the written statement filed by the judgment-debtor No. 1, it is not stated that the Chairman was not able to depose to the facts of the case, within the meaning of Order XXIX, Rule 1 of the Civil Procedure Code, or not acquainted with the facts of the case, within the meaning of Order XXI, Rule 11 (2) of the Civil Procedure Code. The darkhast application is in the form prescribed by Order XXI, Rule 11 of the Civil Procedure Code. It is signed and verified by the Chairman of the Society, stating as follows:

"मी दरखास्त देणार बि. बा. वि. का. स. सो लि. तर्फे व करीता चेअरमन सि. को. रासकर असा इकरार करतो की, या दरखास्तीन लिहीलेला सर्व तपशील माझ्या स्वतःच्या उत्तम माहिती प्रमाणे खरा आहे. कोपरगांव येथे सही केली. तारीख मजकूर, २६-४-१९६७."

11. The statement in Marathi appears to be the Marathi translation of the verification clause, which is to be in Form No. 6, Appendix 'E' to the Civil Procedure Code, which reads as follows:

"I declare that what is stated herein is true to the best of my knowledge and belief."

12. The learned Assistant Judge has ignored this verification, which in terms shows that the person, who signed the darkhast, was signing it on behalf of the Society, which is a corporate body and he had himself declared before the Court that he was acquainted with the facts of the case; and he has stated before

the Court that whatever was stated in the darkhast, was true to the best of his information, which he had. This necessarily implies that the Chairman of the Society was acquainted with the facts of the case, within the meaning of Order XXI, Rule 11 (2) of the Civil Procedure Code, and he was able to depose to the facts of the case, within the meaning of Order XXIX, Rule 1 of the Civil Procedure Code. The learned Assistant Judge erred in law in assuming that the person, who signs a proceeding on behalf of the corporate body, must be a person properly authorised by a resolution to institute a proceeding.

13. It is necessary to observe that in considering any part of the procedure of the Court, the learned Assistant Judge was bound to follow the Civil Procedure Code; and not to lay down what he considered to be the law. The words of the Civil Procedure Code are simple and if he had only looked at them, he would not have committed the error of assuming that some more or other authorisation was necessary, before the Darkhast application was filed on behalf of the Society.

14. In the result, the orders passed by the two Courts below are set aside; and it is ordered that if the judgment-debtor No. 1 fails to pay the decretal amount within one week from the receipt of the writ of this Court by the trial Court, the trial Court shall issue a warrant for the arrest of the judgment-debtor No. 1 under Order XXI, Rule 38 of the Civil Procedure Code and execute the same in accordance with the provisions of Order XXI, Rule 40 (3) (4) (5) of the Civil Procedure Code, as the case may be. The Second Appeal allowed with costs throughout.

Appeal allowed.

AIR 1976 BOMBAY 336

JOSHI, J.

Sd. Umar Sd. Ahmed, Petitioner v. Dadamiya Husenbhai and others, Opponents.

Special Civil Appln. Nos. 2789, 2790 and 2792 of 1971, D/- 25-7-1975.*

(A) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 11 (1), 11 (3) and 12 (2) — Fixa-

*(To set aside order passed by Dist. J., Ahmednagar, D/- 10-9-1971.)

ET/FT/B912/76/JHS

tion of standard rent — Tenant's application under Section 11 (1) already pending when suit was filed — Separate application under Section 11 (3) need not be made.

If a tenant's application under Section 11 (1) for fixation of standard rent is already pending when the suit is filed or when the notice under Section 12 (2) is issued by the landlord, it is redundant on the part of the tenant to make a fresh application under Section 11 (3). The old application could be treated or be deemed as an application preferred on receipt of the notice issued under Section 12 (2) and he can obtain an order for fixation of interim rent and comply with the same. (1954) 56 Bom LR 619, Followed.

(Para 15)

(B) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12, Explanation I — 'Readiness and willingness to pay'.

The mere fact that the tenant applies for fixation of standard rent as contemplated by Explanation I is not sufficient to hold that he is ready and willing to pay. The language of Explanation I is quite plain and clear and admits of no ambiguity. It contemplates two contingencies, firstly, the filing of an application before the expiry of the period of one month after the notice referred to in sub-section (2) and secondly, the payment of rent as specified in the order made by the Court.

(Para 17)

(C) Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12 (3) (b) — Suit for eviction — Standard rent fixed by trial Court — Tenant must comply with trial Court's decree on point of standard rent and pay regularly during pendency of matter in higher court — Otherwise he will lose protection of Section 12 (3) (b). Case law discussed.

(Para 19)

Cases Referred: Chronological Paras (1969) 71 Bom LR 607 = 1969 Mah LJ 808

AIR 1968 SC 1109 = 70 Bom LR 714 20

AIR 1964 SC 1341 = (1964) 5 SCR 157

18, 19

(1958) 60 Bom LR 1359 = ILR (1959) Bom

437 11, 18

(1954) 56 Bom LR 619 15

B. P. Apte, for V. N. Ganpule, for Petitioner; M. L. Pendse, for Opponent No. 1 (in all the matters).

ORDER:— I propose to dispose of all these special civil applications preferred under Article 227 of the Constitution of India by the original tenant

fore contemplates that the limited owner must be in possession of the property at the time of the commencement of Act. If she has already parted with her possession by alienating the said property, the alienee cannot be said to be a limited owner in possession of the property as contemplated by S. 14. The lower appellate Court below in order to come to the finding that Chanchala's limited ownership over the property which she purchased from Matibala ripened into full ownership relied only on the decision reported in AIR 1968 Delhi 264 (FB), (Sm. Chinti v. Smt. Daultu). In this case a gift was made by a mother in favour of a daughter before the commencement of the Act. It was held that

"a daughter-donee became a full owner of the gifted property with effect from the date of the commencement of the Act by virtue of Section 14 when the daughter-donee is in possession of the gifted property upon the date of the commencement of the Act."

Their Lordships were of the opinion that conferring on the female-donee full rights of ownership is inherent in Section 14 itself. Their Lordships relied on the decision reported in AIR 1959 SC 577, (Gummalapura Taggina v. Setra Veeravva). In that case it was held that

"Possession referred to in Section 14 need not be actual physical possession or personal occupation of the property by the Hindu female but may be possession in law. The possession of a licensee, lessee or a mortgagee from the female owner or the possession of a guardian or a trustee or an agent of the female owner would be her possession for the purpose of Section 14".

But the facts of the present case are different. In this case Chanchala is neither a licensee, a lessee or a mortgagee. She is a transferee and claims to have acquired right on the basis of a deed of sale executed by Matibala, and that being so, it cannot be said that at the commencement of the Act Matibala was in possession of the property. Their Lordships of the Delhi High Court also relied on the case of *Gostha Behari v. Haridas Samanta*, (AIR 1957 Cal 557). It was held in the above case

"The opening words 'property possessed by a female Hindu' obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's posses-

sion when the Act came into force. That possession might have been either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transferred into absolute estate under this particular section, was at least in such possession taking the word 'possession' in its widest connotation, when the Act came into force, the section would not apply".

We fail to see how the observations of P. N. Mukherjee, J. as above could persuade the learned Judges of the Delhi High Court to hold that a daughter in whose favour gift was made before the commencement of the Act by her widow mother becomes a full owner of the gifted property with effect from the date of the commencement of the Act by virtue of Section 14, simply because daughter donee is in possession of the gifted property upon the date of the commencement of the Act. Most respectfully we are to say that the opinion expressed in AIR 1957 Cal 557 did not lay down any such proposition. Their Lordships next relied on a decision reported in AIR 1966 SC 1879, (*Eramma v. Veerupana*). In that case it was held

"The property possessed by a female Hindu as contemplated in Section 14 is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act. It has further been held that the object of Section 14 is to make a female Hindu a full owner of the property which she has already acquired or which she acquired after the enforcement of the Act. It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title."

Their Lordships did nothing more than interpret Section 14 and very clearly laid down that the limited owner must have acquired the property in any of the modes mentioned in the Explanation to Sec. 14 and that she must be in possession of the said property at the time of the commencement of the Act. The Section cannot be said to have contemplated the cases where the limited owner before the commencement of the Act had parted with her possession by making a deed of sale or a deed of gift. Their Lordships of the Delhi High Court were conscious of the position that their interpretation of Section 14 would create an anomalous position, while a male donee from a limited owner remaining a limited owner, the female donee becomes absolute owner by

virtue of Section 14. Their Lordships however were of the opinion that the anomaly is inherent in the section itself and the transferee's right to become an absolute owner cannot be denied on that ground. With respect we cannot agree with the view expressed by their Lordships that the anomaly is inherent in the section. Mr. Banerjee submits that on a plain reading of the section it must be held that the section contemplates only cases of those limited owners who are in possession of the property either actual or constructive at the time of the commencement of the Act and the Section does not contemplate cases where the limited owner before the commencement of the Act has already parted with possession by way of deed of gift or deed of sale.

8. Mr. Banerjee next refers to us several decisions of the Supreme Court in which Section 14 has been interpreted. The first decision relied on by Mr. Banerjee has been reported in AIR 1959 SC 577, (*Gummalapura Taggina v. Setra Veervava*). This is the very decision on which their Lordships of the Delhi High Court relied. It has been held in this case that

"The word 'possessed' in Section 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power. Thus the opening words 'property possessed by a female Hindu' must be in possession of the female concerned at the date of the commencement of the Act. That possession might have been either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word 'possession' in the widest connotation when the Act came into force, the section would not apply."

Their Lordships in this case approved of the decision reported in AIR 1957 Cal 557. This decision, in our opinion, very clearly stated that a Hindu widow who has acquired the property in any of the ways mentioned in the Explanation to Section 14 must be in possession of the said property at the commencement of the Act in order to attract the provisions of Section 14. It is only in such a case that her limited ownership is ripened into full ownership.

9. Mr. Banerjee next refers to the decision reported in AIR 1967 SC 1786, *Mangal Singh v. Smt. Rattno*. It has been held in this case that

"on the language of Section 14 (1), this provision will be applicable to any property which is owned by a female Hindu even though she is not in actual, physical or constructive possession of that property. The expression 'possessed by' is not intended to apply to a case of mere possession without title and the legislature intended this provision for cases where the Hindu female possesses the right of ownership of the property in question."

10. Mr. Banerjee contends that different High Courts have interpreted Section 14 of the Act to say that the limited owner must be in possession of the property at the time of the commencement of the Act and that the alienee cannot get the benefit of Section 14. Mr. Banerjee refers to a decision reported in AIR 1958 Ker 142, *Chandrasekhara Iyer v. Sivaramkrishna Iyer*. It has been held that

"where the female owner had sold away property, in which she had only limited interest, before the Act came into force and put the vendee in possession, she could in no sense, be regarded as 'possessed' of the property when the Act came into force".

The facts of this case are similar to the facts of the present case.

11. Mr. Kanan Kumar Ghosh, learned Advocate appearing on behalf of the respondent however contends that if the alienee be a female Hindu and if she be in possession of the property at the commencement of the Act which she has acquired in any of the modes mentioned in the Section, then she would certainly get the benefit of Section 14. We will subsequently deal with the arguments advanced by Mr. Ghosh to support his contention. The next case referred to by Mr. Banerjee is reported in AIR 1966 Punj 31, (*Mst. Mukhtiar Kaur v. Mst. Kartar Kaur*). In this case a Hindu widow parted with possession by executing a deed of gift. It was held that

"the widow cannot be said to be 'possessed' of the property within the meaning of Section 14 and does not become full owner."

The next case referred to by Mr. Banerjee has been reported in AIR 1970 Pat 352, (*Sulochana Kuer v. Deomati Kuer*). In this case a gift was made by a female Hindu having limited interest in favour of one daughter to the exclusion of other daughters. The said gift was made before coming into force of the Act. It was held that

"The estate which the donee got did not become absolute because a Hindu

woman's estate cannot be transferred by sale or gift."

It was further held that

"Reversioners could obtain declaration that gift deed was ineffective beyond lifetime of the widow".

Mr. Banerjee next refers to the Full Bench decision of the Patna High Court reported in AIR 1958 Pat 581, (Harak Singh v. Kailash Singh). In this case their Lordships overruled the earlier decisions of their Court and held that

"the object of the Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided that they were in possession of the property when the Act came into force, and, therefore, in a position to take advantage of its beneficial provisions. The Act was certainly not intended to benefit alienees who with their eyes open purchased the property from the limited owners without justifying necessity before the Act came into force, and at a time when the vendors had only limited interest of Hindu women. The effect of Section 14 is not to enlarge the alienee's interest into an absolute indefeasible interest".

Similar view was taken in the case reported in AIR 1958 Mad 255, (Marudakkal v. Arumugha Goundar). In this case it was held that

"the property alienated by a Hindu widow and possessed by the alienee before the Act came into force is not within the language of Section 14 (1). Nor does an enlargement of the interest owned by the alienee in the property form any part of the purpose sought to be achieved by the enactment of Section 14 (1). The purpose of the section is merely to free Hindu women from the fetters imposed on them by the earlier Hindu law in relation to the holding and enjoyment of property. No such purpose would be served by enlarging alienee's interest."

The proposition laid down in this case applies with all force to the facts of the present case. Similar view has been taken in the case reported in AIR 1957 Andh Pra 280, (Venkayamma v. Veerayya).

12. Mr. Banerjee next refers to a Full Bench decision of the Punjab High Court reported in AIR 1960 Punj 530, (Amar Singh v. Sewa Ram). It has been held in this case that

"Section 14 can have no applicability to a case in which a female Hindu had

sold the property before the Act came into force and parted with its possession at the time of sale. Section 14 was never intended to benefit transferees from a female owner purchasing the property from her at a time when her estate was limited".

Similar view was taken in the case reported in AIR 1963 Mad 37, (S. Kanthimathinatha Pillai v. Vayyapuri Mudaliar) and also in the case reported in AIR 1963 Pat 330, (Sheopujan Pandey v. Ramsevak Ojha).

13. Mr. Banerjee also refers to a decision reported in AIR 1958 Orissa 75, (Sansir Patelin v. Satyabati Naikani). It has been held in this case that

"Where a female heir transfers the property inherited by her before the Act came into force without any legal necessity, she does not get any absolute estate in respect of it as it cannot be said that the property was in her possession".

This being the legal position Mr. Banerjee with much force contends that the provisions of Section 14 are very clear to indicate that in order to get the benefit, a limited owner acquiring property in any of the modes mentioned in Section 14 must be in possession of the said property either actual or constructive. When she has already parted with her property by executing a deed of gift or a deed of sale the donee or the transferee from the limited owner cannot be said as being in possession of the property as a limited owner as contemplated under Section 14 of the Act. The intention of the Legislature, Mr. Banerjee submits was to enlarge the limited interest of a Hindu female but it never contemplated female Hindu in whose favour the property was already transferred before the Act came into force.

14. Mr. Ghosh in support of his contention very much relies on the section itself. He placed the section several times before us and contended that it is very clear that Section 14 provides that any property possessed by a female Hindu shall be held by her as full owner thereof and not as a limited owner. The Explanation to Section 14 lays down the modes in which the property can be acquired. One of the modes is by purchase and that being so, a female Hindu who has acquired the property before the commencement of the Act by purchase from a limited owner and got the limited interest, her limited interest will ripen into absolute interest. In support of his contention he very much relies on the

Full Bench decision of the Delhi High Court which we have discussed above. Mr. Ghosh while placing the Full Bench decision of the Delhi High Court submits that their Lordships were conscious of the anomalous position that while the male transferees have been excluded that female transferees have been benefitted by Section 14. Mr. Ghosh submits that this is a legislative dispensation and the Section should be interpreted as it is. Simply because the male transferees have been excluded it cannot be said that the female transferees would not get the benefit of Section 14 if it otherwise gives such benefit to the female transferees. In this connection Mr. Ghosh further submits that the process of benefitting the females started as early as in 1929 and the legislative intent was always to give benefit to the females and the enactment of Section 14 is culmination of the said process. In this connection Mr. Ghosh refers to the several amendments by which the rights of females were recognised more and more from time to time keeping pace with the prevailing social conditions. Mr. Ghosh goes on to say that the language of Section 14 is very clear and that the section should be interpreted as it is without trying to import anything else into the section and if the section is interpreted as it is, it must be said that all the female Hindus who are in possession of limited interest in respect of any property at the time of the commencement of the Act would become full owners in respect of the said property after coming into force of the Act. The section cannot exclude the transferees from the limited owner. Mr. Ghosh relies on the decision reported in AIR 1966 SC 1879, (*Eramma v. Veerupana*). In this case it has been held that

"the property possessed by a female Hindu as contemplated in the section is clearly property to which she has acquired some kind of title whether before or after the commencement of the Act".

It was further held that

"The section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words, the provisions of Section 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act when she is only a trespasser without any right to property".

Their Lordships therefore laid down that the section contemplates the cases of the limited owners who have succeeded as such or acquired property as such, but does not contemplate those of the female Hindu who have acquired any legal right on the basis of a deed of transfer. This case therefore does not help Mr. Ghosh.

15. After giving our careful consideration and relying on the proposition of law as laid down by the Supreme Court in the cases referred to above and also the principles laid down by several High Courts including the Calcutta High Court, we have no hesitation to hold that Section 14 was not meant to benefit an alienee. Section 14 wanted to benefit those female Hindus who were limited owners in the then existing Hindu Law before the commencement of the Act. In the present case the limited owner Matibala having transferred the limited interest to Chanchala before the passing of the Act, it cannot be said that Chanchala's limited interest, if any, ripened into absolute interest in terms of Section 14 of the Act.

16. With regard to the question whether the transfer by Matibala in favour of Chanchala was for legal necessity, the trial Court finds that there was no legal necessity for the sale of the property. It was further held by the learned Subordinate Judge that the whole transaction was a collusive one. The lower appellate Court observed that the finding of the learned Subordinate Judge that the sale was made without any legal necessity was not challenged at the time of argument. He further finds that

"it is seen from the evidence that Matibala who had none else to maintain besides herself had enough lands for that purpose. The learned Subordinate Judge has elaborately and ably discussed the evidence on this point and I have nothing to add to it. His finding is fully justified by the evidence on the record. The learned Subordinate Judge drew the inference that the transaction was a collusive one. It is difficult to differ from the inference drawn by the learned Subordinate Judge and the transaction really smacks of collusion between the defendant and Matibala. It further appears that Matibala was eager to see that the property left by her husband went to the hands of her own relations before her death so that the reversioner may have nothing to inherit".

After observing as above the learned appellate Court below finds that

"When the consideration money was fully paid and the sale took place, it is not worthwhile to enquire what was the real motive behind the sale. Collusion or no collusion the defendant acquired a valid title under the sale whatever might be the nature of the title acquired by her. I accordingly hold that the sale was real and for consideration and that the defendant acquired a valid title to the suit property under the sale".

After holding that the sale was not for legal necessity and further holding that the transaction was collusive, we fail to understand how the lower appellate Court came to conclusion that the sale was real and for consideration, and that the defendant acquired a valid title to the same. Be that as it may, it is the concurrent finding of both the Courts below that the sale was not for legal necessity and we find nothing to differ from the said concurrent finding. In conclusion we hold that Section 14 does not come forward to benefit the alienees who with their eyes open purchased the property of a limited owner; Section 14 was enacted with the object of enlarging the limited interest of a female Hindu acquiring the property in any of the modes mentioned in the section and who was in possession of the property either actual or constructive at the time of the commencement of the Act. It never intended to enlarge the limited interest of such female Hindu who before the commencement of the Act has parted with the possession of the property by executing either a deed of sale or a deed of gift.

17-18. For the reasons stated above this appeal is allowed. The judgment and decree passed by the appellate Court below are set aside and those of the learned Subordinate Judge are restored. There will be no order for costs.

29-3-1976:— 19. After we delivered judgment Mr. Ghose, learned Advocate for the respondent, submitted that in our judgment we did not consider one of his arguments, namely, even assuming that Chanchala's interest did not ripen into absolute ownership. In that case even the plaintiff cannot be held to be the reversioner of Ramgati. In this connection it is stated that on the evidence adduced on behalf of the plaintiff it is very clear that Ramgati had a sister named Motibala and there is no evidence that when Ramgati's widow Matibala died, Ramgati's sister Motibala was alive or not. The plaintiff did not adduce any evidence to that effect. If it is established

that Motibala, Ramgati's sister was alive, when Ramgati's widow Matibala died, then Ramgati's sister Motibala would be the reversioner in preference to Anath Bandhu Sen Mondal, the plaintiff. We have gone through the grounds taken in the lower appellate Court. Though it was challenged that Ramgati was not the reversioner, no ground was taken to the effect that Ramgati's sister Motibala was the reversioner. It is true that P. W. 1 Radha Govinda Chakraborty in cross-examination states that Suryyanarayan had a son and a daughter. The daughter was Motibala. Again in cross-examination P. W. 4 Dwijendranath Mandal states that Ramgati had a sister. But there is absolutely no evidence to show either on the side of the plaintiff or on the side of the defendant whether Ramgati's sister Motibala was alive when Ramgati's widow Matibala died. On going through the judgments of the Courts below we find that both the Courts took into consideration all the oral and documentary evidence and came to the definite conclusion that the plaintiff is the reversioner of Ramgati. That being the concurrent finding of both the Courts we are of the opinion that we should not disturb that finding. The contention raised by Mr. Ghosh is therefore negatived.

B. C. RAY, J.:— I agree.

Appeal allowed.

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A. N. SEN, J.

M/s. Jessop's Co-operative Society Ltd. and others, Petitioners v. Registrar of Co-operative Societies, W. B. and others, Respondents.

Matter No. 284 of 1975, D/- 17-3-1976.

(A) Interpretation of Statutes — Legislative intent — Meaning of words — Rule of construction.

The principles of construction require that the true legislative intent has to be determined. The intention of the legislature has, however, to be gathered primarily from the language used in the statute. In construing any statute any word used in the statute should generally be given its plain and ordinary meaning unless any contrary intention appears expressly or by necessary implication. In appropriate cases, true interpretation may require giving any particular word a special meaning for ascertainment of the

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true intention of the Legislature. The decision on the construction of a particular statute are of no real assistance in construing another statute unless the statutes are in *pari materia*. (Paras 18, 19)

(B) W. B. Co-operative Societies Act (16 of 1973), Ss. 86, 87 — Words "relating to the affairs" of the society — Meaning.

It will not be proper to construe the words "relating to the affairs" of the society used in the Act of 1973 to have the same meaning as the words "touching the business" of the Society used in the Co-operative Societies Act of 1912 and the Bengal Co-operative Societies Act of 1940 prior to its amendment in 1965.

(Paras 21, 23)

The words "relating to the affairs" of the society have a much larger connotation and must be held to be wide enough to cover every sphere of activity of the society whether the activity relates to the business of the society in its narrow sense of trade and property, the management of the society, the administration of the society and the running of the society. The word "affairs" ordinarily understood has a wider connotation than the word business construed in the narrow sense of trade and commerce only and the affairs of a society would ordinarily include the holding of annual and other general meetings, the constitution of its managing committee, the election of office bearers and management of the society. The terms of the enactment sufficiently manifest the intention of the legislature and make it abundantly clear that affairs of the society will cover all matters concerning the society unless any matters are specifically excluded. The bye-laws of the society, also support this construction.

(Paras 22, 23)

Thus, when the dispute relates to the validity of the notice for holding the annual general meeting of the society, the proceedings of the said annual general meeting, re-constitution of the Managing Committee at the said meeting and the election of the office bearers of the Managing Committee on various grounds and such a dispute on reference under Section 86 (1) is pending for adjudication before the Arbitrator it must be held to relate to the affairs of the society and the Arbitrator has jurisdiction to decide the same.

(Para 24)

(C) W. B. Co-operative Societies Act (16 of 1973), Sections 132 (2) (d) and 141 — Scope — Act taking away jurisdiction of Civil Court — Rule of construction — (Interpretation of Statutes).

Any enactment curtailing or taking away the jurisdiction of the Civil Courts has to be strictly construed. Unless the jurisdiction of the Civil Courts is taken away, expressly or by necessary implication, by any statute, it must be held that the Civil Court retains the jurisdiction to decide the matter. In the instant case the jurisdiction of the Civil Courts is unequivocally and clearly taken away in express terms by the provisions contained in Section 132 (2) (d) and Section 141 of the W. B. Co-operative Societies Act.

(Para 25)

Cases Referred: Chronological Paras

1975 AC 373	8
(1973) 77 Cal WN 455 = 1974 Co-op LR 7	8
(1972) 76 Cal WN 562 = 42 FJR 120	8
AIR 1970 SC 245 = 1970 Lab IC 285	12
AIR 1969 SC 1320 = (1969) 1 SCR 887	8, 10, 12, 13, 22
AIR 1958 Cal 373 = 62 Cal WN 405	8
AIR 1938 Cal 394 = 42 Cal WN 461	7, 8
AIR 1934 Cal 537 = 38 Cal WN 459	7, 8
AIR 1932 Cal 317 = 36 Cal WN 414	7, 8
(1921) 2 Ch 318 = 91 LJ Ch 237	8
1919 AC 548 = 88 LJ PC 59	8
(1913) 3 KB 299 = 82 LJ KB 1264	8

I. P. Mukherjee, for Petitioners; Somnath Chatterjee (for No. 5) and P. P. Ghosh (for Nos. 1 to 4), for Respondents.

ORDER :— An interesting question of some importance involving the interpretation of Section 86 of the West Bengal Co-operative Societies Act, 1973 arises for consideration in this writ proceeding.

2. Jessop's Co-operative Society Ltd. (hereinafter referred to as the Society) is a duly registered Society and as such is a body corporate. Ajit Narayan Sinha, the respondent No. 5 herein, is a member of the Society. Ajit Narayan Sinha disputed the validity of the notice dated 5th of May, 1975 for holding the annual general meeting dated 20th of May, 1975 of the Society, the proceedings of the said annual general meeting, re-constitution of the Managing Committee at the said meeting and the election of the office bearers of the Managing Committee on various grounds. He referred the disputes in accordance with the provisions contained in Section 86 of the West Bengal Co-operative Societies Act, 1973 (hereinafter referred to as the Act) and he filed a plaint verified by him on the 19th of June, 1975 before the Assistant Registrar Co-operative Societies. Shri D. K. Sanyal Co-operative Development Officer (Arbitration) II Cal. was appointed the Arbitrator to decide the disputes

in terms of the provisions contained in Section 87 of the Act. The case was numbered as Dispute Case No. 50/Cal. of 1974-75. The parties to the said case were. Ajit Narayan Sinha who was the plaintiff in the case, and the Society, the Managing Committee of the Society, Shri Santosh Kumar Sengupta, Chairman of the Society and Shri Nemai Dulal Sinha, the Hony. Secretary of the Society, who were all made defendants. In the said case the plaintiff Ajit Narayan Sinha prayed on the basis of the averments made in the plaint:

"In the circumstances, stated hereinabove the Plaintiff prays that your Honour may be graciously pleased to set aside the impugned notice dated 5th May 1975, proceedings of the Annual General Meeting dated 20th May 1975, reconstitution of the Managing Committee at the meeting dated 20th May 1975 and impugned election of office bearers of the impugned reconstituted Managing Committee on the grounds mentioned hereinabove."

3. A statement of defence was filed on behalf of the defendants in answer to the plaint filed by the plaintiff Ajit Narayan Sinha. In the written statement of defence it was contended on behalf of the defendants in paragraph 1:

"The defendants submit that the disputes purported to be raised by Sri Ajit Narayan Sinha describing himself as the plaintiff abovenamed as detailed in paragraph 9 of the application for purposes of reference of the disputes wrongly described as plaint as also in the prayer thereof, viz., the matter relating to the notice dated the 5th May 1975, proceeding of the Annual General Meeting, dated the 20th May 1975, the Annual General Meeting, election of directors, reconstitution of the Managing Committee at the meeting dated 20th May 1975 and election of the office bearers of the reconstituted Managing Committee are not disputes relating to the affairs of the Jessop's Co-operative Society Ltd., the alleged defendant No. 1 abovenamed, nor is Messrs. Jessop's Co-operative Society Ltd. a party to any of the said disputes. As such, the said disputes nor any of them can be legally referred to the Registrar of Co-operative Societies, Calcutta under Section 86 of the West Bengal Co-operative Societies Act, 1973. And the Registrar has no jurisdiction to entertain any such purported reference and to transfer the same to any Arbitrator under Section 87 (1) (c) of the said Act."

4. On the application of the defendants a preliminary issue as to jurisdiction was raised and considered by the Arbitrator. By an order passed by the Arbitrator on 19-8-1975, the Arbitrator held that he had jurisdiction to decide the suit. In his order the Arbitrator has stated—

"In its petition dated 21-7-1975 the defendants have raised certain points as to the jurisdiction of the Registrar of Co-operative Societies to refer the instant suit for arbitration under Section 86 of the W. B. C. S. Act, 1973. The petition was heard. The contention of the defendant is that the matter relating to holding of general meeting issue of notice thereof, constitution and/or reconstitution of the Managing Committee and election of office bearers are not matters relating to affairs of the defendant society."

The Arbitrator in his order considered the argument advanced on behalf of the parties and the various authorities which were cited before him. The Arbitrator has held—

"The 'affairs' has a wider meaning than 'Business' as is evident from the above observation of the Hon'ble Supreme Court. The affairs of a Co-operative Society are the affairs contemplated under the Co-operative Societies Act, the Rules framed thereunder and the Bye-laws. Holding of general meeting of a co-operative society, issue of notice thereof, constitution and/or reconstitution of managing committee and election of office bearers are all the affairs of a co-operative Society regulated by Co-operative Societies Act, Rules and the Bye-laws. The matters of instant suit being the affairs of the defendant society relating to holding of general meeting, issue of notice thereof, constitution and/or reconstitution of managing committee and election of office bearers are to be regulated by the provisions of the West Bengal Co-operative Societies Act, 1973, the West Bengal Co-operative Societies Rules, 1974 and the registered bye-laws of the defendant society. Therefore, I hold that the instant suit in dispute is within the meaning of Section 86 (1) of the W. B. C. S. Act, 1973 and the learned Assistant Registrar of Co-operative Societies, Calcutta is competent to appoint Arbitrator under Sec. 87 (1) (c) of the W. B. C. S. Act, 1973 and I have jurisdiction to decide the instant suit."

5. The validity of the said decision of the Arbitrator has been questioned in this petition under Article 226 of the Con-

stitution. The grounds on which the said decision has been challenged have been set out in paragraph 27 of the petition.

6. Mr. I. P. Mukherjee, learned counsel appearing on behalf of the petitioners in support of this application, has submitted that on a true construction of Section 86 of the Act, the subject-matter of the dispute Case No. 50/Cal. 1974-75 pending before the Arbitrator on the reference of the Registrar under Section 87 of the Act cannot be construed to mean and constitute disputes relating to the affairs of the Society which can be referred to the Registrar. It is his submission that the dispute raised by Ajit Narayan Sinha in the instant case relates to the validity of the notice dated 5th May 1975 for the Annual General Meeting held on the 20th of May 1975, to the legality of the proceedings of the Annual General Meeting held on 20th May 1975 and to the legality of reconstitution of the Managing Committee at the said Annual General Meeting and the election of office bearers of the reconstituted Managing Committee and this dispute cannot be considered to be any dispute relating to the affairs of the Society. Mr. Mukherjee has argued that the affairs of the Society must be construed to mean societies 'concerns in trade or property'. Mr. Mukherjee contends that the word 'affairs' has not been defined in the Act and the word should, therefore, be given the meaning in which it is understood in the legal sense in English language. In this connection Mr. Mukherjee has referred to the meaning of the word in Earl Jowitt's "Dictionary of English Law" and has drawn my attention to the meaning of the word in Vol. I at p. 78 where the meaning of the word 'Affairs' is given as "A person's concerns in trade and property". Mr. Mukherjee has also drawn my attention to the meaning of the word 'Business' at page 294 of the same Volume and the meaning attributed to business is "Wider term than trade". Mr. Mukherjee has also drawn my attention to the meaning of the word 'Affairs' in Wharton's Lexicon '14th Edition' and at page 38 the word 'Affairs' has been given the same meaning "A person's concerns in trade or property", as in Earl Jowitt's "Dictionary of English Law". It is the argument of Mr. Mukherjee that a dispute with regard to the validity of the notice of the Annual General Meeting and the legality and the proceedings thereof cannot be said to constitute a dispute relating to the affairs of the Society, as the notice of the Annual General Meeting, the

holding of the Annual General Meeting, the proceedings of the Annual General Meeting, the reconstitution of the Managing Committee at the meeting and the election of the office bearers are not concerns of the society in its trade and property. Mr. Mukherjee has drawn my attention to the Bye-law which provides for the objects of the Society and the objects of the Society as set out in the Bye-laws of the Society are:

"4 (1) The objects of the Society are—

- (a) Primarily to create funds to be lent to members; and
- (b) To provide facilities for the exercise of, thrift and savings and
- (c) Generally to encourage self-help and mutual aid among members.

(2) In furtherance of the above objects the Society shall be at liberty—

- (a) To receive money by way of deposits from members only and to receive money by way of loans from members, non-members or any other source and to secure repayment thereof either by mortgaging, assigning or pledging the properties of Society or otherwise.

(b) To establish a "provident fund" for members and to make suitable contributions to such fund out of the profits;

(c) To purchase, take on lease or in exchange or otherwise acquire lands, buildings or any movable or immovable property necessary for the business of Society; and

(d) Generally to do all such other things as are incidental or conducive to the attainment of its objects."

7. Mr. Mukherjee argues that the objects of the Society clearly indicate the nature of trade to be carried on by the Society and the holding of the Annual General Meeting, constituting the Managing Committee and the election of the office bearers of the Society are clearly not the society's concerns in trade and property. Mr. Mukherjee has submitted that under the provisions of the old Acts, namely, the Co-operative Societies Act, 1912 (hereinafter referred to as the Act of 1912) and the Bengal Co-operative Societies Act of 1940 prior to its amendment in 1965 (hereinafter referred to as the Act of 1940) a dispute touching the business of the Society between members or past members of the Society or persons claiming through a member or past member or between member or past member or persons so claiming and the Committee or any officer could be referred to the Registrar. He submits that the words 'touching the business of a Society' came

up for consideration before this Court in a number of cases and three Division Benches of this Court have held that on a true construction of the said words 'touching the business of the Society' any dispute with regard to the legality and validity of the Constitution of the Managing Committee cannot be considered to be a dispute touching the business of the Society. In this connection he has referred to the decisions (1) in the case of Ramendra Nath v. Balurghat Central Co-operative Bank Ltd. reported in AIR 1932 Cal 317, (2) in the case of Barisal Co-operative Central Bank Ltd. v. Benoy Bhusan Gupta reported in AIR 1934 Cal 537 and (3) in the case of Hara Dayal Nag v. Chandpur Central Co-operative Bank Ltd. reported in AIR 1938 Cal 394.

8. He has placed particular reliance on the following observations of Rankin, C. J. in Ramendra Nath Mukherjee's case AIR 1932 Cal 317 at page 319 — "....., but I cannot regard a question whether the plaintiff is or is not a shareholder, whether the Society's new constitution is valid or invalid, whether it is in effect of the 'mixed' or 'pure' type, as a mere dispute between members or between a member and an officer 'touching the business of the Society' ". Mr. Mukherjee has submitted that this decision has been referred to and followed in the other two decisions reported in AIR 1934 Cal 537 and AIR 1938 Cal 394 and similar views have been expressed in the said decisions. Mr. Mukherjee in this connection has also referred to the decision in the case of Heard v. Pickthorne, (1913) 3 KB 299, MC Ellistim v. Bally Macelligott Co-operative Agricultural and Dairy Society Ltd., (1919) AC 548 and also in the case of Ruinn and National Catholic Benefit and Thrift Societies Arbitration, (1921) 2 Ch 318. It may be noticed that all these decisions have been considered in the judgment of Rankin, C. J. in the case of Ramendra Nath v. Balurghat Central Co-operative Bank Ltd., reported in AIR 1932 Cal 317. Mr. Mukherjee has submitted that in the Bengal Co-operative Societies Act of 1940 the words used in Section 86 of the Act were 'any dispute touching the business of a Co-operative Society' and were similar to the words used in the Act of 1912. Mr. Mukherjee has referred to the decision of P. B. Mukharji, J. in the case of M/s. Co-operative Milk Societies Union Ltd. v. State of West Bengal, AIR 1958 Cal 373, to the decision of the Division Bench of the Court in the case of South Eastern Rly. Employees' Co-

operative Urban Bank v. Presiding Officer, 1st Industrial Tribunal, (1972) 76 Cal WN 562 and also to the decision of S. C. Ghose, J. in the case of Sm. Bina Das v. Registrar, Co-operative Societies, (1973) 77 Cal WN 455 and he has submitted that in these decisions of this Court the Act of 1940 before its amendment in 1965 came to be considered. Mr. Mukherjee argues that the decisions of P. B. Mukharji, J. and of the Division Bench lend support to his contention and the decision of Ghose, J. which appears to take a contrary view is not correct. Mr. Mukherjee has also referred to the plain meaning of the word 'affairs' as given in Oxford Concise Dictionary (5th Edition) and he has contended that for a proper construction of Section 86 of the Act of 1973, the word should not be given its popular meaning in a broad sense and should be given a restricted meaning, as understood in legal sense as given in Earl Jowitt's "Dictionary of English Law" and Wharton's "Law Lexicon". It is the argument of Mr. Mukherjee that in common parlance the word 'Affairs' and the word 'Business' may mean and cover the same field and by way of example he has mentioned two expressions commonly used, namely 'mind your own business' and 'mind your own affairs'. Mr. Mukherjee has contended that the change in the language brought about by the amendment of 1965 by introducing the words 'relating to the affairs' of the Society in place of the words 'touching the business' of the Society does not indicate or establish the intention of the Legislature to bring about any change in the existing law as established by the various decisions of this Court starting from the decision of Rankin, C. J. in AIR 1932 Cal 317. It is the contention of Mr. Mukherjee that if the Legislature wanted to bring about a change in the existing law and the legislative intent was that a dispute relating to the validity of the notice of any general meeting, the holding of the meeting and the proceedings thereof, constitution of the Managing Committee and the election of office bearers would come within the ambit of Section 86 of the Act and could be referred to the Registrar, the Legislature would have made clear provisions to this effect in the way as has been done by the Legislature in passing the Maharashtra Co-operative Societies Act. In this connection Mr. Mukherjee has referred to the decision of the Supreme Court in the case of Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalchand Jugraj Jain, AIR 1969 SC 1320 and he has com-

mented that this decision of the Supreme Court which was concerned with the construction of Maharashtra Co-operative Societies Act, is of no assistance in the instant case. It is his comment that the Supreme Court had so decided in this case in view of the specific provisions contained in Section 91 of the said Act. Mr. Mukherjee has argued that if the Legislature intends to oust the ordinary jurisdiction of Civil Courts, the Legislature must make its intention manifestly clear. Unless the legislative intent to oust the jurisdiction of Civil Courts is made manifestly clear, argues Mr. Mukherjee, the Court should proceed to hold that the ordinary jurisdiction of Civil Courts has not been taken away. He contends that any Legislation which seeks to take away ordinary jurisdiction of Civil Courts has to be strictly construed and if the Legislature has not been sufficiently articulate in expressing its intention, the Court should not presume any such legislative intention and should not proceed to construe the provisions on the basis of such presumption. In support of this contention Mr. Mukherjee has drawn my attention to Section 9 of the Code of Civil Procedure, to Halsbury's Laws of England, 3rd Edition, Vol. 9, Article 825 at pages 352-353 and to the decision of the House of Lords in the case of *Maunsell v. Olins* reported in 1975 AC 373 and he has placed particular reliance on the observations of Lord Simon at page 392. Mr. Mukherjee handed over to Court written notes of his submissions and I direct that the same should be kept in the records of the proceeding.

9. Mr. Somnath Chatterjee, learned counsel appearing on behalf of the respondent No. 5 Ajit Narayan Sinha who has referred the disputes to the Registrar and who is the plaintiff in the Dispute case now pending before the Arbitrator, has submitted before me that the order of the Arbitrator holding that the Arbitrator has jurisdiction to decide the disputes which form the subject-matter of the proceeding before the Arbitrator, is perfectly valid, as the disputes relate to the affairs of the Society and clearly come within the purview of the Act of 1973. Mr. Chatterjee contends that the words 'relating to the affairs' of the Society has a much wider connotation than the words 'touching the business' of the Society. It is his contention that the words 'relating to the affairs' of the Society cover every sphere of activity of the Society whether it appertains to its business activity in its

narrow sense or not. Mr. Chatterjee argues that the Legislature must be presumed to have knowledge of the state of law as it existed under the provisions of the Act of 1912 and also the Act of 1940 prior to its amendment on the basis of the various decisions of this Court. It is his submission that the Legislature has deliberately brought about a change in the language of the Section by the amendment of 1965 to the Act of 1940 by using the words 'relating to the affairs' of the Society which were introduced by way of amendment and the said words 'relating to the affairs' of the Society which were first introduced by the amendment to the Act of 1940 in 1965 and which have been used in the present Act, are clearly different from the words used in the Act of 1912 and also in the Act of 1940 prior to its amendment in 1965. Mr. Chatterjee submits that if the Legislature did not want to bring about any change in the law as established by the decisions of this Court on the basis of the interpretation of the provisions contained in the Act of 1912 and also in the Act of 1940 prior to its amendment, the Legislature would certainly not have considered it necessary to amend the Act of 1940 in 1965 by substituting the words 'relating to the affairs' of the Society, in place of the words 'touching the business of the Society' and would also not have incorporated the said words 'relating to the affairs of the Society' in the present Act of 1973. Mr. Chatterjee contends that the purpose of deleting the words 'touching the business' of the Society and introducing in their place the words 'relating to the affairs' of the Society must necessarily be to bring about a change in the existing law. Mr. Chatterjee has submitted that as the decisions relied on by Mr. Mukherjee are concerned with the interpretation of the provisions contained in the Act of 1912 and also in the Act of 1940 before its amendment and as the words used in the said Acts were 'touching the business of the Society', entirely different from the words used in the present Act, the said decisions are indeed of no assistance in construing the present Act. Mr. Chatterjee argues that it is well established that in construing any particular statute, the words used must be given their ordinary meaning, unless in the context or otherwise in the statute, there is definite indication to suggest that ordinary meaning should not be given to the word used in the Act. Mr. Chatterjee has argued that as the ordinary meaning of the word 'affairs' is very wide and is wide enough to cover every

aspect and sphere of activity, the legislature has not chosen to give any definition of the word in the Act. Mr. Chatterjee has argued that the legislative intent is made manifestly clear by the change in the language in the section and by introducing words of very wide import, connotation and significance in place of words which had a restricted meaning and it is his contention that the provisions of Section 86 of the Act, particularly the proviso contained therein, make this intention absolutely clear. Mr. Chatterjee has drawn my attention to the provisions contained in Section 26 (b) of the Act of 1973 and also to certain other sections and he has contended that in the Act of 1973 the word 'affairs' cannot be equated with the word 'business' and the Legislature never intended to use the word 'affairs' as a synonym for the word 'business' used in the Act of 1912 and also in the Act of 1940 prior to its amendment.

10. Mr. Chatterjee has argued that the word 'affairs' has a much wider connotation and will generally include every affair of the Society whether it relates to its objects, to its constitution, to the holding of meetings, to the constitution of the Managing Committee or the election of office bearers and directors. Mr. Chatterjee in this connection has drawn my attention to the provisions contained in the Bye-laws of the Society and particularly to the provisions contained in Bye-laws 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56. He has argued that unless the general meeting, and the election of the Managing Committee were considered to be the affairs of the Society, these provisions could not have found any place in the Bye-laws of the Society. Bye-laws of the Society, argues Mr. Chatterjee, only make provision relating to affairs of the Society. Mr. Chatterjee has argued that there is nothing in the statute to indicate that the word 'affairs' in Section 86 of the Act should be construed in any narrow sense and the Legislature has made specific provision in the said section itself as to what only is not intended to constitute an affair of the Society for the purpose of the said section in the proviso to Sec. 86 itself. Mr. Chatterjee has submitted that the decision of the Supreme Court in the case of *Deccan Merchants Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain*, AIR 1969 SC 1320, though concerned with the construction of the Maharashtra Co-operative Societies Act, clearly indicates what is the true meaning of the word

'affairs' which should be attributed to the word used in Section 86 of the Act. He has placed particular reliance on the following observations of the Supreme Court at page 1325—

"The answer depends on the words used in the Act. Although number of cases have been cited to us on similar expressions contained in various other Acts, both Indian and English, in the first instance, it is advisable to restrict the enquiry to the terms of the enactment itself, because the legislatures have been changing the words and expanding the scope of references to arbitrators or to the Registrars step by step. The sentence, namely, 'notwithstanding anything contained in any other law for the time being in force' clearly ousts the jurisdiction of Civil Courts if the dispute falls squarely within the ambit of Section 91 (1). Five kinds of disputes are mentioned in subsection (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word 'business' in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word 'business' has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws."

11. Mr. Chatterjee has submitted that the principles of construction of statute relating to ouster of jurisdiction of the Civil Courts are well settled. It is, however, his submission that Section 132 (2) (d) and Section 141 of the Act clearly establish the ouster of jurisdiction of the Civil Courts in case of any dispute which is covered by Section 86 of the Act. According to Mr. Chatterjee the disputes which form the subject-matter of the Dispute Case No. 50/Cal. of 1974-75 before the Arbitrator clearly relate to affairs of the Society and come within the purview of Section 86 of the Act and the jurisdiction of the Civil Courts is clearly and expressly taken away by virtue of the provisions contained in Section 132 (2) (d) and Section 141 of the Act.

12. Mr. P. P. Ghosh, learned counsel appearing on behalf of the respondents Nos. 1 to 4 has adopted the arguments advanced by Mr. Chatterjee and he has submitted that the words 'relating to the affairs' of the Society used in the Act of 1973 cannot be given the same meaning as the words 'touching the business' of the society used in the Act of 1912 and also in the Act of 1940 prior to its amendment for the following reasons—

(1) Deliberate change in the language indicates that the Legislature did not want that these words should be used in the same sense as the words used in the Act of 1912 and in the Act of 1940 before its amendment. Unless the Legislature intended to bring about a change in the existing law as established by the interpretation of this Court in the various decisions relied on by Mr. Mukherjee, there will be no sense in changing the words which have been interpreted by this Court and have been given a definite meaning.

(2) The proviso to Section 86 shows the legislative intent. The proviso had been incorporated as in the absence of the provisions contained in the proviso, disputes relating to matters mentioned in the proviso would also become disputes relating to the affairs of the Society.

(3) The Legislature has expressly used both the words business and affairs in other sections of the Act. The two words must, therefore, denote different connotations and cannot have the same meaning. In this connection he has referred to Section 26 (1) (b) of the Act.

(4) The Judgment of the Supreme Court in the case of Deccan Merchants Co-operative Bank Ltd. v. Dalichand Jugraj Jain reported in AIR 1969 SC 1320 lays down that the word 'affairs' has a wider meaning and has a wider connotation than the word 'business'. Mr. Ghosh in this connection has also referred to the decision of the Supreme Court in the case of Co-operative Central Bank Ltd. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad reported in AIR 1970 SC 245.

13. Mr. Ghosh has also contended that Section 132 (2) (d) read with Sec. 141 of the Act clearly has the effect of introducing the non obstante clause which was referred to and considered by the Supreme Court in its decision in AIR 1969 SC 1320.

14. The only question which falls for determination in the instant case is whether on a true construction of Section 86 of the Act the disputes which have

been referred to the Registrar by the respondent No. 5 Ajit Narayan Sinha and which form the subject-matter of the dispute case pending the Arbitrator are disputes relating to the affairs of the Society within the meaning of the said section and are covered by the said section. The real question which therefore arises on the interpretation of Section 86 of the Act is — "what is the meaning of the expression 'relating to the affairs of the Society' used in the said section?"

15. Section 86 of the Act reads as follows:

"86 (1) Any dispute relating to the affairs of a Co-operative Society or of the liquidator of a society shall be referred to the Registrar if the parties thereto are among the following, namely:—

(a) the society, its managing committee, any past or present officer, agent or employee or the liquidator of the society; or

(b) a member, past member or person claiming through a member, past member or deceased member of the society; or

(c) a surety of a member, past member or deceased member of the society, whether such surety is or is not a member of the society; or

(d) any other co-operative society or any person having transactions with the concerned co-operative society or the liquidator of such society:

Provided that nothing in this subsection shall apply to any dispute—

(a) regarding disciplinary action taken by a society or its managing committee against its paid employees or

(b) between a society or its managing committee and its paid employees over terms and conditions of service of such employees and matters incidental or consequential thereto.

(2) Any dispute mentioned in subsection (1), other than a dispute relating to the recovery of money shall be referred to the Registrar within one month from the date of the cause of action."

It is also necessary to set out certain other provisions of the Act. Section 2 (q) defines dispute to mean 'any matter capable of being the subject of civil litigation, and includes a claim in respect of any sum payable to or by a Co-operative society, whether such claim be admitted or not'. Sections 24 and 25 of the Act may be set out:

"24. The State Government may, on the application of a co-operative society supported by a resolution of the manag-

ing committee or the general body of members of the society or on the recommendation of the Registrar and on such conditions as may be prescribed, depute a Government officer to the service of the society for the purpose of managing its affairs, and the officer of the Government so deputed shall exercise such powers and perform such duties as may be prescribed:

Provided that the Registrar may, on the application of a Co-operative society supported by a resolution of the managing committee or the general body of members of the society or of his own motion, depute a Government officer, in respect of whom he is the appointing authority, to the service of the society for the aforesaid purposes, and the officer of the Government so deputed shall exercise such powers and perform such duties as may be prescribed.

25. (1) If the Registrar is satisfied, for reasons to be recorded by him in writing, that the managing committee of a co-operative society is mismanaging its affairs, he may, under clause (b) of sub-section (1) of Section 22, direct that, within such time as he may determine, a special general meeting of the society shall be held to dissolve and reconstitute the managing committee.

Explanation.—In this sub-section, the expression "mismanaging its affairs" includes wilfully disobeying or wilfully failing to comply with any lawful order or direction issued by the State Government or the Registrar.

(2) In any direction given under sub-section (1), the Registrar may, for reasons to be recorded by him in writing order that all or any of the members of the out-going managing committee shall, for such period not exceeding three years as he may determine, be disqualified for election or appointment as an officer of the society.

(3) If the managing committee is not dissolved and reconstituted within the time determined, and in such manner as may be directed by the Registrar under sub-section (1), the Registrar may, by order dissolve the managing committee, and the members thereof shall forthwith vacate their offices and the Registrar shall thereupon appoint a managing committee with the nominees, if any, of the State Government on the managing committee which has been dissolved and with such members of the co-operative society as he thinks fit, to manage the affairs of the co-operative society for such period not ex-

ceeding one year, and to arrange for the constitution of a new management committee by such date as the Registrar may determine

(4) An order under sub-section (3) shall be in writing shall set forth the reasons for which they are made, and shall be made only after an opportunity has been given to the defaulting managing committee to state its objections, if any, thereto."

16. Provisions of Section 26 of the Act relevant for the purpose of the present application read as follows:—

"26 (1) If, in the opinion of the Registrar,—

(a) the managing committee of any co-operative society

(i) has persistently made defaults, or has been grossly negligent, in the performance of the duties imposed on it by this Act or the rules or bye-laws, or

(ii) has committed any act which is prejudicial to the interest of such society or other co-operative societies, or

(iii) has wilfully disobeyed or wilfully failed to comply with any lawful order or direction issued by the State Government or the Registrar or

(b) the affairs and business of a co-operative society have, due to persistent default or negligence in the performance of duties on the part of the members of the managing committee or a section thereof, or otherwise, come to a standstill,

the Registrar may, after service of a notice upon such committee and giving such committee an opportunity of being heard, by an order in writing stating reasons therefor, dissolve such committee, the members of which shall forthwith vacate their offices and the Registrar shall appoint one or more administrators to manage the affairs of such society for such period not exceeding two years at a time as may be specified in the order and may also by an order in writing extend the period so, however, that the total period shall not exceed five years:"

16-A. Section 132 (2) (d) provides: "Save as provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of—

(d) any dispute required under Section 86 to be referred to the Registrar; or".

17. Section 141 of the Act is in the following terms:

"141. This Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract expres-

sed or implied or in any instrument having effect by virtue of any enactment other than this law and notwithstanding any usage or custom to the contrary."

18. The principles of construction of a statute are well settled. The principles of construction require that the true legislative intent has to be determined. The intention of the legislature has, however, to be gathered primarily from the language used in the statute. In construing any statute any word used in the statute should generally be given its plain and ordinary meaning unless any contrary intention appears expressly or by necessary implication. In appropriate cases, true interpretation may require giving any particular word a special meaning for ascertainment of the true intention of the Legislature.

19. It is also well settled that the decisions on the construction of a particular statute are of no real assistance in construing another statute unless the statutes are in pari materia.

20. The decisions relied on by Mr. Mukherjee will not be of any great assistance, unless it can be held that the words 'relating to the affairs' of the society used in the present Act convey the same meaning and sense as the words 'touching the business' of the society, used in the earlier Act of 1912 and the Act of 1940 prior to its amendment. It may be noted that in none of these decisions the words 'relating to the affairs' of the society came to be considered and the Act of 1940 after its amendment in 1965 did not fall for consideration in any of the cases cited from the Bar.

21. In my opinion, it will not be proper to construe the words 'relating to the affairs' of the society used in the Act of 1973 to have the same meaning as the words 'touching the business' of the society used in the Act of 1912 and the Act of 1940 prior to its amendment. The Legislature must be presumed to have been aware of the provisions contained in the Act of 1912 and also in the Act of 1940. The Legislature must also be presumed to know of the various decisions interpreting the said words 'touching the business' of the society. On the basis of the interpretation given by the Courts to the words 'touching the business' of the society, the law must be considered to be fairly settled as to the true meaning, effect and import of the words 'touching the business' of the society used in the Act of 1912 and also in the Act of 1940

prior to its amendment. The Legislature in its wisdom thought it fit to amend the provisions of the Act of 1940 in 1965 by deleting the words 'touching the business' of the society and introducing the words 'relating to the affairs' of the society. This deliberate change in the legislation by this amendment must have been introduced by the Legislature for the purpose of changing the law, as it stood prior to the amendment. If the Legislature did not intend to bring about a change in the existing law as settled by various decisions of the Courts, there could be no purpose of effecting the amendment and the Legislature would certainly have allowed the words 'touching the business' of the society to remain, particularly as the said words have already been judicially interpreted. I must, therefore, hold that the words 'relating to the affairs' of the society introduced in the Act of 1940 after amendment cannot and do not have the same meaning, import and effect as the words 'touching the business' of the society which were there in the Act of 1912 and also in the Act of 1940 before its amendment in 1965. The legislature has thought it fit to retain in the present Act of 1973 the words 'relating to the affairs' of the society introduced by amendment to the Act of 1940 in 1965. In that view of the matter the decisions relied on by Mr. Mukherjee on the interpretation of the words 'touching the business' of the society are of no real assistance in construing the present Act.

22. The words 'relating to the affairs' of the Society must be held, in my opinion, to have a much wider import than the words 'touching the business' of the society. The words 'relating to the affairs' of the society have a much larger connotation and must be held to be wide enough to cover every sphere of activity of the society whether the activity relates to the business of the society in its narrow sense of trade and property, the management of the society, the administration of the society and the running of the society. The plain meaning of the word 'Affair' as given in the Oxford Concise Dictionary (5th Edition) reads: "Thing to be done; concern, business, matter, as that is my...; love... ..; (pl) ordinary pursuits of life." In Webster's New Twentieth Century Dictionary (2nd Edition) 'Affair' has been defined to mean "(1) business of any kind; that which is done or is to be done, (2) (pl) transactions in general as, human affairs, political or ecclesiastical affairs, public affairs, a man of affairs, (3) (pl)

matters of business, (4) any matter, occurrence or thing, (5) (from love affair) an amorous relationship or episode between two people not married to each other; and amour."

The plain ordinary meaning of the word 'affair' as understood in common parlance is therefore wide enough to cover every aspect of activity. The meaning of the word as given in Earl Jowitt's 'Dictionary of English Law' and in Wharton's 'Law Lexicon' which I have already noted, does not suggest that the word has any narrower connotation and is confined to any activity relating only to business or property. The meaning given in Earl Jowitt's Dictionary of English Law and also in Wharton's Law Lexicon is 'a person's concerns in trade and property'. A person's concerns in trade and property are not the same thing as the person's trade and property and a person's concerns in trade and property have a much larger sphere of activity and have a much wider connotation. The decision of the Supreme Court in the case of Deccan Merchant Co-operative Bank Ltd. v. M/s. Dalichand Jugraj Jain, AIR 1969 SC 1320, to my mind, lends support to the view that the word 'affairs' ordinarily understood has a wider connotation than the word business construed in the narrow sense of trade and commerce only and the affairs of a society would ordinarily include the holding of annual and other general meetings, the constitution of its managing committee, the election of office bearers and management of the society. I have already quoted the relevant observations of the Supreme Court and the following observations of the Supreme Court at page 1325 in this connection may be particularly noted:

"It is clear that the word 'business' in this context does not mean affairs of a society because election of office bearers, conduct of general meetings and management of a society would be treated as affairs of a society."

23. Apart from this aspect of the Legislature introducing a deliberate change in the language by inserting and using words of wider significance and import, the provisions contained in the Act, to my mind, clearly establish that the Legislature did not intend the words 'relating to the affairs' of the society to signify and mean the same thing as the words 'touching the business' of the society. The provisions of the Act clearly indicate that the Legislature intended

that the words 'relating to the affairs' of the society would be wide enough to cover all matters concerning the society and the words 'any dispute relating to affairs of a Co-operative Society' would cover all disputes concerning all matters of the society other than those specifically excluded by the Act itself. Sections 24, 25 and 26 of the Act which I have already set out, clearly go to indicate that the word 'affairs' cannot be given the same meaning as the word 'business' in its narrow and restricted sense of trade and commerce. The proviso to Section 86 of the Act which I have already noted makes the intention of the Legislature clear beyond any doubt. The proviso makes it clear that the matters mentioned in the proviso would be affairs of the society and it was therefore necessary to introduce the proviso as the Legislature intended to exclude the matters mentioned therein from the purview of Section 86 (1) as otherwise the matters mentioned in the proviso would be affairs of the society and would be covered by Section 86 (1) of the Act. To take the matters mentioned in the proviso out of the purview of Section 86 (1) of the Act, as in the absence of the proviso, the said matters would be covered by Section 86 (1) of the Act as affairs of the society, the proviso had to be incorporated. The terms of the enactment sufficiently manifest the intention of the Legislature and make it abundantly clear that affairs of the society will cover all matters concerning the society unless any matters are specifically excluded. The bye-laws of the society, to my mind, also support this construction. The bye-laws deal with and make provisions for all affairs relating to the society. The bye-laws make necessary provisions as to the holding of the annual general meeting, notice of the annual general meeting, election of the Managing Committee and office bearers of the society. Unless these were affairs of the society I fail to understand why any provision with regard to the same will be made in the bye-laws of the society. It appears to me to be inconceivable that the holding of the annual general meeting and the election of the Managing Committee and the office bearers of the society are not affairs of the society.

24. The subject-matter of the disputes which were referred to the Registrar under Section 86 (1) of the Act and which are pending adjudication in the dispute case before the Arbitrator must,

therefore, be held to relate to the affairs of the society. The disputes are, therefore, clearly covered by Section 86 (1) of the Act and the order of the Arbitrator holding that he has jurisdiction to decide the disputes, must therefore be upheld. It is not in dispute that the requirements of the Act are otherwise complied with.

25. It may be noticed that in the larger interest of the Co-operative Societies and for speedy disposal of any dispute relating to the affairs of a Co-operative Society, the Legislatures have been changing the words in the enactment and have been expanding the scope of reference to the Registrar or to the Arbitrators in terms of the provisions of the Acts. The provision contained in Section 87 (4) of the Act directing all disputes referred to the Registrar to be decided within three months from the date of receipt of such disputes by the Registrar clearly indicates that it is the intention of the Legislature that such disputes should be expeditiously disposed of. For achieving this purpose the Legislature has thought it fit to take away the jurisdiction of the Civil Courts. It is well settled that any enactment curtailing or taking away the jurisdiction of the Civil Courts has to be strictly construed. It is also well settled that unless the jurisdiction of the Civil Courts is taken away, expressly or by necessary implication, by any statute, it must be held that the Civil Court retains the jurisdiction to decide the matter. In the instant case the jurisdiction of the Civil Courts is unequivocally and clearly taken away in express terms by the provisions contained in Section 132 (2) (d) and Section 141 of the W. B. Co-operative Societies Act.

26. In the result this petition fails. The Rule is discharged. Interim orders, if any, are all vacated. There will be no order as to costs.

Petition dismissed.

AIR 1976 CALCUTTA 320

SABYASACHI MUKHARJI, J.

Rathindra Nath Mitra, Petitioner v. Mrs. Angur Bala Mullick and another, Respondents.

Suit No. 280 of 1974, D/- 1-3-1976.

(A) Civil P. C. (1908), O. 41, R. 6 (2) — Order for final decree — Not an order for sale of property in execution.

ET/ET/B452/76/CWM

In view of the language used in sub-rule (2) of Rule 6 of Order 41 read with the definition of decree under Section 2 (2) of the Code and the scheme of the preliminary and final decree it is clear that when an order is made for a final decree, it is not an order for sale of immoveable property in execution of a decree. AIR 1931 All 386; AIR 1945 PC 152 and (1946) 50 Cal WN 486, Rel. on; AIR 1914 PC 150 and AIR 1916 Bom 305, Dist. (Para 2)

Cases Referred: Chronological Paras

(1946) 50 Cal WN 486	1
AIR 1945 PC 152 = 72 Ind App 277	1
AIR 1931 All 386 = 1931 All LJ 508 (FB)	1
AIR 1916 Bom 305 = 18 Bom LR 38	2
AIR 1914 PC 150 = 42 Ind App 88	2
(1911) ILR 38 Cal 913 = 16 Cal WN 49	2

A. N. Bose and Manna, for Petitioner; P. K. Das and S. Sen, for Respondents.

ORDER:— The plaintiff in the instant case had filed this suit against the defendants on the 2nd of July, 1974, for a declaration of charge in respect of two immoveable properties belonging to the defendants and for a decree under Order 34, Rule 5-A of the Code of Civil Procedure. A preliminary mortgage decree was passed on the 7th March, 1975. Thereafter, as the defendants failed to pay the dues in accordance with the preliminary decree an application was made. From the said preliminary decree an appeal was preferred and is still pending. Thereafter, as the defendants did not pay the decretal dues, an application was made for a final decree. I passed the final decree on the 16th December, 1975. An appeal from the said final decree is pending. These shortly are facts relevant for the purpose of this application. The petitioner thereafter made an application to the court of appeal for interim stay or decree pending the hearing of the appeal from the final decree. No order was made on that application without prejudice to the rights of the petitioner to make an application under Order 41, Rule 6 if the petitioner was otherwise entitled to under the law. This is an application in which the petitioner is asking for various reliefs, inter alia, that the operation of the final decree passed by me be stayed until the final disposal of the appeal. It was contended that this application was under the provisions of sub-rule (2) of Rule 6 of Order 41 of the Code of Civil Procedure. Sub-rule (2) of Rule 6 of Order 41 deals with the case where an order has been made for sale of immoveable property in exe-

cution of a decree. The question is whether an order has been made for sale of immoveable property in execution of a decree. Reading the section as it is I am unable to accept the contention that a final decree in a mortgage suit is an order for sale of immoveable property in execution of the decree. In order to be executable there must be a decree which can be executed. The preliminary decree is not capable of execution as such. There can be no execution until a final decree is passed. This position appears to me clear from the provisions of sub-rule (2) of Rule 6 of Order 41. This view in my opinion is also supported by the decision of a Full Bench of the Allahabad High Court in the case of *Sat Parkash v. Bahal Rai*, AIR 1931 All 386 at page 387. In the case of *Madan Theatres Ltd. v. Dinshaw and Co.*, AIR 1945 PC 152 the Judicial Committee also was of the same view. This question was considered also by a Bench decision of this Court in the case of *Jivandas Khimji v. Dindoyal Shah*, (1946) 50 Cal WN 486 where the Division Bench observed that a preliminary decree in a mortgage suit was not a decree for payment of money and such a decree, in default of payment by the judgment-debtor as directed thereunder, could not be executed by the attachment and sale of the property of the judgment-debtor. The sole remedy of the decree-holder in such circumstances was to apply for a final decree under Order 34, Rule 6 of the Code of Civil Procedure. If a preliminary decree in mortgage suit was not a decree for payment of money, then the order passed after the preliminary decree could not in my opinion be considered to be an order in execution of a decree.

2. Counsel for the petitioner, however, contended that in view of certain observations of the judicial committee it should be considered that a final decree in a mortgage suit was really an order in execution of the decree. In order to appreciate this contention it would be relevant to refer to Sections 88 and 89 of the Transfer of Property Act as it stood prior to its amendment, by Transfer of Property (Amendment Supplementary) Act 1929. Sections 88 and 89 were as follows:

"88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of Section 86, and also ordering that, in default of the defendant paying as therein mentioned, the

mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance of the terms.

89. If in any case under Section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in Section 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in Section 88; and thereupon the defendant's right to redeem and the security shall both be extinguished."

What had happened was that there was a suit in the High Court, upon the mortgage in which the mortgagee obtained a consent decree dated the 16th December, 1886, for payment on June 15, 1887, with the provision that in default of payment the mortgaged property should be sold and the mortgagor should make good any deficiency arising under the sale. On the 3rd of July, 1909, no payment having been made, the mortgagee applied to the High Court for relief to sell the mortgaged property. The High Court decided that the application was one to 'enforce a judgment or decree' within the meaning of Schedule 1, Article 183 of the Limitation Act, 1908 and was barred since it was not made within 12 years from the 15th June, 1887. The decision of the High Court is reported in (1911) ILR 38 Cal 913. On appeal the Judicial Committee

held that the decision of the High Court was right. The decision of the Judicial Committee is reported in 42 Ind App 88 (89) = (AIR 1914 PC 150). I am not concerned with the meaning of the expression 'to enforce a judgment or decree' as contemplated under Article 183 of the Limitation Act, 1908. I am concerned only with the question whether the final decree that is passed is an order for sale of property in execution of a decree. This has to be construed in the light of the definition of the decree as provided by Section 2 (2) of the Code of Civil Procedure. My attention was also drawn to a decision of the Bombay High Court in the case of Murlidhar v. Vishnudas, AIR 1916 Bom 305 where it was held that like a decree under Section 88 of the Transfer of Property Act a preliminary decree under Order 34, Rule 4 was a decree which must be appealed from if the party concerned was aggrieved by it. If it was not appealed from, it should be accepted as determining the rights of the parties for the purpose of all subsequent proceedings. In that context the Bombay High Court noted for the purpose of limitation when an order for sale on default of payment was one for the execution of the decree or to enforce a judgment under Article 189. As mentioned hereinbefore for the purpose of this application in view of the language used in sub-rule (2) of Rule 6 of Order 41 read with the definition of decree under Section 2 (2) of the Code and the scheme of the preliminary and final decree and authorities as indicated before, I am of the opinion, that when an order is made for a final decree, it is not an order for sale of immoveable property in execution of a decree.

3. Counsel then contended that for execution of a final decree there was no other procedure available and only the decree had only to be filed. He drew my attention to the relevant rules of the High Court for enforcement of final decree. It was not necessary to have the certified copy or to proceed by tabular statement as required. Whether the same is required or not, in my opinion, it is not necessary for me to go into this aspect at this stage. Whether the other procedure required for enforcement of a final decree for putting the property to sale would be steps in execution of decree or not it is also not necessary for me to decide. It was, lastly, contended on behalf of the respondent that the application as framed was not under sub-rule (2) of Rule 6 of Order 41. Though the petition

is not happily worded, I am unable to accept this contention on behalf of the respondent.

4. In the view I have taken this application must, therefore, fail and is dismissed with costs.

Application dismissed.

AIR 1976 CALCUTTA 322

R. BHATTACHARYA, J.

Niranjan Modak, Appellant v. Lakshmi Narayan Guin and others, Respondents.

Second Appeal No. 1195 of 1970 D/- 28-1-1976.

(A) Civil P. C. (1908), O. 7, R. 7; O. 41, R. 33— Subsequent events— Ejectment decree under T. P. Act — W. B. Act 12 of 1956 applied in that area during pendency of appeal — Appellate Court was bound to take cognizance of subsequent events and to apply provisions of W. B. Act, before confirming ejectment decree — (W. B. Premises Tenancy Act (12 of 1956), S. 13 (1)).

A decree for ejectment was passed by the trial Court against the tenant under Transfer of Property Act. During the pendency of the first appeal, the provisions of the West Bengal Premises Tenancy Act, 12 of 1956 were extended to the area where the suit premises stood. There was no evidence on record to prove any case for ejectment as required under the W. B. Act:

Held that the appellate Court ought to set aside the decree passed by the trial Court and dismiss the suit. In view of the introduction or extension of the W. B. Act, the court even in pending cases was to see whether any order or decree for recovery of possession could be passed according to the provisions of the Act, even if the suit was originally filed under a different statute. AIR 1941 FC 5; AIR 1959 SC 577; (1888) ILR 15 Cal 94, Foll.; ILR (1968) 2 Cal 183; AIR 1962 Cal 563 (SB), Disting. (Paras 11, 14)

(B) W. B. Premises Tenancy Act (12 of 1956), S. 2 (h) — "Decree for eviction" means final decree passed by the court of competent jurisdiction — Decree challenged in appeal not covered. (Para 12)

Cases Referred: Chronological Paras
AIR 1974 SC 1380 = (1975) 1 SCR 394 12
ILR (1968) 2 Cal 183 14

CT/DT/A864/76/AMG/VBB

1976 Niranjana Modak v. Lakshmi Narayan (R. Bhattacharya J.) [Prs. 1-6] Cal. 323

AIR 1962 Cal 563 = 66 Cal WN 796 (SB)

AIR 1961 SC 1596 = (1962) 2 SCR 159

AIR 1959 SC 577 = (1959) Supp (1) SCR 968

AIR 1941 FC 5 = 1940 FCR 84 (1940) 309 US 551 = 84 Law Ed 920

AIR 1936 PC 49 = 63 Ind App 47

AIR 1926 PC 93 = 53 Ind App 197

AIR 1917 All 163 = 15 All LJ 734 (SB)

(1888) ILR 15 Cal 94

R. K. Banerjee and Abhijit Kr. Banerjee, for Appellant; M. N. Ghosh, G. N. Chandra and Dilip Kr. Banerjee, for Respondents.

JUDGMENT:— This appeal is by the defendant Niranjana Modak who suffered a decree for ejectment in respect of the suit premises in the original suit filed by the plaintiff Lakshminarayan Guin and others, the respondents before this Court. In the first appeal below also Niranjana Modak was unsuccessful.

2. Briefly stated, the case of the plaintiffs is that they are the owners of the suit property, a house and the defendant was a tenant under them in respect of the premises in question at a monthly rent of Rs. 100 payable according to Bengali Calendar month. The defendant did not pay any rent for the suit premises to the plaintiffs in spite of demand. Moreover, the plaintiffs required the premises for reconstruction of a new house on the land for their own use. As the defendant did not vacate the house in spite of service of notice to quit, the suit was filed for recovery of khas possession and also for arrears of rents. The defendant filed a written statement stating that there was no relationship of landlord and tenant as between him and the plaintiffs. The allegation about arrears of rent is false. According to the defendant, one Sishubala is the owner of the house and the defendant is a tenant under her and he paid rents to the said landlady. It has been further stated that the father of the plaintiffs obtained several deeds from Sishubala by making misrepresentation and by practising fraud. The trial court found that the case of the plaintiffs was proved and the defence case was not accepted. The suit was, therefore, decreed. In the first appeal taken by the defendant, it was held that the defendant was a tenant under the plaintiffs and the appellate court below also agreed with the trial court to affirm the decree passed against the defendant.

3. I have heard Mr. Banerjee, the learned Advocate appearing on behalf of the appellant and Mr. Ghosh for the respondents.

4. The only point that has been urged by Mr. Banerjee on behalf of the defendant-appellant is that as the provisions of the West Bengal Premises Tenancy Act, 1956, hereinafter referred to as the Act were extended during the pendency of the first appeal below to the area where the suit premises stands, the decree passed by the trial court under the Transfer of Property Act is liable to be set aside in the absence of any evidence on record to prove any case as required under the Act. Mr. Ghosh's contention on the other hand, is that as the provisions of the Act have been extended to the suit properties after the passing of the original decree against the defendant, there can be no occasion for application of the provisions of the Act in the present case. The learned Advocates referred to several decisions which I have discussed hereafter.

5. The original suit was filed on 12-6-67. The decree was passed by the trial court against the defendant on 17-2-69. The appellate court below dismissed the appeal on 16-1-70 and the present second appeal was presented on 25-3-70. Admittedly when the decree was passed by the trial court, the Act was not extended to the area of the suit property. The suit relates to a house which comes under the definition of 'premises' according to the Act. By the Notification No. 18398-LR the Government

41-29/69, extended the Act to the area called Memari where lies the suit premises. Both the courts below dealt with the case as one under the Transfer of Property Act. Regarding these facts there is no dispute.

6. Mr. Ghosh at one stage made an attempt to argue that the records would show that the decisions arrived at by both the courts below were made according to the evidence as required under the provision of the Act. The record, however, reveals that no notice was served upon the defendant under Section 13 (6) of the Act and moreover, there is no evidence whatsoever proving any ground for ejectment of a tenant as mentioned in Section 13 (1) of the Act and therefore, Mr. Ghosh gave up that point. His main contention against the argument of Mr. Banerjee is that when the Act was ex-

tended during the pendency of the first appeal, the objection taken by Mr. Banerjee will be futile as a decree for eviction had already been passed by the trial court. Mr. Ghosh wanted to say that in the first appeal when the Act was extended, the defendant could not be a tenant as defined under the provisions of the Act so as to get any relief in the present case. Therefore, the first and the only question that arises for the decision is whether the decree passed by the trial court against the defendant would be set aside on the ground that the Act came to be applicable to the suit premises during the pendency of the first appeal and whether the dismissal of the appeal by the first appellate court shall, in the second appeal, be set at naught and the suit should be dismissed. Mr. Ghosh has submitted that when the suit was filed, it was to be governed by the Transfer of Property Act and according to the provisions of that Act the suit was decreed. The subsequent extension of the Premises Tenancy Act will not alter the position as it was at the time of the institution of the suit.

7. The first case referred to by Mr. Banerjee is Lachmeshwar Prasad Shukul v. Keshwar Lal Chowdhury, decided by the Federal Court and reported in 1940 FCR 84 = (AIR 1941 FC 5). That was a suit by a mortgagee for recovery of money by sale of the mortgaged property. The suit was decreed. The amounts were borrowed partly to discharge antecedent debts and partly to meet future expenses. A compound interest was also allowed. There was an appeal to the High Court and there was a cross appeal. The claim for compound interest was disallowed in the High Court. There was a deduction in the amount of decree also on the bonds. A contention was raised before the High Court based on Section 11 of the Bihar Money Lenders Act which was enacted during the pendency of the appeal. The High Court held that the said section was void and granted a certificate under the Constitution Act. An appeal was preferred to the Federal Court by the defendants. After the decision of the High Court in the matter, the Bihar Legislature enacted Act VII of 1939 taking certain precautions necessary to obviate the objections to the validity of the earlier Act. On the question whether the court is to take into account the legislative changes since the decision under appeal, Gwyer, C. J. said:

"..... I desire to point out that the rule adopted by the Supreme Court of the United States is the same as that which I think commends itself to all three members of this Court. In *Patterson v. State of Alabama*, Hughes C. J. said "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what the justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

This view of its powers was reaffirmed by the Court in a case decided as recently as March last; *Minnesota v. National Tea Co.*, (1940) 309 US 551 at p. 555."

The same view will appear from the judgment of Varadachariar, J. in his separate judgment. He says as follows:

"As stated in *Shymkant's* case, there is no reason to suppose that the powers of this Court when acting as a court of appeal are less extensive than those of the High Courts when hearing an appeal and it has been a principle of legislation in British India at least from 1861 that a court of appeal shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Civil Procedure Code on courts of original jurisdiction."

Further down in his judgment he says,

"It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against."

8. Let us now consider the case of *K. C. Mukherjee v. Mt. Ram Ratan Kaur* (AIR 1936 PC 49) referred to in the Federal Court case just considered. Here a suit was filed by the Official Receiver of the High Court at Calcutta against Ram Ratan Kaur on the ground that she had taken a transfer of a non-transferable occupancy holding by a deed dated 28-9-1916. The suit was filed on 30-6-1927. The trial court passed a decree for eviction of the defendant No. 1 Kaur. An appeal was taken to the High Court at Patna. It was held that after the date of the transfer, the right of the transferee was recognized by the plaintiff or his predecessors. An appeal was taken to the

Privy Council by the Official Receiver. During the pendency of the appeal before the Board, Bihar Tenancy Amendment Act, 1934 was passed and the operation of the Act was started on 10-6-1935. Particularly Section 26 (N) of the New Act was relevant in that case and according to this provision, every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January, 1923 and in case of the transfer of a portion of a holding, to have accepted, the distribution of the rent of the holding as stated in the instrument of transfer. If this new provision was applicable, then certainly, the suit would be dismissed. In the new Act there was no saving clause modifying the effect of Section 26 (N). On this point it has been held as follows:

"This is retrospective; the question is not whether general language shall be taken only in a prospective sense. The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land. Within this class the legislature has not thought fit to discriminate against the tenants whose right is under challenge in a suit, a course which it may well have regarded as invidious or unnecessary. As substantive rights of landlords and their accrued causes of action were to be abrogated, respect for pending suits over old transfers cannot be assumed."

9. The next case relied upon by Mr. Banerjee is G. T. M. Katturuswami v. Setra Veeravva, reported in AIR 1959 SC 577. In this case also the principles referred to in the case of Lachmeswar Prosad Sukhul (AIR 1941 FC 5) mentioned earlier has been reaffirmed in the following words of Imam, J.:

"It is well settled that an appellate court is entitled to take into consideration any change in the law."

10. I now come to S. B. K. Oil Mills v. Subhas Chandra, reported in AIR 1961 SC 1596. In this case while a suit for eviction was pending, a Notification was issued under Section 6 of the Bombay Rents Hotels & Lodging House Rates Control Act, 1947 applying Pt. II of the Act to the area where the suit property was situated and the tenant claimed protection under Section 12 in Part II of the Act which

deprived the landlord of the right of possession under certain circumstances. The High Court held that Section 12 was prospective in character and did not apply to pending suits or proceedings. The Supreme Court on this point held as follows:

"But a section may be prospective in some parts and retrospective in other parts. While it is the ordinary rule that substantive rights should not be held to be taken away except by express provision or clear implication, many Acts, though prospective in form, have been given retrospective operation, if the intention of the Legislature is apparent. This is more so, when acts are passed to protect the public against some evil or abuse. (See Craies on Statute Law, 5th Edn., p. 365). The sub-section says that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the standard rent etc. and observes and performs the other conditions of the tenancy. In other words, no decree can be passed granting possession to the landlord, if the tenant fulfils the conditions above mentioned."

In the same judgment it has been stated:

"The point of time when the sub-section will operate is when the decree for recovery of possession would have to be passed. Thus, the language of the sub-section applies equally to the suits pending when Part II comes into force and those to be filed subsequently. The contention of the respondent that the operation of Section 12 (1) is limited to suits filed after the Act comes into force in a particular area cannot be accepted. The conclusion must follow that the present suit cannot be decreed in favour of the respondent." The question, therefore, arises whether the Court is to see from the language of the statute what the intention of the Legislature is and the question would be further whether the provision in question will be applicable in the pending cases. It all depends upon the construction of the statute and the language used.

11. Now, let us consider the relevant Section 13 of the West Bengal Premises Tenancy Act extended to Memari during the pendency of the suit. Section 13 (1) of the Act starts with the following words:

"Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against a tenant

except on one or more of the following grounds....."

There are several grounds for which the landlord may evict the tenant. As the Act was not in force when the suit was filed, the landlord wanted to evict the tenant under the provision of the Transfer of Property Act. Both the trial court and the first appellate court below dealt with the case as one under the Transfer of Property Act. According to the clear language of Section 13 (1) stated above, there can be no doubt whatsoever that in spite of any other law being in force, no Court can pass any order or decree of recovery of possession of the suit premises evicting a tenant except on one or more of the grounds mentioned in sub-section (1) of Section 13. If the Act is applicable at the time when the Court is to pass necessary order or decree in the suit, the duty of the Court would be to see whether any ground mentioned in sub-section (1) of Section 13 has been proved by the landlord for the eviction of the tenant and if there is no such ground, the Court shall not pass any order for eviction of the tenant. I have no doubt to hold that in view of the introduction or extension of of this Act, the Court even in pending cases is to see whether any order or decree for recovery of possession can be passed according to the provision of the Act. It does not matter whether the suit was originally filed under a different statute. There is no dispute that the suit premises, a house comes under the purview of the definition of 'premises' under the Act. The submission of Mr. Banerjee is that the appellate court below ought to have set aside the decree for recovery of possession passed by the trial court when the Act had already come into force in the locality and even if it was overlooked by the appellate court below, it is the duty of the Court in the second appeal to set aside the decree so that the landlord cannot get any decree for recovery of possession according to the provision of the Act.

12. Mr. Ghosh, however, took his stand on one objection to the submission of Mr. Banerjee. His argument is that the decision in the case of *S. B. K. Oil Mills v. Subhas Chandra* reported in AIR 1961 SC 1596 is not applicable because the definition of the word 'tenant' under the West Bengal Act is quite different from that under the Bombay Act. Mr. Ghosh says that according to the definition of 'tenant' in the West Bengal Act, a person shall not be a tenant against whom any

decree or order for eviction has been made by a Court of competent jurisdiction. There is no doubt that in the Bombay Act a person suffering any decree or order for eviction has not been described as a tenant. In the present case the trial court passed a decree for recovery of possession in favour of the landlord against the tenant. While the appeal preferred by the tenant was pending before the first appellate Court, the Act came into force to be applicable to the locality. Mr. Ghosh contends that when the Act became applicable, a decree for eviction had already been passed against the tenant and, therefore, the appellant cannot be described as tenant when the appeal was pending. Reading the definition of 'tenant' given in Section 2 (h) of the Act, we get that a person against whom any decree or order for eviction has been made by a Court of competent jurisdiction is not described as a tenant. In the instant case after the passing of the decree, the tenant filed an appeal against the decree and the appeal was pending before the court for adjudication. Now, as soon as the decree is appealed against, it cannot be stated to be a decree which is final, because with the filing of the appeal, the matter is re-opened and the appeal is meant for re-hearing of the dispute. The decree for eviction referred to in the definition clause for 'tenant' is meant to be final decree passed by a Court of competent jurisdiction. It does not and cannot imply, in my view, a decree under appeal. If there is an appeal against any decree and if the decision of the appellate court is to affirm the decree of the trial court, we get a decree of the appellate court and the trial court decree merges in the appellate court decree. Again if the appellate court sets aside the decree of the trial court, we also get the decree of the appellate court nullifying the decree of the original court. When the appeal was filed by the tenant against the decree of the trial court and it was pending before the appellate court below, it was the duty of the court below to see whether any decree could be passed for recovery of possession as against the tenant according to the provision of the Act then extended to the suit premises. It cannot, therefore, be said that the tenant who preferred an appeal before the first appellate court or who has filed the present appeal is not a tenant under the Act. In fact, the decree of the lower court, comes under consideration before the higher appellate court and it cannot be

stated that any such decree has been finally passed by any Court of competent jurisdiction. The decree mentioned in the definition clause is a final and different decree other than the decree challenged in the pending appeal. The appellant can certainly claim to be a tenant as defined under the Act to get the benefit of Section 13 (1) of the Act. In this connection, we may refer to the judgment of Varadachariar, J. already quoted above in connection with Lachmeshwar Prasad Shukul v. Keswarlal Chowdhury (AIR 1941 FC 5) where it has been clearly stated that an appeal is in the nature of a re-hearing of the case. In the case of Gojer Brother (P.) Ltd. v. Ratanlal Singh reported in AIR 1974 SC 1380, the Supreme Court has held the following:

"In cases where the decree of the trial court is carried in appeal and the appellate court disposes of the appeal after a contested hearing the decree to be executed is the decree of the appellate court and not of the trial court. In Jowad Hussain v. Gendan Singh, 53 Ind App 197 = (AIR 1926 PC 93) the Privy Council while holding that the limitation of three years within which an application for a final decree must be made runs from the date of the decree of the appellate court, quoted with approval the statement of law contained in the judgment of a learned Judge of the Allahabad High Court to the following effect: "when an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause". Per Banerji, J. in Gajadhar Singh v. Kishan Jiwan Lal, ILR 39 All 641 = (AIR 1917 All 163) (SB). The Privy Council also adopted the statement contained in a judgment of Tudball, J., to this effect: "when the Munsif passed the decree it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree and only that which can be made final in the cause between the parties." Thus, when the decree of the Court of first instance is confirmed by the High Court and the latter decree is confirmed by the Privy Council the decree capable of execution is the decree of the Privy Council."

13. Then again we have got the decision of our High Court in the case of Gobind Chunder Roy v. Guru Charan of the year 1887 reported in (1888) ILR 15 Cal 94. This is a Division Bench decision.

The relevant portion of the judgment is quoted below:

"The proceedings in the Appellate Court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against, we ought to take it that the decree of the Appellate Court was the decree in the suit....."

14. In view of my discussions made above, I am of the view that although a decree has been passed by the trial Court, the appellant can still be regarded as a tenant as defined under Section 2 (h) of the Act to get relief in this case, because no final decree, unchallenged in any court has been passed against him. The decree in question is under consideration and the Court is entitled to see whether the defendant-tenant can get any relief under the Act in the appeal under consideration. Mr. Ghosh relied upon a Division Bench decision of this Court in the case of Madho Prasad v. Gangaram reported in ILR (1968) 2 Cal 183. In that case the suit for ejectment was filed under the Transfer of Property Act. During the pendency of the trial, West Bengal Premises Tenancy Act was extended to that area. The suit was decreed by the trial Court. The Subordinate Judge in the first appeal dismissed the appeal preferred by the defendant. There the Division Bench held that the special statute namely, the West Bengal Premises Tenancy Act would not govern that pending suit. Going through the judgment I do not find any reference to any decision of the Privy Council, the Supreme Court or the Federal Court on the point as has been placed before me. There the case of V. R. Verma v. Mohan Kumar Mukherjee reported in 66 Cal WN 796 = (AIR 1962 Cal 563) (SB) was mentioned. This was the Special Bench decision in connexion with the notices under Section 106 of the Transfer of Property Act and under Section 13 of the West Bengal Act 12 of 1956. However, in view of the decisions of the Supreme Court, Federal Court and the Privy Council discussed in this judgment, those two decisions referred to by Mr. Ghosh do not appear to be applicable in the case before me. Mr. Ghosh's contention, however, is that the appellant against whom there is the decree of the trial court cannot be described as a tenant under the Act and, therefore, he can-

not get any relief. He does not, however, challenge the decisions of the Supreme Court, Federal Court or the Privy Council relied upon by Mr. Banerjee and, of course, he cannot. But, his only point seriously urged is the distinction appearing in the definition of 'tenant' in the Acts of West Bengal and Bombay. I cannot accept the contention of Mr. Ghosh as put forward before this Court regarding the definition of tenant applicable in the present case. I have, therefore, no hesitation to hold that the appellate court below ought to have set aside the decree passed by the trial court and dismissed the suit on the ground that for want of evidence and materials, no case could be proved for eviction of the defendant under the provision of the Act extended to the suit property during the pendency of the first appeal.

15. I was just thinking whether the matter should be sent back to the trial court giving an opportunity to the plaintiff to adduce evidence regarding the grounds for eviction pleaded, but I find that no useful purpose would be served because according to the provision of the Act the plaintiff is required to serve one month's notice under Section 13 (6) of the Act, but in the present case there was the notice for eviction giving time less than a month though more than 15 days. Mr. Ghosh at the very outset wanted to show that the provisions of the Act were complied with, but when the requirement of notice was not fulfilled by the plaintiff, Mr. Ghosh challenged the propriety of this Court to give any relief to the tenant as a decree had already been passed by the trial court. There can be no question of sending back of the case for reconsideration.

16. No other point of law has been raised. I find that the appellate court below ought to have set aside the decree of the trial court and dismissed the suit after the extension of the Act to the local area.

17. In the result, the appeal is allowed. The judgments and the decrees of the courts below are hereby set aside and the suit stands dismissed. In the facts and circumstances, however, the parties will bear their own costs throughout.

18. There was an application dated 27-11-75 for taking additional evidence under Order 41, Rule 27, C.P.C. In view of the decision of this appeal, the application requires no order.

19. It is prayed on behalf of the respondents that leave may be granted for preferring Letters Patent Appeal. The prayer is refused.

Appeal allowed.

AIR 1976 CALCUTTA 328

SACHINDRA KUMAR BHATTACHARYYA AND ARUN KUMAR JANAH, JJ.

Dhunseri Tea & Industries Ltd., Petitioner v. The Hanuman Estates Private Ltd., Respondent.

Civil Rule No. 2028 of 1975, D/- 24-12-1975.*

(A) West Bengal Premises Tenancy Act (12 of 1956), Ss. 17 (1) (as amended by Act 24 of 1965), 17 (2), 17 (3), 13 — Income-tax Act (1961), S. 226 (3) — Suit for eviction by landlord — Tenant served with writ of summons — Payments made by tenant in compliance with notice under S. 226 (3) of Income-tax Act with Income-tax Officer after expiry of one month from the service of the writ of summons — Although payment operates as valid discharge under S. 226 (3), it could not be regarded as valid payment within S. 17 (1).

An obligation to pay an amount equivalent to rent or to deposit the same in accordance with the provisions of S. 17 (1) of the Act, is a statutory obligation, which cannot be regarded as having been superseded or taken away by the introduction of S. 226 (3) of the Income-tax Act (1961). These two Acts operate in different fields. The notice under S. 226 (3) prohibits a tenant from making any payment to the assessee landlord and required to pay any amount due from him to the landlord or held by him on landlord's account to Income-tax authorities. The payment so made by a tenant in compliance with the notice, constitutes a good and valid discharge of a tenant's liability to pay rent to the assessee landlord to the extent of the amount paid but it could not have the effect overriding the provisions of S. 17 (1) or (2) of the Act, with the result that the tenant, in order to avail of the protection of S. 13, must

*(Against order passed by T. K. Mutsudhi, Chief Judge, City Civil Court, Calcutta, in Ejectment Suit No. 839 of 1973, D/- 12-5-1975.)

show that the payment to the income-tax authorities were made within time strictly in accordance with the provisions of S. 17 (1) or (2) of the Tenancy Act. (1975) 79 Cal WN 88, Rel. on, Case law discussed. (Paras 9, 11)

(B) Constitution of India, Pre. and Art. 254 (2) — West Bengal Premises Tenancy Act (12 of 1956), S. 17 — Income-tax Act (1961), S. 226 (3) — Provisions of Section 17 of W. B. Premises Tenancy Act and those contained in S. 226 (3) of Income-tax Act neither conflicting nor inconsistent — Principle of implied repeal held not attracted.

The general provision enumerated in S. 226 of Income-tax Act does not abrogate special provisions of S. 17 of W. B. Premises Tenancy Act, which is a complete scheme by itself. (Para 10)

If there is an apparent conflict between the two independent provisions of law, one special and one general, the special provision must prevail. S. 226 of the Income-tax Act is a general provision applicable to all assesseees and in all circumstances enumerated therein but S. 17 of W. B. Premises Tenancy Act is a special provision which deals with particular classes of tenants, who had made defaults and against whom proceedings for eviction have been initiated. It is also settled law that if there is any inconsistency in the provisions of a general law and a local law, the provisions of local law shall prevail and the general statute must yield to the provisions of the special Act applicable to a particular locality. AIR 1965 SC 1909, Rel. on. (Paras 9, 10)

Cases Referred: Chronological Paras
(1975) 79 Cal WN 88 3, 4, 11
(1973) Suit No. 319 of 1973, D/- 8-11-1973 (Cal) 4

AIR 1973 Cal 123 = 76 Cal WN 435 12

AIR 1972 Cal 56 8

AIR 1965 SC 440 = (1964) 6 SCR 181 11

AIR 1965 SC 1909 = (1966) 1 SCR 34 8, 10

AIR 1964 Cal 105 = 68 Cal WN 30 (SB) 9

Tibrewal, M. P. Chowdhury and P. L. Khaitan, for Petitioner; Saktinath Mukherji, for Respondent.

S. K. BHATTACHARYA, J:— This Rule was obtained by the tenant defendant under Section 115 of the Code of Civil Procedure against an order passed by the Chief Judge, City Civil Court, Calcutta, striking out the defence of the defendant against delivery of possession under Section 17 (3) of the West Bengal Premises Tenancy Act, 1956 (to be herein-

after referred to as 'the Act') in a suit for eviction filed by the plaintiff opposite party.

2. The suit was instituted on July 16, 1973 on the allegation that the petitioner had failed and neglected to pay rent since June, 1970. The writ of summons was served in the suit upon the petitioner on June 3, 1974 and on July 17, 1974, the petitioner filed an application under Section 17 (2) of the Act. The said application was dismissed by the Court on September 4, 1974 and exactly a month thereafter the opposite party filed an application under Section 17 (3) of the Act, out of which the present Rule arises.

3. Before the learned Chief Judge, the petitioner company contended that they were not defaulters inasmuch as they had discharged their liability in so far as the opposite party's claim is concerned, pursuant to a notice issued by the income-tax authorities under Section 226 (3) of the Income-tax Act, 1961. The learned Chief Judge on a consideration of the materials placed before him came to the conclusion that the petitioners were defaulters inasmuch as they had not deposited the statutory interest due to the landlord in accordance with the provision of the Act with the income-tax authorities and the petitioners were also defaulters at least in respect of the months of June and July, 1970. The learned Chief Judge, further, held that the current rents have not also been deposited by the defendant and in view of the decision reported in the case of Hanuman Estates Pvt. Ltd. v. Dhanuka Industries Pvt. Ltd. ((1975) 79 Cal WN 88) came to the conclusion that the defendant did not comply with the requirement of Section 17 (1) or (2) of the Act and accordingly allowed the opposite party's application and struck out the defence of the petitioner. It is against this order the petitioner moved this Court and obtained this Rule.

4. Mr. Tibrewal the learned counsel appearing for the petitioner has canvassed two points. In the first place, it has been contended that the tenant defendant having been served with a notice under Section 226 (3) of the Income-tax Act, 1961 and having paid whatever arrear rent was due from him on account of the assessee plaintiff, would be deemed to have completely discharged his obligations and his client is thus relieved of making any further payment to his landlord within the meaning of Section 17 (1) or (2) of the Act. In the next place, Mr. Tibrewal contended that even before his

client was served with the writ of summons, a learned single Judge of this Court in the case of Hanuman Estates Pvt. Ltd. v. Dhanuka Industries Pvt. Ltd. being Suit No. 319 of 1973 of the original side of this Court, held on 8-11-1973, that such payment to the Income-tax authorities would relieve the tenant of his liability to pay any rent under Section 17 (1) or (2) of the Act and accordingly he cannot any longer be regarded as a defaulter. The said decision was, however, reversed in appeal on September 23, 1974 (appellate decision reported in ((1975) 79 Cal. WN 88) wherein the learned Judges have held that the notice served by the Income-tax Department under Section 226 (3) of the Income-tax Act did not have the effect of overriding the provisions of Section 17 (1) of the Act. Mr. Tibrewal further contended that during the interregnum the law was as laid down by the learned single Judge of this Court on November 8, 1973 and accordingly he was protected, when he made this payment to the Income-tax Authorities and nothing remains payable to the landlord within the meaning of Section 17 (1) or (2) of the Act. During this period the tenant appears to have paid up arrear rents upto the period of September 1974.

5. Mr. Sakti Nath Mukherjee the learned Advocate appearing for the plaintiff opposite party conceded that if the tenant pays the entire amount, that had become due as a result of his default, to the income-tax authorities within the period specified in Section 17 (1) of the West Bengal Premises Tenancy Act, then it would operate as a complete discharge of his liability to the landlord and nothing would be payable to the landlord within the meaning of Section 17 (1) or (2) of the Act. Mr. Mukherjee however contended that even assuming that the decision rendered by the learned single Judge on November 8, 1973 afforded protection to the petitioner, no such protection would be available after the decision was reversed on September 23, 1974.

6. In order to examine the respective contentions of the parties, it is necessary to set out a few further facts. On August 28, 1970 the petitioner was served with a prohibitory notice under Section 226 (3) of the Income-tax Act which inter alia recites that a sum of Rs. 8,24,370 is due from the plaintiff opposite party on account of income-tax and the petitioner was required to forthwith pay any amount due from him to the plaintiff or held by him on plaintiff's account and it was fur-

ther stated in the said notice that whatever payment was made by him in compliance with the notice will, in law, constitute a good and valid discharge of the petitioner's liability to the person assessed to the extent of the amount paid. The said notice has been marked annexure 'A' to the petition. Pursuant to this notice, the petitioner is alleged to have paid half the rent for the months of August and September, 1970 to the credit of the Income-tax Department on November 6, 1970 and thereafter he continued to pay half rent to the Income-tax Department from time to time up to June 4, 1974, on which date half month's rent upto May, 1974 was paid to the credit of the Income-tax Department aggregating a total sum of Rs. 16,502-50 P. The other half of the rent for period from June, 1970 to May 1974 amounting to Rs. 17,220 was deposited under a challan on August 8, 1974. Thereafter, the petitioner paid the rent for the full month from June, 1974 to March, 1975 in 8 instalments on different dates, in all aggregating a sum of Rupees 41,615. Besides, a sum of Rs. 717-50 P. towards half the rent for the months of June and July, 1970 was paid or deposited with the United Bank of India respectively on July 23, and September 1, 1970 on the authority of a letter stated to have been received by the petitioner on August 8, 1971. Against the background of these payments, Mr. Mukherjee requested us to examine if these payments could be regarded as valid deposits or payments within the meaning of Section 17 (1) of the Act, at any rate, after expiry of one month from the date of service of the writ of summons on the defendant on June 3, 1974.

7. Before we discuss the first contention of Mr. Tibrewal that the provisions of Section 226 (3) of the Income-tax Act, 1961 override the provisions of the special law enacted in Section 17 of the West Bengal Premises Tenancy Act, we propose to scrutinise the deposits or payment made by the petitioner with the income-tax authorities. It would appear that all the payments made by the petitioner are enumerated in a chart annexed to the petition, which has been marked Annexure 'C' to the application. Mr. Mukherjee did not dispute the correctness of these deposits and accepting the chart as it is, he contended that the payments for the months of June 1974, September to November, 1974 and January, 1975 were all made beyond time and in contravention of the provisions of Section 17 (1) of

the Act. As for the payments made prior to the service of the writ of summons by the petitioner, Mr. Mukherjee argued that all these deposits were invalid deposits as these consist of half month's rent and the balance sum of Rs. 17,220 was not paid within one month from the date of service of the writ of summons on the tenant defendant viz. by July 3, 1974. None of these deposits, according to Mr. Mukherjee, could therefore be regarded as payment to the landlord within the meaning of Section 17 (1) of the Act.

8. We have carefully gone through the table annexed to the revisional application (Annexure 'C') and there is little doubt that had these deposits as enumerated therein, been made either with the Rent Controller or with the Court, they could not be regarded as valid deposits within the meaning of Section 17 (1) of the Act. Undoubtedly, half month's rent upto May 1974 had been in deposit at the date of service of the writ of summons and the remaining half month's rents from June 1970 to May 1974 were deposited in a lump on August 8, 1974 that is beyond the period of one month from the date of service of writ of summons. This apart, no interest as Mr. Mukherjee contends, has been paid to the credit of the income-tax authorities in accordance with the requirement of Section 17 (1) of the Act. Besides, the rent for the month of June, 1974 and September to November, 1974 as also January 1975 could not be regarded as valid deposits or payments within the meaning of Section 17 (1) of the Act. That is, these amounts were not deposited or paid by the 15th of each succeeding month. Mr. Mukherjee accordingly urges that these payments, even if they operate as valid discharge within the meaning of Section 226 (3) of the Income-tax Act, could not be regarded as payment to the landlord within the meaning of Section 17 (1) of the Act. Relying on the Supreme Court decision in the case of *Kaluram v. Baidyanath*, (AIR 1965 SC 1909), Mr. Tibrewal contends on a parity of reasoning that payment with the Income-tax Officer made by the tenant under a statutory obligation imposed on him would, in law, be treated as payment of rent made by him to the landlord. *Kaluram's* case came to be decided by the Supreme Court before the 1965 amendment to Section 17 (1) of the Act, as introduced by the West Bengal Premises Tenancy (Amendment) Act (Act 24 of 1965) and the point for consideration before the Supreme Court was whether a deposit of rent made by a tenant with the

Rent Controller under Section 21 of the Act after the writ of summons was served on him, could be set up as a valid deposit in an application under Section 17 (3) of the Act. The Supreme Court negatived the contention and following the Supreme Court decision, the section was amended so as to include the deposit with the Controller as a valid deposit. According to Mr. Tibrewal, the expression 'pay to the landlord' in Section 17 (1) of the Act would mean actual delivery or parting with money physically and for the purpose relied upon the decision in the case of *Rajputana Trading Co. Pvt. Ltd. v. Tswarsingh Kripalsingh* (AIR 1972 Cal 56). Stretching the meaning of the expression a little further, Mr. Tibrewal contends that where the tenant is statutorily obliged to part with his money physically because of landlord's default, it would amount to payment to the landlord within the meaning of Section 17 (1) of the Act. That position has been accepted by Mr. Mukherjee subject to this that the payment in order to be valid must comply with the requirements of Section 17 (1) of the Act.

9. An obligation to pay an amount equivalent to rent or to deposit the same in accordance with the provisions of Section 17 (1) of the Act, in our view, is a statutory obligation, which cannot be regarded as having been superseded or taken away by the introduction of Section 226 (3) of the Income-tax Act, 1961. These two Acts operate in different fields and there is no apparent conflict or inconsistency in the provisions contained in Section 17 of the West Bengal Premises Tenancy Act and those contained in Section 226 (3) of the Income-tax Act. Consequently, the principle of implied repeal cannot be called in aid for the purpose of Art. 254 (2) of the Constitution nor can it be said to be a case of direct conflict between the provisions of the two statutes. Moreover, if there is an apparent conflict between the two independent provisions of law, one special and one general, the special provision must prevail. Section 226 of the Income-tax Act is a general provision applicable to all assesseees and in all circumstances enumerated therein but Section 17 of the West Bengal Premises Tenancy Act deals with particular classes of tenants, who had made defaults and against whom proceedings for eviction have been initiated. It is also settled law that if there is any inconsistency in the provisions of a general law and a local law, the provisions of local

law shall prevail and the general statute must yield to the provisions of the special Act applicable to a particular locality. Mr. Tibrewal however contended that Section 226 of the Income-tax Act is a special provision and in a case of a conflict between two special Acts, each of which may be described as special in some particular sense, the court would lean against repeal of the earlier Act by implication and in support relied upon an observation of Mr. Jagdish Swarup in his *Legislation and Interpretation* at page 311, Art. 11.6, 2nd Edition, 1974. We have already pointed out that the provision of Section 226 of the Income-tax Act is not a special provision and the same is applicable to all assesseees and in all circumstances mentioned in the said section. Consequently, this rule enunciated by Mr. Swarup in his book does not assist Mr. Tibrewal. Moreover, in construing the Rent Acts, Sinha J., (as he then was) in his judgment in the Special Bench case of *Siddheswar v. Prakash Chandra* (AIR 1964 Cal 105 at page 111) observed that one must not give too literal an interpretation and it was necessary to give a commonsense rendering of the provisions, such as is likely to achieve the objects with which the Act was framed and not defeat them. In these circumstances, Section 17 must be regarded as a special provision applicable only to particular classes of tenants where there is a suit for eviction on grounds enumerated in Section 13 (1) of the Act and a tenant who fails to comply with the requirement of Section 17 would lose the available right in that his defence against delivery of possession is liable to be struck out. The general provision enumerated in Section 226 of the Income-tax Act does not in any way abrogate the special provisions of Section 17 of the West Bengal Premises Tenancy Act, Art. 254 of the Constitution cannot, therefore, assist the petitioner in the instant case in any way.

10. Section 226 (1) of the Income-tax Act, no doubt begins with a non-obstante clause but that non-obstante clause relates only to the issue of a certificate to the Tax Recovery Officer under Sec. 222 of the said Act. On the contrary, Section 17 has been interpreted by the Supreme Court in the case of *Kaluram v. Baidyanath* (AIR 1965 SC 1909) (*supra*) as a complete scheme by itself and the Legislature by its introduction intended that the payment of rent by the tenant to the landlord must be made in the manner prescribed by Section 17 (1) of the Act, in

any suit or proceedings to which the said provisions apply.

11. Mr. Tibrewal also relied upon the Supreme Court decision in the case of *V. N. Vasudeva v. Kiroi Mal* (AIR 1965 SC 440) and contended that the notice under Section 226 (3) of the Income-tax Act amounted to a garnishee order and the petitioner could not so long as the notice stood make any payment whatsoever to the landlord. The said decision, in our view, does not assist Mr. Tibrewal at all. In that case before the Supreme Court the tenant was no doubt served with a notice under Section 46 (5A) of the Income-tax Act, 1922 (now Section 226 (3)) directing him to deposit all sums by way of rent as also future rents and this notice was utilised by the tenant to withhold payment to everyone viz. landlord, Income-tax Officer, the Receiver appointed by the Court and others. Such a contention were also advanced before the Supreme Court and it was repelled. The decision impliedly holds that the provisions of Section 15 (1) of Delhi Rent Control Act was not in any way superseded or abrogated by Section 46 (5A) of the Income-tax Act, 1922. It is true that the tenant in that case did not make any payment or deposit with the Income-tax Officer as was done by the petitioner in the instant case. But, as already pointed out, these deposits were not in accordance with the provisions of Section 17 of the Act. The Division Bench decision in the case of *Hanuman Estates Pvt. Ltd. v. Dhanuka Industries Pvt. Ltd.* ((1975) 79 Cal WN 88) in our view rightly points out that the notice under Section 226 (3) of the Income-tax Act at the most prohibited the petitioner from making any payment to the opposite party but it did not or could not have the effect overriding the provisions of Section 17 (1) or (2) of the Act, with the result that the tenant, in order to avail of the protection of Section 13, must show that the payment to the Income-tax authorities were strictly in accordance with the provisions of Section 17 (1) or (2) of the West Bengal Premises Tenancy Act. In this, the petitioner has failed.

12. Mr. Tibrewal, as a last resort, contended that the court had inherent power to do justice by extending the period in making the deposits and for the purpose relied upon the decision in the case of *Sitala Devi v. Man Bahadur*, 76 Cal WN 435 = (AIR 1973 Cal 123) where it was held that under Section 151 of the

Code of Civil Procedure the Court had inherent power in an appropriate case to extend time even in respect of deposit in proceeding under Section 17 of the West Bengal Premises Tenancy Act. On the facts of the case, however, the Court held that the delay could not be condoned and the order for striking out the defence against delivery of possession was allowed to stand. The circumstances referred to in that decision as would justify condonation of the delay were exceptional cases, which did not fall to be decided in the instant case.

13. In the circumstances discussed above, the instant application must fail and the Rule is accordingly discharged without any order as to costs.

JANAH, J.:— I agree.

The learned Advocate for the petitioner states that he has been instructed to file an application for leave to appeal to the Supreme Court and accordingly prays for stay of the operation of this order. Pending filing of such an application let the operation of this order be stayed for a period of three weeks from this date.

Application dismissed.

AIR 1976 CALCUTTA 333

ANIL KUMAR SEN AND AMBICA
PADA BHATTACHARYA, JJ.

Shri Krishna Investment and others,
Appellants v. Union of India and others,
Respondents.

A. F. O. O. Nos. 756 and 758 of 1973.
D/- 11-9-1975.*

(A) Public Premises (Eviction of Unauthorised Occupants) Act (1971), S. 5 — Power of Estate Officer to pass eviction order — Power is not arbitrary — Abuse of power vested by statute does not render the source of power tainted — (Constitution of India, Art. 14).

The Act itself has laid down sufficient guidelines for exercise of power under the Act and also provides reasonable opportunities for the parties to be affected to make representations and showing cause as to why such an order for eviction should or should not be made against them. The power or the discretion vested in the Estate Officer is not arbitrary. But

*(Against order of Chittatosh Mookerjee J. in C. R. No. 4627 (W) of 1970 D/- 31-7-1973.)

no statute can be struck down only on the ground that powers thereunder when abused would result in discrimination. An abuse of powers vested by a statute does not render the source of the power tainted, it only renders such act of abuse liable to be struck down.

Sec. 5 no doubt uses the word 'may' in authorising the Estate Officer to make an order of eviction as such words are always used in all enabling provisions. That section contemplates an adjudication prior to the making of the order and furnishing of a reasonable opportunity of being heard to the party proceeded against. Such adjudication, may in some cases make out reasonable grounds for not making an order of eviction. Therefore on the scheme of things, the statute cannot but only make an enabling provision, leaving exercise of such powers to the discretion of the Estate Officer to be exercised only on the guidelines prescribed by the statute. AIR 1972 SC 2205, Applied. (Para 6)

Cases Referred: Chronological Paras
AIR 1972 SC 2205 = (1973) 1 SCR 515

3, 5
AIR 1968 Cal 560 = 72 Cal WN 787 2, 5
AIR 1967 SC 1581 = (1967) 3 SCR 399

2, 5
Prasanta Kumar Ghosh and Ratindra
Mohan Roy Choudhury, for Appellants;
R. N. Das and Sib Kumar Majumdar, for
Respondents.

ANIL K. SEN, J.:— These two appeals under Clause 15 of the Letters Patent are at the instance of the two petitioners in two Rules. Those were the two Rules obtained on two writ petitions. As the Rules raised a common question as to constitutional validity of the material provisions of the Public Premises (Eviction of Unauthorised Occupants) Act 1971, they were heard together and were disposed of by a common judgment dated July 31, 1973 by a learned single Judge of this Court. Those Rules were discharged and the writ petitions were dismissed by the learned single Judge and feeling aggrieved by the said decision and the orders dismissing the respective writ petitions, the petitioners have preferred these two appeals.

2. The subject matters of challenge in those writ petitions were the two notices respectively dated 4th July, 1970 (in the case of Sri Krishna Investment & another) and 25th June, 1970 (in the case of Manton & Company Limited and another), both issued by the Estate Officer under Section 4 (1) of the Public Premises (Eviction of Unauthorised Occupants)

Act, 1958 as amended by Act 40 of 1963 and Act 32 of 1968. The Estate Officer being of opinion on grounds set out in the notices that the petitioners were in unauthorised occupation of the respective Public Premises specified in the respective notices, called upon the petitioners to show cause why an order of eviction in respect of each of the petitioners should not be made. Before there could be any adjudication by the Estate Officer, the petitioners moved this Court with the aforesaid writ petitions challenging the validity of the initiation of the proceedings on the ground that material provisions of the Act are ultra vires the constitution being violative of Article 14 thereof. Inspiration for such a contention was obviously derived from the Special Bench decision of this Court in the case of *Rajendra Prasad Singh v. Union of India*, 72 Cal WN 787 = (AIR 1968 Cal 560) based as the same was on the decision of the Supreme Court in the case of *Northern India Caterers Ltd. v. State of Punjab*, AIR 1967 SC 1581.

3. Pending the Rules in this Court, the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 was repealed and re-enacted in Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as the said Act) and on the provisions of Section 20 thereof the impugned notices are to be deemed to have been issued under Section 4 of the said Act. The material provisions of the said Act were also retrospective having effect from September 16, 1958 (when the earlier Act had come into effect). In the case of *Hari Singh v. Military Estate Officer, Delhi*, AIR 1972 SC 2205 the Supreme Court having upheld the constitutional validity of the said Act, the learned single Judge hearing the above Rules overruled the solitary ground of challenge of the impugned notices in the writ petitions and dismissed those writ petitions.

4. In these appeals the petitioner-appellants have raised the same point which had unsuccessfully been raised before the learned single Judge hearing the writ petitions. According to them Section 5 of the said Act is violative of Article 14 of the Constitution and as such void.

5. Mr. Ghosh, learned Advocate appearing in support of these appeals has contended that the said provision may not be violative of Art. 14 of the Constitution on grounds such as those in the case of *Northern India Caterers* (AIR 1967 SC 1581) (*supra*) or *Rajendra Prasad Singh v.*

Union of India, 72 Cal WN 787 = (AIR 1968 Cal 560), but it is so because when Sec. 5 provides that the Estate Officer may make an order for eviction, the Estate Officer may or may not make an order or make an order against one but not against the other and as such the provision is highly discriminatory. Apart from the fact that there is a fundamental fallacy in this argument of Mr. Ghosh, we are of the opinion that the learned trial Judge is right in his conclusion that such a point is no longer *res integra* in view of the Supreme Court decision in the case of *Hari Singh v. Military Estate Officer, Delhi* (AIR 1972 SC 2205). According to Mr. Ghosh the ground on which he contends the provision to be ultra vires was not raised before or considered by the Supreme Court in the case of *Hari Singh* and as such that decision cannot conclude the points sought to be raised by him. We are, however, unable to accept such a contention. The Supreme Court held the material provisions of the Act to be intra vires Article 14 of the Constitution and it is not permissible for Mr. Ghosh to contend or suggest that though the provision is ultra vires for reasons suggested by him, the Supreme Court overlooked the said aspect in declaring the provision to be intra vires. In this view we uphold the view taken by the learned trial Judge that the point sought to be raised is concluded by the decision of the Supreme Court in the case of *Hari Singh v. Military Estate Officer, Delhi*.

6. That apart, as indicated hereinbefore there is a fundamental fallacy in this contention of Mr. Ghosh. We are in agreement with the learned trial Judge that the Act itself has laid down sufficient guideline for exercise of power under the Act and also provides reasonable opportunities for the parties to be affected to make representations and showing cause as to why such an order for eviction should or should not be made against them. The power or the discretion vested in the Estate Officer is not arbitrary. If the Estate Officer exercises his power or discretion in an arbitrary or discriminatory manner such exercise of power or discretion would not be *bona fide*. But no statute can be struck down only on the ground that powers thereunder when abused would result in discrimination. We must always proceed on the footing that the powers conferred by a statute would be used and not abused. An abuse of powers vested by a statute does not render the source of the power tainted, it only

renders such act of abuse liable to be struck down. Section 5 no doubt uses the word 'may' in authorising the Estate Officer to make an order of eviction as such words are always used in all enabling provisions. That section contemplates an adjudication prior to the making of the order and furnishing of a reasonable opportunity of being heard to the party proceeded against. Such adjudication, in our opinion, may in some cases make out reasonable grounds for not making an order of eviction. Therefore on the scheme of things, the statute cannot but only make an enabling provision, as it is made, leaving exercise of such powers to the discretion of the Estate Officer to be exercised only on the guidelines prescribed by the statute. That is explicit when the provision itself lays down that the Estate Officer is to record his reasons and the orders so made are subject to appeals under Section 9 thereof. It is however incorrect to think—as suggested by Mr. Ghosh — that such a provision authorises any abuse or discriminatory use of the powers thereunder. We therefore find no merit in the only point raised by Mr. Ghosh in these appeals.

7. Incidentally Mr. Ghosh raised a preliminary objection to the hearing of these appeals. Relying on the Presidential proclamation dated June 27, 1975 under Article 359 (1) of the Constitution, Mr. Ghosh contended that the present appeals being pending proceedings for enforcement of the appellants' fundamental rights under Article 14, such appeals are liable to be suspended during the period the proclamation remains in force. We do not think such a plea is really bona fide. Having obtained stay of further proceedings of the eviction proceedings under the Act under interim orders obtained in these appeals, it would certainly be to their interest for the appellants to delay hearing of these appeals. The objection so raised by Mr. Ghosh is but an endeavour in this respect to delay the hearing of these appeals. But what the proclamation had suspended is any proceedings for enforcement of fundamental rights under Article 14 but when on our findings made hereinbefore no such right of the appellants had at all been infringed, the proceedings now before us cannot be said to be proceedings for enforcement of such rights which are liable to be suspended on the Presidential Proclamation relied on by Mr. Ghosh.

8. Thus all the points raised in these appeals fail and are overruled. On

the conclusion as above these appeals fail and are dismissed with costs. Hearing fee is assessed at 5 G. Ms.

A. P. BHATTACHARYA, J.:— I agree.

Appeals dismissed.

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N. C. MUKHERJI AND B. C. RAY, JJ.

New Bangasree Bastralaya and another, Petitioners v. Ramanlal Phurma Karta, Opposite Party.

Civil Rule No. 2159 of 1974, D/- 6-5-1976.

(A) Civil P. C. (1908), S. 148 — Extension after the expiry of period originally fixed.

Suit under O. 37 for recovery of Rs. 11,800 — On application by defendant for leave to defend suit, defendant directed to furnish security for Rs. 8,000 — Defendant preferred revision — At the time of issuance of rule, defendant directed to furnish security for Rs. 2,500 — Order was complied — At the time of final hearing defendant agreed to furnish security for the balance of Rs. 5,500 within certain time — Order passed accordingly — This order was not complied — After expiry of time, defendant applied for extension of time — Defendant ready and willing to comply with order — Application for extension of time must be allowed — AIR 1961 SC 882, Relied on. Case law discussed. (Para 8)

Cases Referred: Chronological Paras

AIR 1971 Cal 243	4
(1967) 71 Cal WN 12	3
AIR 1965 Cal 354	4
(1964) F. A. No. 151 of 1964 (Cal)	7
AIR 1961 SC 882 = (1961) 3 SCR 763	3, 4, 7, 8
(1949) 53 Cal WN 192	2

Jamini Kumar Banerjee and Tapas Kumar Mukherjee, for Petitioners; G. C. Tandon, Biswajit Ghosh and Mrs. Gita Lalwani, for Opposite Party.

N. C. MUKHERJI, J.:— This is an application for extension of time to furnish security of Rs. 5,500 in the trial Court in modification of the order passed by this Court on 13th of August 1975. The facts of the case may briefly be stated as follows:—

The opposite party filed a suit in the City Civil Court at Calcutta for recovery
ET/FT/B648/76/SSG

of a sum of Rs. 11,800.00 under Order XXXVII of the Code of Civil Procedure. The petitioners after entering appearance filed an application praying for unconditional leave to defend the suit. The petitioners were allowed to contest the suit only on furnishing security to the extent of Rs. 8,000. It was further ordered that in default of furnishing security the application would stand rejected. Being aggrieved by the aforesaid order, the petitioners moved an application under Section 115 of the Code. On the said application a Rule was issued being Civil Rule No. 2159 of 1974. When the Rule was issued the petitioners were directed to furnish security to the extent of Rs. 2,500. That order was complied with. The Rule came up for final disposal on August 13, 1975. On that date the petitioners agreed to furnish security for the balance sum of Rs. 5,500 within two weeks after the Puja Vacation. It was ordered that on furnishing the said security and the same being accepted leave would be granted to the petitioners to contest the suit. In default the application for leave would stand rejected. The said order could not be complied with for the reasons stated in the present application. It has been stated in paragraph 13 of the application that in spite of their best efforts the petitioners could not furnish security and that they have now been able to make necessary arrangements for furnishing security to the extent of Rs. 5,500.

2. Mr. Biswajit Ghosh, learned Advocate appearing on behalf of the opposite party strongly contends that this application is not maintainable because by order dated August 13, 1975 the Rule was disposed of and that being so, this Court has now become functus officio and cannot pass any order in modification of the order passed on August 13, 1975. In support of his contention Mr. Ghosh refers to a decision reported in (1949) 53 Cal WN 192 (Pulin Krishna Roy v. Sushil Kumar Dey). In this case it was held by Chatterjee, J. that

"Where in an application for leave to defend under Order 37 of the Code of Civil Procedure leave was granted upon furnishing security within a specified time and it was provided that in default the application should stand dismissed with costs (sic)," it was also held that "in default the action was dead and no further extension of time was possible."

In rejecting the application for extension of time for furnishing security the learned Judge observed

"The difficulty I feel is that in a suit under Order 37 an application for leave to defend must be made within 10 days of the service of the writ of summons and the Court has no power to extend this period."

But it may be mentioned that in this very case leave was granted to the defendants to defend the suit on condition that security to be furnished within a fortnight to the satisfaction of the Registrar. The application for leave to defend was filed within 10 days of the service of the writ of summons.

3. Mr. S. P. Ray Chowdhury, learned Advocate appearing on behalf of the petitioners, first refers to a decision reported in (1967) 71 Cal WN 12 (Brojomohan Sabui v. Binapani Sur). It has been held in this case that

"Where direction for payment is made in a procedural order the Court is not functus officio to extend the time if payment is made after the expiry of the time originally fixed."

It was however held that

"Where time is fixed by the decree the Court has no jurisdiction to extend the time after expiry of the period fixed by the decree."

In coming to the decision the learned Judge relied on the decision reported in AIR 1961 SC 882 (Ram Das v. Ganga Das)

4. Mr. Ray Chowdhury next refers to a decision reported in AIR 1971 Cal 243 (Sm. Lakshmi Bala Chanak v. Brojendra Nath Pain). In this case it has been held that

"A Court has power to extend time under Section 148 even after the time fixed by decree or order has expired".

In view of the decision reported in AIR 1961 SC 882 the learned Judge held that AIR 1965 Cal 354 was not good law.

5. We thus find that in both the cases the learned Judge relied on the Supreme Court decision referred to above. In the Supreme Court case an appeal was decided in favour of the appellant but a peremptory order was passed fixing the period for payment of deficit court-fee and the appellant made an application for extension of time before the time fixed had run out, but the application came on for hearing before a Division Bench after the period had run out. It was held by the Supreme Court that

"the High Court was not powerless to enlarge the time even though it had

dorsed has sufficient interest to maintain a suit against the railway administration for compensation for loss of goods and there is nothing in the decision in *Shamji Bhanji v. North Western Railway*, AIR 1947 Bom 169, which is inconsistent with the earlier decision in *Dolatram's case* (AIR 1914 Bom 178). This is the view of Shah J., which he expressed in another case decided by him sitting with Vyas, J., (*Union of India v. Teherali*, (1956) 58 Bom LR 650). Shah, J., there approvingly referred to the East Punjab decision in *Jalan & Sons v. Governor-General in Council*, AIR 1949 East Punj 190 which was a case of an endorsee. The plaintiff firm in the present case stands on a much higher footing. They are the named consignee having an interest in the goods.

23. There is a Full Bench decision of the Allahabad High Court (*Dominion of India v. Gaya Pershad*, AIR 1956 All 338) (FB) which though ordinarily should have been entitled to great respect has been the subject of adverse criticism and disapproval in subsequent decisions. There it was held that a consignee, who is not the owner of the goods, but to whom the goods are consigned for the purpose of sale on commission basis is entitled to maintain a suit for loss in respect of damage caused to the goods in transit.

24. In *Commissioners for the Port of Calcutta v. General Trading Corporation*, AIR 1964 Cal 290, A. K. Mukherjea, J., speaking of the Full Bench of Allahabad observed that "the whole decision is full of observations and arguments which cannot be supported either by precedent or authority or on general principles". (P. 315). In *Union of India v. Dayabhai*, AIR 1962 Guj 266, Raju, J., differed from the Full Bench. Miabhoy and Mehta, JJ., in *Ibrahim v. Union of India*, AIR 1966 Guj 6 refused to follow the Allahabad Full Bench.

25. Indian Law like the English Law does not recognise a contract made for the benefit of a third party, so that if A makes a contract with B for the benefit of C, only A and B are the parties to the contract and C acquires no rights under it even though it was made for his benefit. The learned Judges of Allahabad High Court have on the other hand held that "in India not only can parties to a contract sue upon it but also who are entitled to a benefit under it or to whom the rights created by it are transferred". This certainly does not seem to be correct.

26. One other decision of importance remains to be noticed. In *Mulji*

Deoji v. Union of India, AIR 1957 Nag 31 one of the questions raised was whether the plaintiff as a bare endorsee of the railway receipt could maintain an action for damages against the railway. On a difference of opinion between Kaushalendra Rao, J. and Hidayatullah, C. J., the matter was referred to the third Judge, viz., Tambe, J. Tambe J., agreed with Hidayatullah, C. J. In *Commissioners for the Port of Calcutta v. General Trading Corporation*, AIR 1964 Cal 290 (316 to 318), A. K. Mukherjea, J., disagreed with the majority judgment of Hidayatullah, C. J. and Tambe, J. The other Judge Bachawat, J., in the Calcutta case also disagreed with the view taken in Nagpur decision that benefit under the contract of carriage passes to the endorsee of the railway receipt by reason of endorsement (p. 321). This decision need not detain me as I am not concerned in this case with an endorsee. I am concerned with the consignee. But one thing seems certain. The endorsee of a railway receipt for valuable consideration, as pledgee or assignee can sue the railway for loss or damage to the goods: See *Morvi Mercantile Bank v. Union of India*, AIR 1965 SC 1954.

The railway receipt is a document of title to goods. (See Section 2 (4), Sale of Goods Act). An endorsee has sufficient interest in the goods covered by it to maintain an action for their loss. Sixty years ago the Privy Council held this in *Ramdas Vithaldas v. Amar Chand and Co.*, AIR 1916 PC 7.

27. The rule (condition No. 3) framed for the railways and printed on the back of the railway receipt under the heading "notice to consignors" contemplates delivery to the consignee. It provides:

"That the railway receipt given by the railway company for the articles delivered for conveyance, must be given up at destination by the consignee to the railway company, otherwise the railway may refuse to deliver and that signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery.

If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced, the delivery of the goods may, at the discretion of the railway company, be withheld until the person entitled in its opinion to receive

them has given an indemnity to the satisfaction of the railway company."

28. It is said that the consignee is not a party to the contract and, therefore, cannot sue. As Dr. John Morris in Chitty on Contracts (23rd Ed.) page 269 says:

"The difficulty that he (the consignee) does not appear to be a party to the contract of carriage was eventually met by deeming the consignor to contract with the carrier as agent for the consignee."

29. This was settled in England by the House of Lords as long ago as 1874. (See *Cork Distilleries Co. v. G. S. & W. Rly.*, (1874) 7 HL 269). This being so there is no difficulty for the consignee to maintain a suit in his own name. It must be remembered that living law is to be found not so much in the pages of the law reports as in the contractual terms by which carriers define the conditions on which they are prepared to carry goods, passenger and luggage. Any account of the modern law which ignored these contractual terms, many of which have become standard forms of contract, would give a most misleading impression.

30. Paradoxical though it may seem it is true that the consignee in the instant case is the agent of the principal at Savda (the consignor). The principal himself (the consignor) will be deemed to have acted as the agent of the consignee at the time of making the contract with the carrier. For the purposes of the Contract Act and the Sale of Goods Act the consignee is the agent in this case. For the purposes of the Indian Railways Act the consignee is the principal for whom the consignor will be deemed to have acted as agent at the time of booking the goods with the railway. The consignee can, therefore, enforce the contract against the railway.

31. At least this much must be conceded to the learned Judges of the Allahabad Full Bench that they did take into consideration this important aspect of the contractual terms. On the whole it seems to me that their conclusion on the locus standi of commission agent to sue is right though one may find it difficult to agree with all their reasoning.

32. That the right of a commission agent to sue was upheld as early as 1914 in the Bombay case, *Firm of Dolatram Dwarkadas v. B. B. and C. I. Rly. Co.*, ILR 38 Bom. 659 = (AIR 1914 Bom 178). This decision was followed by a strong bench of the Punjab High Court

in *Jalan and Sons v. Governor General in Council*, AIR 1949 East Punj 190. (Mahajan and Teja Singh JJ). The judges in the Punjab case disapproved the judgment of Bhagwati, J., in *Shamji Bhanji v. North Western Rly.*, AIR 1947 Bom 169. It is somewhat curious that the bench decision of his own Court was not brought to the notice of Bhagwati, J., and was not even referred to in the judgment.

33. *Firm of Dolatram Dwarkadas v. B. B. & C. I.*, ILR 38 Bom 659 = (AIR 1914 Bom 178) was also followed by Shah, J., in the bench decision of *Union of India v. Taherali*, (1956) 58 Bom LR 650. In that case *Jalan & Sons v. Governor General in Council*, AIR 1949 East Punj 190 was also approvingly referred.

34. It is true that both these decisions — *Firms of Dolatram Dwarkadas* (AIR 1914 Bom 178) as well as *Jalan & Sons*, (AIR 1949 EP 190) (supra) — were adversely criticised by A. K. Mukherjea, J., in his exhaustive survey of decided cases in the *Commissioners for the Port of Calcutta v. General Trading Corporation*, AIR 1964 Cal 290. But it seems to me that criticism is not well founded. Too much has been dismissed too lightly.

For the case of *Dolatram Dwarkadas* (supra) the learned Judge ought to have referred to the complete report of the case in ILR 38 Bom 659 = (AIR 1914 Bom 178) where fuller facts are given instead of the equivalent in AIR 1914 Bom 178 to which he refers where only the judgment has been reproduced. *Dolatram Dwarkadas* is itself based on another bench decision of that court: *Amar Chand & Co. v. Ramdas Vithaldas*, ILR 38 Bom 255 = (AIR 1914 Bom 290) which was affirmed on appeal by the Privy Council.

In *Jalan & Sons* an endorsee was held entitled to maintain the suit. The right of an endorsee for valuable consideration to sue has now been recognised by the Supreme Court in *Morvi Mercantile Bank v. Union of India*, AIR 1965 SC 1954.

In this court a division bench followed *Jalan & Sons* case in *Union of India v. Ghamandi Lal Narsh Chaud Jain*, (RFA 18-D of 1958) decided on 1-3-1967 (Delhi). In the Circuit Bench of the Punjab High Court at Delhi *Jalan's* case as well as *Dominion of India v. Gaya Pershad*, (AIR 1956 All 338) (FB) (supra), were followed by a Division Bench. (See *Latto Mal Nanu Ram v. Union of India*, RFA 106-D/54 decided on December 31, 1963) (Punj).

After traversing this weary path in a welter of conflicting decisions where do we stand? Is there a sign post or a landmark to guide our steps? In *Morvi Mercantile Bank v. Union of India*, (AIR 1965 SC 1954 (1960)) the Supreme Court noticed the conflict of opinion in Indian decisions but did not resolve the difference. Now in *Union of India v. W. P. Factories*, AIR 1966 SC 395, the Supreme Court has said:

"..... Ordinarily, the consignor is the person who has contracted with the railway for the carriage of goods and he can sue; and it is only where title to the goods has passed that the consignee may be able to sue. Whether title to goods has passed from the consignor to the consignee will depend upon the facts of each case."

35. I think the Supreme Court in *Union of India v. W. P. Factories*, (AIR 1966 SC 395) (supra), has set its seal of approval on those decisions which take the view that a bare consignee cannot sue. One such decision is *Chhangamal v. Dominion of India*, AIR 1957 Bom 276. A consignee in whom the property in the goods has passed can sue. As Shah, J., tersely put it:

"A consignee can maintain an action not because he is the consignee but because he is the owner of the goods."

36. A commission agent or a 'pucca adatia' cannot institute a suit against the railway administration unless he is able to show that the goods represented by the railway receipt had been transferred to him or any interest therein had been created in his favour. See *Ibrahim v. Union of India*, AIR 1966 Guj 6.

37. To sum up in the law of carriage this is important to note who are the parties to the contract because the law presumes that the contract of carriage of goods is made between the carrier and the owner of the goods and it often happens that the person who consigns the goods is not himself the owner. Let us consider the following four sets of circumstances:

(a) Where the consignor is the owner of the goods both before and after carriage. (This might happen for example where goods are sent on approval or under a contract of sale on the condition that ownership is not to pass to the buyer until the goods are paid for).

In this case no problems arise. The parties to the contract are clearly the

consignor and the carrier. Only the consignor can sue.

(b) Where the consignor is not the owner of goods but has been entrusted with the possession of them by their real owner, he is said to be a bailee of the goods and, as such, is entitled to make a contract in his own right. This is illustrated by the old case of *Freeman v. Birch*, (1843) 3 QB 492=114 ER 596 (often known as the *Laundress case*). In that case a laundress was in the habit of collecting linen from her customers, washing it and returning it by carrier. Some of the linen was lost and it was held that she was entitled to sue the carrier because, being a bailee of the goods, she had made the contract in her own right.

(c) Where the consignee is the owner of the goods both before and after carriage. The consignor is deemed to have acted as the consignee's agent in entrusting the goods to the carrier. In this case the consignee can sue.

(d) Where ownership in the goods passes on delivery to the carrier.

This would be the normal state of affairs when goods are consigned under a contract of sale, for the *Sale of Goods Act 1930* (see Sections 23 and 39) expressly stipulates that in such circumstances delivery to the carrier is deemed to be sufficient delivery to the buyer for the purpose of passing the ownership of the goods. In such a case the consignor is again deemed to be the agent of the consignee for the purpose of making the contract. In this case the consignee can sue the carrier.

38. Why is it important to the carrier to know who the other party to the contract is? Obviously because this is the person to whom the carrier should look for payment of his charges and to whom he should pay compensation in the event of the goods being lost or damaged. The law allows him to presume in the absence of evidence to the contrary that the consignee is the real owner of the goods. This means that if the goods are lost or damaged and the carrier pays the consignee, he is safe in all cases. If he pays the consignor, he may have to pay the consignee all over again.

39. This then is my conclusion. The plaintiff as commission agent has sufficient interest in the goods and is entitled to sue. To hold to the contrary "would be a retrograde step and would paralyse the entire mechanism of finance

of our internal trade. In this vast country where goods are carried by railway over long distances and remain in transit for long periods of time, the railway receipt is regarded as a symbol of the goods for all purposes". (Morvi Mercantile Bank v. Union of India, AIR 1965 SC 1954 (1960)).

40. The second question is about proof of misconduct. The plaintiff's case is that there was delay in delivery at Delhi and this has resulted in the deterioration of the goods. Plantains are perishable by nature. It is said to be their inherent vice. The plaintiff says that usually the goods can be carried from Savda to New Delhi in three day's time. He gave ten such instances in evidence where goods reached Delhi within three days. Out of these ten instances, seven were admitted by the railway. In this case the railway took four days. It is said that delay of one day was not because of the misconduct or negligence of the railway. The railway gave 15 instances where the goods arrived in Delhi sometimes in four days and sometimes in five.

41. Counsel for the plaintiffs argues that the instances given by the railway cannot be of assistance as they are instances which were given to show the maximum period taken in the arrival of the goods. There is much truth in what he says. It appears to me that if in seven cases goods can arrive within three days then I should think that is the normal time. If more than three days are taken by the railway in bringing plantains to Delhi they must show how and in what circumstances the goods reached on the fourth day as in this case. How did the railway deal with the goods in transit? This is a matter within their special knowledge. (Section 106, Evidence Act). They have to explain. They have to prove. In this case no such evidence was given by the railway. The court is entitled to draw an adverse presumption against them under Section 114 (g) of the Evidence Act. (See Union of India v. Delhi Cloth and General Mills Co. Ltd., AIR 1964 Punj 147). The appellate Court has reached the conclusion that there was delay in delivery. What is a reasonable time in each particular case is a question of fact. (See Explanation to Section 46, Contract Act). Whether there is a delay or not in a particular set of circumstances is essentially a question of fact and cannot be reargued in this court in second appeal.

42. The plaintiff's goods were despatched from Savda on coaching tariff basis rates and it was expected of the railway that they will bring the goods by a fast train because the goods are perishable by nature. That the railway took care to bring the goods as early as possible is a matter which the railway had to prove when once the plaintiff had shown that in as many as seven cases the usual time taken was three days.

43. The goods were booked on October 13, 1963 at Savda but they were despatched on October 14, 1963 at 2.45 hours. This shows a detention of 10 hours for despatch. Then there is delay in transit. The movement of the train from the starting station to New Delhi will be clear from the following chart:

(For Chart See Page 245)

44. It appears that sometimes the train was detained at a station for as many as 11 hours as at Itarsi. Then the train covered a distance of 382 KM from Itarsi to Jhansi in 26.34 Hrs. From Agra to New Delhi the distance is 194 KM. The train took 9.40 Hrs. The result of all this is that the goods booked on 13-10-1963 reached New Delhi on October 17, 1963 at 21.30 hrs. in the night. If the day of booking is included it took the goods five days to reach the destination, otherwise four.

45. Delay is prima facie proof of misconduct and negligence. The train took unusual time. It was for the railway to explain it properly. The plaintiffs' instances show that the goods can arrive in three days. The instances given by the railway cannot be accepted. They were selective. These were not taken at random from record. They were chosen to illustrate the maximum time. What about instances where on this very route the train journey was covered in three days? In agreement with the first appellate Court I would therefore hold that there was misconduct on the part of the railway as makes them liable in damages.

46. The third argument was on the measure of damages. In total loss the measure of the carrier's liability will be the value of the goods. But what is meant by value? A person may put a very high value on something that has little intrinsic worth, but the carrier cannot be held responsible for this, as it is not reasonably foreseeable. The test must be objective, and the standard the law adopts is the market value of the goods at the time and place at which they should have been delivered. This will

Station	Departure & Arrival Time.	Detention at Station	Time & Detention in transit.
Savda	Departure 14.10.63		21.45 Hrs.
	Time 2.45 Hrs.		
286 Km. Itarsi	Arrival 15.10.63		
	Time 0.30 Hrs.	11.16 Hrs.	
	Departure 15.10.63		
	Time 11.46 Hrs.		26.34 Hrs.
382 Km. Jhansi	Arrival 16.10.63		
	Time 14.20 Hrs.	5.10 Hrs.	
	Departure 16.10.63		
	Time 19.30 Hrs.		12.20 Hrs.
216 Km. Agra Cantt.	Arrival 17.10.63		
	Time 7.50 Hrs.	4.00 Hrs.	
	Departure 17.10.63		
	Time 11.50 Hrs.		9.40 Hrs.
194 Km. New Delhi	Arrival 17.10.63		
	Time 21.30 Hrs.		

normally include the cost of freight, and if the carrier's charges have not in fact been paid, he may deduct these from the damages payable. The consignor may include in his claim any profit he might reasonably have expected to make from a sale of the goods at their market price, but if he had contracted to sell the goods at an exaggerated price, he cannot claim for the abnormal profit he would have made thereby — unless of course this fact was known to the carrier.

47. In damage to the goods the measure of the plaintiff's loss will be the amount by which the value of the goods has diminished, e.g., the market value of the goods minus their value in their damaged state. The plaintiff must do all that he reasonably can to mitigate his loss, and if, for example, the damaged goods are still saleable, though at a lower price, the measure of damages will be the market price of the goods minus what they would have fetched in their damaged state if the plaintiff had sold them.

48. The counsel for the railway says that there is no reliable evidence of the plaintiff to prove what was the market value of the goods on the day of despatch and the day of arrival. I cannot accept this submission. The measure of damages in such a case as this will be the difference in the value of the goods having regard to the condition of the goods in which they ought to have been deli-

vered and the condition in which they were actually delivered. If at the starting station the plantains were fresh, raw and green and if at arrival at Delhi they had greatly deteriorated in quality and could not fetch on sale the price which goods in better condition would have fetched that is the amount of damages to which the plaintiff is entitled. There is evidence on the record that the value of this wagon of plantains was Rs. 4,900/-. The plaintiffs' books of account show the value. When the goods arrived at Delhi the plaintiffs took delivery on October 18, 1963, and sold them the same day for Rs. 2,568.69. This resulted in a loss of Rs. 2,431/- to the plaintiffs. They have claimed only Rs. 2,000/-. To this compensation they are clearly entitled. The first appellate Court has believed this evidence of the plaintiffs. I cannot disturb this finding on second appeal. The quantum of damages is essentially a question of fact if right principles governing the measure of damages are followed.

49. At the time of delivery of the goods the railway issued a certificate to the plaintiffs that the goods had gone bad to the extent of 40 per cent. This clearly shows that the claim for Rs. 2,000/- is not inflated.

50. The counsel for the railway argues that the certificate cannot be looked into as it was issued "without preju-

dice". He bases himself on Section 23, Evidence Act. I do not agree. The certificate was issued certainly "without prejudice". It only meant without prejudice to railway's liability. At the time the certificate was issued the railway did not admit their liability. In fact they have denied their liability all through. The case had to be fought in court. The plaintiff had to establish liability. But if liability is once established the court is not precluded from looking into the certificate which is the evidence of the measure of damages. If 40 per cent. of the goods worth Rs. 4,900/- had gone bad, I cannot say that the first appellate Court was wrong in granting a decree for Rs. 2,000/- to the plaintiffs. The railway certificate itself proves the quantum of compensation to which the plaintiff is entitled.

At the conclusion of the hearing of the appeal I pronounced the judgment. I dismissed the appeal with costs throughout. I have now given my reasons.

For these reasons I would dismiss the appeal. The respondent will be entitled to costs throughout.

Appeal dismissed.

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B. C. MISRA, J.

Smt. Anuradha, Appellant v. Santosh Nath Khanna, Respondent.

F. A. O. Nos. 17 of 1975 and 226 of 1974, D/- 9-4-1975.*

(A) Hindu Marriage Act (1955), Section 24 — Pendente lite maintenance — Power of court to modify its order.

A court exercising powers under Section 24 possesses inherent jurisdiction and power to vary, modify, rescind or temporarily suspend its previous order. But, in this matter, the court must act and exercise its discretion according to well established principles of law. It is open to the court to enforce obedience of its order or to prevent abuse of its process by staying the proceedings or striking off the defence or by temporarily suspending its operation without prejudice to any other action that may be taken according to law. AIR 1973 Raj 2 and AIR 1961 Punj 42, Relied on. (Para 13)

*(Against order of Jagdish Chandra, Addl. Dist. J., Delhi, D/- 24-1-1975).

HS/IS/C925/75/RSK

(B) Hindu Marriage Act (1955), S. 24 — Pendente lite maintenance order — Order kept in abeyance till production of evidence by applicant wife — Effect.

Where after passing the pendente lite maintenance order in favour of the wife the court in view of the delaying tactics of the wife in producing evidence ordered that the order should remain in abeyance held that it was difficult to construe the said order as total deprivation, since an indigent wife could not be expected to live on nothing except air and water. The object and intention of the order was to prompt the wife to lead her evidence expeditiously and for that purpose a penalty had been imposed, which consisted of deferring of punctual payment of the monthly allowance of maintenance, which itself entailed severe hardship. (Para 18)

Cases Referred: Chronological Paras

AIR 1973 Raj 2 = 1972 WLN 750	11
AIR 1963 SC 687 = 1963 Supp (1) SCR 229	14
AIR 1962 SC 527 = 1962 Supp (1) SCR 450	9
AIR 1961 Punj 42 = ILR (1960) 2 Punj 566	10
AIR 1957 All 825 = 1957 All LJ 644	9
AIR 1932 Mad 263 = 61 Mad LJ 477	9
1910 PD 233 = 79 LJP 92	10
1891 PD 278 = 60 LJP 97	10
(1861) 164 ER 1011 = 2 Sw & Tr 299	10

V. S. Sawhney with R. C. Chopra, for Appellant; Shyam Kishore, for Respondent.

JUDGMENT:— This order will dispose of two appeals, (F. A. O. 226/74 and F. A. O. 17/75) both of which have been filed by the wife against two orders of Mr. Jagdish Chandra, Additional District Judge, Delhi, who was trying the petition of the appellant for dissolution of marriage or judicial separation on the ground of alleged impotency and/or cruelty mentioned in Sections 12 and 10 of the Hindu Marriage Act, 25 of 1955, (hereinafter referred to as 'the Act').

The material facts of the case are that during the pendency of the petition of the wife, Mr. K. S. Sidhu, then presiding officer of the court below passed an order on 8th January, 1970, under Section 24 of the Act directing the husband respondent to pay the wife maintenance pendente lite at the rate of Rs. 125/- per month with effect from the date of the application, besides another sum of Rs. 250/- on account of litigation expenses. This amount had been fixed with

the consent of both the parties and the litigation expenses have been paid and the maintenance was also paid for two months.

2. It appears that the court below felt that the appellant was delaying the production of her evidence in support of the petition and so on 25th March, 1970, Mr. Sidhu passed an order directing that the order of maintenance pendente lite would remain in abeyance during the period the wife continued her default in producing the evidence. This order has been reproduced in the impugned order and will be referred to in detail hereinafter. Construction and legal effect of this order of Mr. Sidhu is the main subject of controversy before me.

3. From 25th March, 1970, up to 12th September, 1973, the wife, appellant before me, failed to produce her evidence, although her counsel has submitted that the fault did not lie entirely with the wife. However, the evidence commenced on 13th September, 1973, and the same has now been concluded.

4. On 2nd November, 1973, the wife moved an application before the court below submitting that she had already examined five witnesses and had to examine other witnesses and that she be paid the arrears of maintenance for the period from 23rd February, 1970 to 31st October, 1973. This application was opposed on behalf of the husband on the ground that by the previous order of Mr. Sidhu, the payment of maintenance was suspended and so she was not entitled to recover the amount. The court below considered the matter and construed the order of Mr. Sidhu and came to the conclusion that the effect of the order was that the wife was to be wholly deprived of the amount of maintenance during the period she was in default in producing her witnesses and that she was entitled to recover it only with effect from 13th September, 1973. The court passed an order that the wife was not entitled to maintenance for the period from 25th March, 1970 to 12th September, 1973 and therefore, dismissed the application. This order which was passed on 17th October, 1974 by Mr. Jagdish Chandra, has given rise to the first mentioned appeal in this court (F. A. O. 226/74). In this appeal, the husband has filed cross-objections to the effect that in the circumstances of the case on a true construction of the order of Mr. Sidhu, the wife was entitled to maintenance only with effect from 18th September, 1974, when she had concluded

her evidence and not from an earlier date when she had commenced producing evidence.

5. During the pendency of proceedings, the wife moved another application dated 18th November, 1974, by which she prayed that in view of the previous order of the court she was entitled to payment of arrears of maintenance at least from 13th September, 1973 and that the husband be directed to pay the same and in default his defence be struck off. This application was refused by the Judge below on the ground that since an appeal against the previous order was pending in the High Court, he could not strike off the defence and that it was open to the wife to recover the amount of arrears of maintenance by taking out execution. Mr. Jagdish Chandra, Additional District Judge, has dismissed this application by order dated 24th January, 1975, which has given rise to the second mentioned appeal, (FAO 17/1975).

6. Mr. R. C. Chopra, Advocate, has appeared and argued the first mentioned appeal, while Mr. V. S. Sawhney, Advocate, has argued the second appeal for the wife. Mr. Shyam Kishore Advocate, has appeared for the husband in both the appeals.

7. The order that had been passed by Mr. K. S. Sidhu, on 25th March, 1970, reads as follows:—

"Counsel for the petitioner has prayed for adjournment. I am granting the adjournment, but in the interest of justice it is essential that during the period the petitioner hereinafter takes in producing her evidence the order of maintenance pendente lite should remain in abeyance. It appears that the petitioner has deliberately withheld producing her evidence today. If the order of maintenance pendente lite is not held in abeyance during the period her default continues it would be nothing short of permitting her to abuse the process of the court."

This order purports to have been passed under Section 24 of the Act. Section 24 reads as follows:—

"24. Maintenance pendente lite and expenses of proceedings. Where in any proceedings under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner

the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

The counsel for the appellant submits that there was no statutory provision for variation or discharge of the order or for its suspension. By way of contradistinction, they have invited my attention to Section 25 of the Act, which provides that an order under Section 25 may be passed either at the time of or subsequent to the passing of the decree and if the Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the Court may deem just.

8. There is no doubt that Section 25 of the Act contains a statutory provision for variation or rescission of an order. This statutory provision was absolutely essential to be enacted. The reason is that once a Court has passed a decree in the matrimonial case, it would normally cease to have any further jurisdiction in the matter and it would be beyond the scope of its powers to modify its final orders. The statute has, therefore, expressly provided that an alimony may be granted by the Court not only at the time of the passing of the decree, but also subsequently, which would not be possible to do without any statutory provision in its support. Since the order for maintenance is passed for the life of the spouse (so long as the applicant remains unmarried) and the change of circumstances after the passing of the decree can reasonably not be foreseen, the legislature considered it wise to confer an express power to subsequently vary, modify or rescind the order as the circumstances of the case may warrant. The said considerations, however, do not apply to an order passed under Section 24 of the Act. The order under Section 24 is passed during the pendency of the proceedings and comes to an end on their termination. The circumstances which may necessitate a variation of the order would be available to the court before it finally disposes of the matrimonial cause.

9. The object behind the passing of the order under Section 24 is to provide financial assistance to the indigent spouse to maintain herself (or himself, as the case may be) during the pendency of

the proceedings and also to have sufficient funds to defend or carry on the litigation, so that the spouse does not unduly suffer in the conduct of the case for want of funds. Such an order is essentially in the nature of an interim order. Interim orders, in my opinion, are by their nature such, that in their respect the court must always retain inherent jurisdiction and power to vary, modify or rescind, as the circumstances may justify. Section 151 of the Code of Civil Procedure, in terms prescribes that nothing in the code shall be deemed to limit or otherwise affect the inherent power of the court to make such an order, as may be necessary for the ends of justice or to prevent abuse of the process of the court. The inherent jurisdiction includes a power to review an interlocutory order, to recall and cancel previous orders or orders which cause injustice. It also possesses a power to stay the proceedings or strike off the defence of the defendant, in order to compel obedience to its order or prevent abuse of the process of the court (see *Manohar Lal Chopra v. Hiralal*, AIR 1962 SC 527, (*Dasari*) *Venkatacharyulu v. Manchala Yesobu*, AIR 1932 Mad 263, and *Sita Ram Sahu v. Kedar Nath Sahu*, AIR 1957 All 825).

10. So far as the exercise of powers in cases under the Hindu Marriage Act are concerned, reference may be made to *Smt. Malkan Rani v. Krishan Kumar*, AIR 1961 Punj 42, where a Division Bench of the High Court, of which I. D. Dua, J. (as he then was), was a party, observed that Section 24 empowered the matrimonial court to make an order for maintenance pendente lite and for expenses of proceedings to a needy and indigent spouse. The Bench observed, "the object and purpose of this provision is to enable the court to see that the indigent spouse is put in a financial condition in which the party concerned may produce proper material and evidence in the case and that a party is not handicapped in or prevented from bringing all the relevant facts before the court for decision of the case because of his or her poverty". The court further observed that Section 28 of the Act laid down the procedure for recovery of the amount due under the order made under Section 24 of the Act. But the same did not affect the court's power to exercise jurisdiction equitably and in such a way as to prevent abuse of its process. The court cited with approval the Chancery Division decisions, *Kemp Welch v. Kemp*

Welch and Crymes, 1910 PD 233, Clarke v. Clarke, 1891 PD 278 and Lethem v. Lathem, (1861) 164 ER 1011, and it observed that these courts took adequate steps including an order staying further proceedings in the case to compel the defaulter to comply with such an order and there was no reason why this power could not be exercised in such circumstances in this country as well.

11. The High Court of Rajasthan in *Smt. Devki v. Purshotam Kewalia*, AIR 1973 Raj 2, observed as follows:—

"Section 24 of the Act vests a wide discretion in a court in the matter of fixation of pendent lite maintenance and costs of the proceedings. The discretion, however, has to be exercised judicially. If there is no enabling provision in the Act for changing such an order by the Court, there is at the same time no disabling provision either and, therefore, the court can in an appropriate case exercise its inherent powers to vary an order of maintenance provided there is a change in circumstances justifying variation of the order. If that were not so, it may lead to manifest injustice in some cases, for example, at the time of granting of maintenance the other spouse may be having a substantial income and after sometime if that income were to be lost by change of fortune or on account of some accidental causes then the continuance of the same maintenance may result in hardship to the other spouse, who is to pay the maintenance. Therefore, I should think that in an appropriate case the court should be able to exercise its inherent powers under Section 15, Civil Procedure Code."

12. In *Halsbury's Laws of England* Third Edition, Volume 12, paragraph 999, page 444, it has been laid down that where the court has made an order for alimony pending suit for maintenance to secured provision in the case of divorce or nullity the court has power to discharge or vary any such order or suspend any provision thereof temporarily, and to revive the operation of any provisions so suspended.

13. As a result of the aforesaid discussion, my conclusion is that a court exercising powers under Section 24 of the Hindu Marriage Act possesses inherent jurisdiction and power to vary, modify, rescind or temporarily suspend its previous order. But, in this matter, the court must act and exercise its discretion according to well established principles of

law. I also hold that it is open to the Court to enforce obedience of its order or to prevent abuse of its process by staying the proceedings or striking off the defence or by temporarily suspending its operation without prejudice to any other action that may be taken according to law. In this view of the matter, the order of Mr. K. S. Sidhu that had been passed on 25th March, 1970 cannot be said to be without jurisdiction or void. The order was legal, valid and amply justified in the circumstances of the case and since it had never been appealed against, it has become final and cannot now be allowed to be assailed collaterally. The order is, therefore, binding on the parties. This leads me to the consideration of the next question as to what is the true construction and legal effect of the said order.

14. It is obvious that Mr. Sidhu, learned Additional District Judge, was not feeling happy with the delay that the wife had been causing in the production of her evidence and he found that her continuing to get the maintenance while prolonging the proceedings and not producing the evidence amounted to abuse of the process of the court. He, therefore, directed that the order for maintenance would remain in abeyance. The question for determination is whether this order amounts to rescission of the maintenance order and total deprivation of the amount of maintenance to the wife for the said period, or it amounts to temporary suspension and mere postponement of the payment. The learned Judge has used the word 'abeyance'. This word, according to Webster's Third New International Dictionary means "temporary inactivity or suppression; cessation or suspension". The expression 'abeyance' is equivalent to 'suspension' which means, 'temporary withholding', temporary forced withdrawal. In my opinion, the learned Judge has used the expression 'abeyance' in the same sense as has been used in *Halsbury's Laws of England* by expression 'Suspension temporarily'. The word 'suspend' or 'suspension temporarily' imply that the suspension is for a temporary period and on the cessation of the suspension order, or fulfilment of the necessary conditions, the original order revives without any further directions. There are numerous instances to illustrate the effect of suspension. We are familiar with the instances in law, where workman is suspended or in government service an employee is suspended. In those

cases, unless the suspension culminates in removal or dismissal, the original contract of service or the status of the government servant revives on the cessation of suspension. We may peruse with advantage the observations of the Supreme Court in *Khem Chand v. Union of India*, AIR 1963 SC 687, para. 15, where the court observed that an order of suspension of a Government servant did not put an end to his service under the Government and he continued to be a member of the service in spite of the order of suspension. The real effect of the order of suspension was that though he continued to be a member of the Government service he was not permitted to work. There was no basis for thinking that because of the order of suspension he ceased to be a member of the service. Further when the order of dismissal was set aside the service revives.

15. We are also familiar with the orders of the court suspending the injunctions, execution of decrees and other orders all of which revive on the cessation of suspension. The result is that the suspension or abeyance of the order does not amount to complete disbarment, but the operation of the order is only suspended or put in inactivity and on the cessation of suspension the order revives with its full vigour without any further orders.

16. It is, therefore, clear that the learned Additional District Judge did not intend to absolutely rescind the order so as to completely deprive the wife of the amount of maintenance. There are two reasons for this view. One is that he has limited the period of suspension to the time which the wife takes in beginning to produce her evidence, and secondly any property or means of subsistence so as not to need the amount of maintenance any longer. There was, therefore, no material before the Judge to hold that the wife had ceased to be indigent and the order for maintenance must be recalled. Had the learned Judge chosen to pass an order wholly rescinding his previous order for grant of maintenance, he would have given sufficient reasons and would have more clearly and categorically expressed himself in the order. It seems that his intention was to really prompt the wife to conclude her evidence expeditiously under threat of penal consequences. For this purpose, he ordered that the payment of Rs. 125/- per month which was payable to the wife for her maintenance would not be paid monthly

till she had produced her evidence. It is reasonable to assume that postponement of the punctual payment is ordinarily a sufficient deterrent to the party who has to live and make her both ends meet on the said amount of maintenance. If this monthly payment is deferred, then sufficient penalty has been imposed upon her to prompt her to conclude her evidence quickly. She could not conclude the evidence in this case for various reasons, one of them being that on 26th August, 1970, the petition was dismissed for non-prosecution and then it would be restored only on 16th August, 1972 and so during this period no evidence on merits could be produced. Neither the intention nor the meaning of the order was that the wife was to be completely deprived of her amount of maintenance for a substantial part of the pendency of the petition.

17. Mr. Jagdish Chandra, learned Additional District Judge in the order dated 17th October, 1974, under appeal has taken a contrary view and he has construed the aforesaid order of Mr. Sidhu as amounting to total deprivation of the amount of maintenance to the wife for the said period. The reason he has advanced is that any other construction would enable the wife to accumulate the amount due to her and she cannot get the accumulated arrears even after producing evidence on account of her own default and, therefore, her default should entail total deprivation of the amount of maintenance during the period of her default in producing the evidence.

18. I am unable to appreciate or agree with the aforesaid reasoning. This situation always comes into being where monthly payments like rents, interest, instalments and maintenance are not regularly paid and the parties are forced to take steps for the recovery, then they do get the amount in lump sum. This, in my opinion, is not a material consideration in construing the meaning and effect of the order of Mr. Sidhu. The amount of maintenance had been granted to the wife in view of her indigent circumstances in order to keep her body and soul together and prosecute the petition. She had not acquired any other means of maintenance. The delay in producing the evidence cannot be a sufficient cause for starving the wife to death, if necessary. Had it been intended by Mr. Sidhu or by his learned successor to totally deprive the wife of the amount of

maintenance, then they would have passed a clear order totally rescinding the previous order. In that event, the wife could not get any maintenance unless another order was passed for grant of maintenance upon the change of circumstances after conclusion of the evidence. It is obvious that the passing of a fresh order for grant of maintenance was in the circumstances of the case neither contemplated nor has been made. Only the operation of the previous order for maintenance had been suspended temporarily. It is difficult to construe the said order as total deprivation, since an indigent wife could not be expected to live on nothing except air and water. As discussed above, the object and intention of the order was to prompt the wife to lead her evidence expeditiously and for that purpose a penalty had been imposed, which consisted of deferring of punctual payment of the monthly allowance of maintenance, which itself entails severe hardship. It was not intended to deprive her of the same for all times to come.

19. As a result, I hold that the appellant wife was, in the circumstances of the case, entitled to the payment of the entire arrears of maintenance allowance at the aforesaid rate upon her commencing of production of evidence, even for the period during which she had failed to produce her evidence. Consequently, the appeal is allowed, the order of the learned Additional District Judge dated 17th October, 1974, is set aside and it is ordered that the appellant wife is entitled to maintenance at the rate of Rs. 125/- per month since 8th January, 1970, being the date of the order, for the entire period during which the petition had been pending. In view of this finding, the cross-objections have no merit and are dismissed.

20. So far as the second appeal, FAO 17/1975, is concerned, the matter of enforcement of the order for payment of maintenance rested in the discretion of the court below and if the learned Judge has exercised the discretion in refusing to strike off the defence, no interference with the same is called for. The counsel for the respondent husband submits that up-till now huge arrears of maintenance have accumulated and the respondent will find it impossible to pay the same in lump sum immediately. The court below has left the right of the appellant wife to recover the arrears of maintenance by taking out execution unaffected. The court, however, in the circumstances of

the case was justified in proceeding with the trial of the petition and refusing to either stay the trial or strike off the defence of the respondent. I am informed that since then evidence of the parties has been completed and the case is now fixed for 10th April, 1975, for final orders. I believe that the court below will proceed with the case expeditiously and will not stay the proceedings. This appeal is therefore dismissed.

21. In the circumstances of the case, both the parties are left to bear their respective costs.

Appeal dismissed.

AIR 1976 DELHI 251

S. RANGARAJAN, J.

Delhi Simla Catholic Archdiocese, Petitioner v. State of Uttar Pradesh and others, Respondents.

Civil Writ No. 1043 of 1967, D/- 7-2-1975.

(A) Government Grants Act (1895), Sec. 3 — Grantee put in exclusive possession — Whether it is to be treated as a lease or licence.

The mere fact of a person being in exclusive possession would not be conclusive in favour of the same being a lease because there may be other circumstances which may still negative the inference of a lease to indicate the same being only a licence. (Para 8)

(B) Government Grants Act (1895), Section 3 — Property situate outside the State — Cannot be granted.

A State cannot make a grant of property situated outside its territorial limits under the Government Grants Act. In respect of such lands it would certainly have ordinary ownership rights — not Statal rights. The power to re-enter the property could not be so easily enforced by a State in areas where it does not exercise sovereignty or Statal power; it would be only at par with a private lessor's right of re-entry. Further, the property situated outside the territories of a State would be subject to the local laws of that State, otherwise it may lead to a conflict between the paramountcy of the State making grant (which is usually nil) outside the territorial limits of the State and that of the State where the property is situate. (Para 9)

FS/HS/C32/75/RSK

(C) Government Grants Act (1895), S. 3 — Grant of land—Power to re-enter.

In the case of a Government grant the grantor will not be able to re-enter if there is any local law which creates rights in the grantee rights higher than or different from those conferred by the said grant. 1970 Rent CJ 95 (SC), Applied.

(Para 15)

Cases Referred: Chronological Paras

AIR 1973 Delhi 169 = 1972 Ren CR 718 13

1970 Ren CJ 95 = 1971 Rev LR 390 (SC) 15

(1969) 2 SCWR 658 = 1969 UJ (SC) 745 8

AIR 1968 SC 620 = (1968) 2 SCR 203 13

(1967) C. W. No. 150-D of 1961, D/- 22-11-1967 (Delhi) 12

AIR 1965 SC 610 = (1964) 6 SCR 642 8

AIR 1964 SC 685 = 1964 SCD 278 14

AIR 1959 SC 1262 = (1960) 1 SCR 368 8

AIR 1955 Cal 601 = 1955 Cri LJ 1572 13

AIR 1949 East Punj 246 10

AIR 1946 PC 127 = 73 Ind App 123 10

AIR 1943 FC 13 = 1943-2 Mad LJ 137 15

AIR 1943 FC 29 = (1943) 2 Mad LJ 114 10

(1920) 1 KB 720 = 89 LJKB 744 13, 14

S. Watel, for Petitioner; G. N. Dikshit with O. P. Rana, for Respondents.

ORDER:— The petitioner (Delhi Simla Catholic Archdiocese) is a society registered under the Societies Registration Act and owns lands situated in the revenue estates of villages Okhla, Bahapur and Jogabai, said to be within the limits of the Delhi Municipal Corporation. Some lands were acquired by the State of U. P. for the purpose of digging what was known as the Agra canal. The petitioner claims that land, measuring 20 bighas (field No. 31-A) in Kham village Jasola had been leased out by the State of U. P. for the Model Farms owned by the Petitioner society. Such a lease is said to have been granted as early as June, 1951, according to the allegations in the petition; it transpires that there were such leases for an earlier period also. The exact period for which the petitioner has been in possession of the lands is, however, not material for the present case. What is material is the grant said to have been made to the petitioner on 1-7-1962 under the Crown (now Government) Grants Act, 1895. The petitioner society which has been having perpetual leasehold rights in 26.016 acres (part of what is known as old Mughal canal) is cultivating these lands also under the name and style of "Model Farms", Masihgarh.

It is alleged that the petitioner society has spent thousands of rupees in developing and filling the said canal to make it fit for cultivation. The above grant, made on 1-7-1962, was for a period of five years; prior to that the leases granted earlier had been successively renewed. By a communication dated 29-5-1967 the petitioner was informed that the rights of cultivation in the said land were being auctioned on 20-6-1967 and that the petitioner might bid at the said auction if it so desired. It is further alleged that when the petitioner's representative met the Executive Engineer and the Assistant Engineer (respondents 3 and 4) of the U. P. Government in connection with the abovesaid communication he was informed that this was done merely with a view to fix the lease money for a further period of six years starting from the first day of July, 1967. But on 10-6-1967 the petitioner was informed by respondent No. 4 that the auction would be proceeded with and that if the petitioner was not the highest bidder ejection would follow. The petitioner gave a notice through their counsel claiming rights as tenant under the Delhi (Urban Areas) Tenants Relief Act, 1961 and the Punjab Tenancy Act, 1887. As soon as the respondent No. 4 orally informed the petitioner's representative that there were orders for ejecting the petitioner society, the present writ petition was filed with a prayer to restrain such forcible eviction pending disposal of the writ petition.

2. An affidavit has been filed by Shri S. K. Sharma, Assistant Engineer No. 1, Upper Division Agra Canal, Okhla in opposition to the writ petition claiming that the land was granted to the petitioner under a registered deed dated 19-12-1962 (Annexure A in reply to the stay application) for five years from 1-7-1962 to 30-6-1967 on the terms and conditions mentioned therein and that the said grant was under the Government Grants Act (Act XV of 1895). The allegation that the amount was spent by the petitioner for developing the land and to make it fit for cultivation has been denied. The allegation in the petition that the petitioner's representative was assured by respondents 3 and 4 after communication dated 29-5-1967 that auction was only to fix the lease money was denied. It was claimed that the respondents were within their rights to hold an auction, enter into a fresh grant with the petitioner and eject it, if it did not offer the highest bid. It was contended that the

possession of the petitioner after the expiry of the period fixed in the grant, namely, 30-6-1967, was unauthorised and that the petitioner was thereafter a trespasser. It was denied that the lands are situate within the Delhi Municipal Corporation limits. It was contended that Section 3 of the Government Grants Act applied and that the same would take effect according to its tenor in spite of any law enacted to the contrary, namely, the Delhi (Urban Areas) Tenants Relief Act (which applies to the Municipal Area) or that any other enactment would in no way make the conditions of the grant invalid.

3. It is not in dispute that the Government Grants Act of 1895 applies to U. P., it is applicable to the Union Territory of Delhi also. There is no difficulty about the application of the said Act because it extends, as per Section 1 (2), to the whole of India except the territories which immediately before the 1st November, 1956, comprised in Part B States. According to Section 3 all provisions, restrictions, conditions and limitations contained in any such grant or transfer as aforesaid shall be valid and take effect according to the tenor, any rule of law, statute or enactment to the contrary notwithstanding.

4. The State of U. P. had amended Sections 2 and 3 of the Government Grants Act, 1895 by the State Amending Act (XIII of 1960). By reason of the said amendment the provisions of the Transfer of Property Act, 1882 were not to apply to Government Grants; the U. P. Tenancy Act of 1939 and the Agra Tenancy Act of 1926 were not to affect certain leases made by or on behalf of the Government, certain leases made by or on behalf of the Government were to take effect according to their tenor. The last provision is important and may be read.

"All provisions, restrictions, conditions and limitations contained in any such creation, conferment or grant referred to in Section 2, shall be valid and take effect according to their tenor; any decree or direction of a court of law or any rule of law, statute or enactment of the Legislature, to the contrary notwithstanding:

Provided that nothing in this section shall prevent or be deemed ever to have prevented, the effect of any enactment relating to the acquisition of pro-

perty, land reforms or the imposition of ceiling on agricultural land."

5. The State of U. P. had chosen to make the abovesaid amendment providing for the land reforms of that State having paramountcy over grants made under the Government Grants Act of 1895. It is also obvious that the State of U. P. would have no legislative power with reference to properties situated outside its territorial limits, namely, Delhi. In other words, it would have no power to legislate with reference to its properties situate outside its territorial limits.

6. If the land in question falls within the Municipal limits of Delhi the provisions of the Delhi (Urban Areas) Tenants Relief Act, 1961 would apply. The reason for the said enactment was as follows: The tenancy laws in force in the urban areas of Delhi, that is, the area which before the 1st of November, 1956, were included within the limits of a Municipality or a Notified Area Committee or a Cantonment, did not provide for protection of tenants against eviction by the landlords. On account of the rapid growth of the city, more and more agricultural lands in the areas of Delhi were expected to be diverted to non-agricultural uses. Until such lands were so diverted it was necessary to confer security of tenure of agricultural tenants and to regulate the rent payable by them. The abovesaid Act was, therefore, passed in order to achieve the abovesaid objective, making provisions for restoration of tenancy to agricultural tenants who were evicted otherwise than on special grounds from their holdings on or after the 1st of July, 1958. The said Act extended to the Union Territory of Delhi which immediately before the 1st day of November, 1956, was included in a Municipality or a Notified Area etc. According to Section 7 it was to have effect notwithstanding anything contrary to any other law, custom or usage or agreement or decree or order of the court. So far as the lands outside the Municipal limits are concerned the Delhi Land Reforms Act of 1954 applies. The said Act extends to the whole of Union Territory of Delhi but not to the areas which are or may before the 1st day of November, 1958, be included in a Municipality; it also did not apply to areas occupied for public purpose or public utility relating to lands acquired for a public purpose. The tenants of those lands who were recorded in the revenue register as being in possession on the relevant date were to ac-

quire interest as Bhoomidar, Asami etc. Such tenants also could not be evicted.

7. It is, therefore, contended on behalf of the petitioner that the Government Grants Act could not have any paramountcy over the abovesaid two local laws in force in Delhi. It is also contended that the petitioner who holds the land belonging to the State of U. P. outside its territorial limits could not be discriminated against by the State providing for the land reforms of U. P. alone being given paramountcy over the Government Grants Act; it should also enable the local Acts of Delhi getting such paramountcy over the provisions of the said Act. Even in the view that the Punjab Tenancy Act of 1887, but not the other two enactments, applied the Petitioner who claims to have made improvements on the land, could not be evicted before compensation was assessed and awarded. According to Section 68 of that Act a tenant who had made improvements in accordance with its provisions could not be ejected until he had received compensation for improvements. It is claimed, therefore, that there could be no forcible eviction of the petitioners by the State of U. P. except in the manner provided by law. The provision of right of re-entry in the said Act would be of no consequence because such right of re-entry could not be exercised in the face of the enactments having validity within the Union Territory of Delhi. The expression "tenant" as has been defined in the Delhi (Urban Areas) Tenants Relief Act, 1961 would have the same meaning assigned to it in relation to areas to which the Punjab Tenancy Act applied as provided in that Act and in relation to the areas to which Agra Tenancy Act applied as provided in that Act. Whatever Act may be applicable according to the definitions in those two enactments the petitioner would be a tenant within the meaning of both those Acts. The Delhi (Urban Areas) Tenants Relief Act, 1961 provides for eviction of a tenant only on the special grounds specified in Section 3; none of those grounds are present in this case.

8. There was also some discussion as to whether the petitioner was merely a tenant or licensee. There can be no doubt that the petitioner has been given exclusive possession of the lands under the grant, even in respect of trees, which were not given to it, the State of U. P. would be able to attend to them or gather their useful effect only with the

premission of the petitioner. These, among other features, are clearly indicative of the exclusive possession being granted to the petitioner. The fact of the petitioner being in exclusive possession has not even been controverted. It is no doubt true that the mere fact of a person being in exclusive possession would not be conclusive in favour of the same being a lease because there may be other circumstances which may still negative the inference of a lease to indicate the same being only a licence. There being no such feature in this case it is not possible to regard the same only as a licence and not a lease (vide *Associated Hotels of India Ltd. v. R. N. Kapoor*, AIR 1959 SC 1262, *Mrs. M. N. Clubwala v. Fida Husain Saheb*, AIR 1965 SC 610 and *Lakhi Ram Ram Das v. M/s. Vidyat Cable and Rubber Industry*, (1969) 2 SCWR 658). I have, therefore, to proceed only on the footing that the petitioner was granted a lease of the land despite reference to the Government Grants Act and the right of entry being provided.

9. I am unable to see how a State can make a grant of property situated outside its territorial limits under the Government Grants Act. In respect of such lands it would certainly have ordinary ownership rights—not Statal rights. The power to re-enter the property could not be so easily enforced by a State in areas where it does not exercise sovereignty or Statal power, it would be only at par with a private lessor's right of re-entry. Further, the property situated outside the territories of a State would be subject to the local laws of that State. I am, therefore, unable to visualise a case of a State making any grant of property under the Government Grants Act outside its territorial limits; otherwise it may lead to a conflict between the paramountcy of the State making the grant (which is usually nil) outside the territorial limits of the State and that of the State where the property is situate. Looked at in this manner it seems to me that reliance on the provisions of the Government Grants Act by the State of U. P. is altogether futile.

10. Achhru Ram, J., speaking for the Division Bench of the East Punjab High Court in *Mathra Das v. Punjab Provinces*, (AIR 1949 East Punj 246) held that Section 3 of the Crown Grants Act did not take the lease of plots of building sites belonging to Government outside the operation of the Punjab Urban Rent Res-

triction Act, in so far as the provisions of that Act were applicable. Relying upon the decision of the Federal Court in Jagannath Baksh Singh v. United Provinces, (AIR 1943 FC 29) and what the Judicial Committee of the Privy Council (reported in AIR 1946 PC 127 as Thakur Jagannath Baksh Singh v. United Provinces) had observed while confirming the abovesaid decision of the Federal Court Achhru Ram, J., held that to eject the tenant on the expiry of the lease, the Crown has to follow the same procedure as laid down in Section 10 of the Punjab Urban Rent Restriction Act which any other landlord similarly situated is required to follow. Explaining the scope of the Crown Grants Act (As it was known then) Achhru Ram, J., referred to the observations of the Federal Court to the effect that there was nothing in the Crown Grants Act to limit the power of the legislature to pass such legislation as it thought fit thereafter as well as of the Judicial Committee of the Privy Council that Crown Grants Act could not be construed to limit the statutory competence of the Provincial Legislature under the Constitution.

11. In the light of the above principle the question is whether any of the above three local Acts or even any one of them would render the provision concerning re-entry in the above grant made under the Government Grants Act inapplicable in the present case. It may be noticed that it has not been possible for Mr. Watel, learned counsel for the petitioner, to make any positive statement before me as to whether the land in question despite an allegation to the effect in the petition which has been controverted in the return, is within the Municipal area or not. He stated at the bar that he made his best efforts to find out what the position was both from the Patwari of the Village as well as from the Delhi Municipal Corporation and he has not been able to make a statement one way or the other; in the result, it may either be within the limits of the Corporation or it may not be. He had, therefore, only to argue this question on an alternative footing.

12. Shri G. N. Dikshit, who argued the case for the State of U. P., drew my attention to a decision of S. N. Shankar, J., in the Delhi Peasants Co-operative Multi-Purpose Society Ltd. v. Collector, Delhi, (C.W. 150-D of 1961 decided on 22-11-1967) holding that as per the language of Section 1 (2) (c) the

Delhi Land Reforms Act, 1954, would not apply to the areas held and occupied for a public purpose or a work of public utility and declared as such by the Chief Commissioner or acquired under the Land Acquisition Act, 1894, or any other enactment other than this Act, relating to acquisition of land for a public purpose. Even in the view that the Delhi Land Reforms Act does not apply to the area where the land in question, which has been acquired for a canal, is situate, Mr. Watel pointed out that according to Section 2 (1) of the same Act the Punjab Tenancy Act, 1887, as modified by Punjab Act No. 9 of 1939, stood repealed only in so far they apply to areas to which the Act extends and that if the land in question was not one to which the provisions of the said Delhi Land Reforms Act of 1954 applied the provisions of the Punjab Tenancy Act of 1887 (as amended) would still be applicable to it. As a consequence of this position Mr. Watel maintained that the petitioner could not be evicted before the payment of compensation. If the land was in the municipal area then the Delhi (Urban Areas) Tenants Relief Act of 1961 would apply and even then he could not be evicted. In no view of the matter, therefore, could the respondents seek to evict the petitioner forcibly by exercising the right of re-entry which has been reserved in the said lease.

13. Reliance was placed by Shri G. N. Dikshit upon a decision of a Division Bench of this Court (To which I was a party) in Raj Singh v. Union of India, (AIR 1973 Delhi 169). None of the observations in that case would be of any assistance to the respondents because the property in that case was in a Cantonment area to which the provisions of the Government Grants Act but no other local Act was applicable; Deshpande, J., who spoke for the Division Bench, had also drawn upon the analogy of a landlord having a right of entry and being able to effect re-entry as laid down in Hemmings v. The Stoke Pogis Golf Club Ltd., (1920) 1 KB 720. But Mr. Watel brings to my notice the fact that the said decision which was followed by the Calcutta High Court in State of West Bengal v. Birendra Nath Basunia, (AIR 1955 Cal 601) has been disapproved by the Supreme Court in Lallu Yashwant Singh v. Rao Jagdish Singh, (AIR 1968 SC 620 at page 623).

14. It is, however, needless to be detained by this aspect because the right

of re-entry as an ordinary lessor in terms of the right of re-entry under the lease has not been pleaded. Such a right, in the sense in which it has been upheld by the decision in Hemmings, (1920) 1 KB 720 could not be claimed by an ordinary lessor in India after the above decision of the Supreme Court.

15. It was finally contended on behalf of the State of U. P., that a writ under Article 226 of the Constitution could not issue at the instance of the grantee against the grantor (the Government) when the grant is resumable. Reliance has been placed for this contention upon the decision of the Supreme Court in *State of Orissa v. Ram Chandra Dev*, (AIR 1964 SC 685). On my above finding that this grant of property being outside the territorial limits of U. P. the State of U. P. cannot effect re-entry no assistance from the abovesaid decision can be derived. The observations made in the abovesaid case were in the context of a grant being resumable on the abolition of the office as remuneration for which the grant was made, in such a situation the person concerned had no legal right to continue in possession; no right of his had consequently been illegally invaded or threatened. The principle of law which is applicable to the present situation is what Hegde, J., explained, speaking for the Supreme Court, in *Mohanlal v. State of Punjab*, 1970 Ren. C. J. 95 (SC) namely, that under our jurisprudence even an unauthorised occupant can be evicted only in the manner authorised by law. In the case of a Government grant of even property situate within the territorial limits of a State the grantor will not be able to re-enter if there is any local law which creates rights in the grantee rights higher than or different from those conferred by the said grant. As explained by Gwyer, C. J., in AIR 1943 FC 13 at p. 18: "if lands or buildings are vested in His Majesty for the purposes of a Province outside the territorial limits of the Province, the rights of the Provincial Government over them are analogous to those of a private owner". The very basis of a Government granting property to another under the Government Grants Act enabling it to re-enter the property in certain eventualities, postulates that the Government can use its power in order to get back possession of the property within its territorial limits and that the grantee will not be able to resist the same; but there will be clearly no scope for the Government effecting re-entry in

the case of property outside its territorial limits for it cannot do so qua Government but only as a private owner outside the territory of the State. In this view the respondents cannot derive any assistance from the fact that the Punjab Tenancy Act, 1887, was earlier than any point of time than the Government Grants Act of 1895.

16. The learned counsel for the State of U. P. were given more than one opportunity to cite decisions in addition to those cited at the regular hearing, even after the conclusion of the hearing, but they have not been able to cite any authority before me pertaining to a case where in respect of a Government Grant of property situate outside its territorial limits, the right of re-entry was upheld.

17. The impugned orders are quashed and the respondents are restrained from ejecting the petitioner by exercising the right of re-entry and except in due course of law. This Writ Petition is accepted accordingly with costs. Counsel fee Rs. 250/-.

Petition allowed.

AIR 1976 DELHI 256

AVADH BEHARI ROHATGI, J.

Pritam Lal, Appellant v. Smt. Anand Kaur, Respondent.

S. A. O. No. 148 of 1975, D/- 6-2-1976.*

(A) Delhi Rent Control Act (1958), Section 14 (1) (a) — Notice of demand — Language and construction of — Notice describing tenant as statutory tenant and claim couched in the language of damages for use and occupation — Notice is bad.

Notices are not designed to trip people up. They are not traps in which the tenant may slip and fall. The object of notice is to make a demand of rent on the tenant so that he may pay up and the matter may not go to court. To achieve that object appropriate words have to be used. The notice must carry out the intention of the Act. The demand under Section 14 (1) (a) of the Delhi Rent Control Act is to be for rent and nothing else. Clause (a) uses the word 'rent' not once but twice. Similarly Sections 15, 26, and 27 speak of rent. (Para 13)

*(From order of N. C. Kochhar, Rent Control Tribunal, Delhi, D/- 16-7-1975.)

DT/ET/B259/76/RSK

Hence a notice describing the tenant as statutory tenant and demanding from him damages for use and occupation is not in conformity with the requirements of Section 14 (1) (a). The notice must be couched in the language of rent and not damages. (Paras 27, 28)

If the landlord used the language which is slipshod the benefit of that cannot be given to him. It is not required that a notice should be worded with the accuracy of a plea but such construction should be placed on the notice as would not work a hardship on the tenant and would not strain the language too much against the landlord. AIR 1954 Nag 293, Referred. (Para 20)

The principle that notice is to be construed not with a desire to find faults in them which would render them defective but to be construed at *res magis valeat, quam pereat* (that the act may avail rather than perish) would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes. The principle will also not apply where the statute demands that the notice must make a demand of rent on a tenant who is in arrears of rent. (Paras 22, 23)

Cases Referred: Chronological Paras

1972 Ren CJ 55 (All)	25
AIR 1972 Delhi 275 = 1972 Rajdhani LR 77 (FB)	21
1972 Ren CJ 199 (Delhi)	26
1971 Ren CR 854 = 1971 Rajdhani LR 1 (Delhi)	27
AIR 1964 SC 1810 = (1964) 7 SCR 831	24
AIR 1962 Ker 55 = 1961 Ker LJ 305	16
AIR 1956 Bom 113	20
AIR 1954 Nag 293 = 1954 Nag LJ 455	20
(1952) 2 QB 29 = 96 SJ 280	23
AIR 1935 Cal 206 = 38 Cal WN 1197	16
(1922) 1 KB 438 = 91 LKJB 263	14
AIR 1918 PC 102 = 45 Ind App 222	22, 23, 27

B. K. Chaudhary, for Appellant.
Janak Singh, for Respondent.

JUDGMENT:— Pritam Lal, appellant, is a tenant of a house owned by the respondent landlady Shrimati Anand Kaur. The agreed rate of rent was Rs. 15/- per month. The tenant did not pay rent from June 1, 1973 to May 31, 1974.

2. On 6-6-1974, the landlady brought an eviction case against the tenant. The sole ground on which the ejection of the tenant was sought was non-payment of rent. In the ejection petition it was said that the tenant had committed default once in the past and as a result of

which an application for his eviction was filed and the Court made an order under Sec. 15 (1) of the Delhi Rent Control Act (the Act) directing him to deposit rent which he did. The default in the payment of rent from June 1973 to May 1974 was said to be a second default.

3. Before the petition was filed by the landlady on December 14, 1973, she served a notice on the tenant. In the notice she wrote to the tenant as follows:—

Registered A. D.
From Shrimati Anand Kaur,
E-130, Kalkaji Colony,
New Delhi-19.

Dated the 14 Dec. 1973.

Shri Pritam Lal,
A-54, Double Storey,
Kalka Ji,
New Delhi-110019
Dear Sir,

Please note that your contractual tenancy in respect of House No. A-54 (Double Storey) Kalka Ji New Delhi-19 had already been terminated whereafter you are a statutory tenant liable to pay damages for use and occupation at the rate of Rs. 15/- (Rupees fifteen per month) to me.

That you have not paid the said damages after May, 1973. In case you do not clear the arrears upto date within two months from the date of this notice, I shall be compelled to issue instructions to my legal adviser to file an application for your eviction, which please note. A copy of this notice has been retained for record.

Yours faithfully,
(Anand Kaur)

4. It is not disputed that the tenant received this notice. On receipt of the notice he went to his lawyer. His lawyer sent a reply on May 15, 1974. With the reply a cheque of Rs. 180/- was also sent to the landlady.

5. It appears that before sending the cheque the tenant had remitted Rs. 135/- by money order sometimes in March, 1974, on account of rent from June 1973 to February 1974. This money order was not accepted by the landlady. The tenant then sent another money order of Rs. 150/- on account of rent for the period from June 1973 to March 1974. This was done in April 1974. This was also returned. Thereafter with the reply a cheque of Rs. 180/- was sent. The landlady refused to accept the cheque. On her behalf her lawyer wrote to the te-

nant on May 30, 1974, that since the tenant did not clear the arrears of rent within two months of the notice dated December 14, 1973, he had made himself liable to eviction and the landlady was going to sue him in ejectment. As regards the cheque it was said that it was too late and the notice period had expired and liability for eviction had already been incurred. The cheque was returned to the tenant. On June 6, 1974, ejectment proceedings were launched by the landlady, as I have said.

6. The tenant filed his written statement. By way of preliminary objection he said that the eviction petition was not maintainable as the notice served by the landlady upon him was not a valid notice of demand as contemplated by Section 14 (1) (a) of the Act. On this ground it was submitted that the eviction petition was unmaintainable.

7. The Additional Rent Controller decided the preliminary objection against the tenant. The tenant appealed to the Tribunal. The Tribunal also rejected the preliminary objection by order dated July 16, 1975. The tenant now appeals to this court.

8. The main question is: Is the notice dated December 14, 1973, a notice of demand as required by the provisions of Section 14 (1) of the Act? The Additional Controller as well as the Tribunal were of the view that it did not matter that the claim was couched in the language of damages for use and occupation as it was specifically said that the tenant was a statutory tenant. It was held that the demand was for rent and not for damages from a trespasser. The Additional Controller said this:

"When the landlord demanded damages for use and occupation from the respondent who was described as a statutory tenant obviously it would mean that rent was demanded from the respondent and not damages from trespasser."

9. The Tribunal had this to say:—

"It is of course true that in the notice dated 14-12-1973 the appellant had not been told that he was in arrears of rent and the word used is damages but in my view that is of hardly any consequence inasmuch as in the first para of the said notice it has been specifically mentioned by the respondent who had herself sent the notice i.e., not through a lawyer, that the contractual tenancy of the appellant had been terminated and he was liable to pay damages for use and occupation

of the premises in dispute, being a statutory tenant."

10. I cannot subscribe to this line of reasoning. Clause (a) of the proviso to Section 14 (1) the Act provides:

"that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the manner provided in Section 106 of the Transfer of Property Act, 1882 (4 of 1882)."

11. Sub-section (2) of Section 14 then provides:

"No order for the recovery of possession of any premises shall be made on the ground specified in clause (a) of the proviso to sub-section (1), if the tenant makes payment or deposit as required by Section 15:

Provided that no tenant shall be entitled to the benefit under this sub-section if, having obtained such benefit once in respect of any premises, he again makes a default in the payment of rent of those premises for three consecutive months."

12. The landlady founded her case on sub-section (2) as according to her the tenant had committed default a second time and had not paid rent for more than three consecutive months. Therefore she claimed ejectment. But before any eviction case could be brought the landlady had to serve a notice in terms of clause (a). It had to be "a notice of demand for arrears of rent". These are the governing words of the statute. The clause clearly says that if the tenant has neither paid nor tendered the whole of the arrears of rent legally recoverable from him within two months of the date on which a notice of demand has been served by the landlord in the manner provided under Section 106 of the Transfer of Property Act the Controller may on an application made to him make an order for the recovery of possession. This however has to be read with sub-section (2).

13. Notices are not designed to trip people up. They are not traps in which the tenant may slip and fall. The object of notice is to make a demand of rent on the tenant so that he may pay up and the matter may not go to court. To achieve that object appropriate words have to be used. The notice must carry out the intention of the Act. The legislature leaves us in no doubt that the de-

mand is to be for rent and nothing else. Clause (a) uses the word 'rent' not once but twice. Similarly Sections 15, 26 and 27 speak of rent.

14. It was said that the expression "damages for use and occupation" in the context mean rent as the term 'statutory tenant' has been used in relation to the tenant. This reasoning found favour with the rent control authorities. The Tribunal said that the notice was given by the landlady herself and not by her lawyer and therefore she can be excused for using inartistic language. I cannot believe that the above notice is the handiwork of the landlady. I was told that she is not a well educated lady. The notice was, I have no doubt, drafted by a lawyer. How many persons understand the true meaning of the term 'statutory tenant'? The status of a statutory tenant is something of a 'jurisprudential curiosity' and he himself may well be described as an "anomalous legal entity" (*Shuter v. Hersh*, (1922) 1 KB 438 (448) per Scrutton L. J. quoted in *Meggary on the Rent Acts* 10th Ed., p. 199). The term "statutory tenant", itself, Justice Meggery has said, is a misnomer, inaccurate and inapposite (p. 198).

15. Therefore, in order to understand the notice as a demand for rent the tenant must first discover the true meaning and import of the expression 'statutory tenant'. He was told that he is a statutory tenant. This is arguing in a circle. This is an instance of circumlocution. A large number of round about words have been unnecessarily used to express the simple idea of rent. Forthrightness ought to have been preferred to circumlocution in order to avoid confusion and to attain the object of the Act.

16. All professions tend to develop innumerable terms that constitute an almost private jargon. The word 'damages' carries a punitive sense. The object of award of damages is, apart from compensating the plaintiff, to punish the defendant for in the eye of the law his conduct is so outrageous as to merit punishment. Damages are a reparation for conscious wrong doing in utter violation of another's rights. The very foundation of the cause of action for damages or mesne profits (for mesne profits are in the nature of damages) is wrongful possession of the defendant (see Section 2 (12), Code of Civil Procedure). No decree for mesne profits can be passed against a person who is in rightful possession (See *Madhavan Nair v. Ankan*,

AIR 1962 Ker 55). The possession of a person against whom a decree for possession has been passed is an instance of wrongful possession. (See *Surendra Lal v. Sultan Ahmad*, AIR 1935 Cal 206 (208)).

17. But admittedly the appellant tenant in this case is not in wrongful possession. He is not liable to pay any damages. From him the landlady is entitled to claim rent. Rent is recompense. The primary meaning of 'rent' is the sum certain, in gross, which a tenant pays his landlord for the right of occupying the demised premises. Rent must always be a profit. It is an acknowledgment made by a tenant to the lord of his realty or tenure. (*Woodfall Landlord and Tenant* (27th Ed. Vol. 1 page 297).

18. Rent, therefore, is not damages. Take for instance an action for rent. It is not an action for damages. The two are as different as chalk and cheese. Rent is rent. Words therefore matter. We have to worry about words. Words express a whole idea and form one of the units of expression in a language. Language is the instrument of thought.

19. The argument of the counsel for the landlady is that though it is true that a demand for damages for use and occupation has been made in the notice in fact it was a demand for rent as the tenant was described as a statutory tenant. A statutory tenant it was said pays rent and not damages. He is a tenant and not a trespasser and therefore the demand is for all purposes a demand for rent, the counsel maintained. This is a circuitous reasoning. Does it require a reasoned argument to explain the meaning of notice?

20. If the landlord used language which was really slipshod the benefit of that cannot be given to him. (See *D. G. Mehta v. B. D. Chudasama*, AIR 1956 Bom 113). It is true that it is not required that a notice should be worded with the accuracy of a plea but such construction should be placed on the notice as would not work a hardship on the tenant and would not strain the language too much against the landlord. (See *Amraoti Electric Supply Co. v. R. S. Chandak*, AIR 1954 Nag 293).

21. If the tenant is not told clearly in ordinary, plain and popular English that he is in arrears of rent and has to pay rent serious consequences can follow. The Rent Controller can save him once if he complies with his order under Sec-

tion 15 (1). But if he makes a second default because the notice is vague, obscure and ambivalent it will result in his eviction for the Controller cannot condone the default. (See *Delhi Cloth Mills v. Hem Chand*, AIR 1972 Delhi 275 (FB)). The first default is the basis of the second default. Whenever he trips, first or second time, it can be a serious matter. Take this very case. The tenant was unable to understand the notice. He went to the lawyer but by then two months had passed. He was advised 'safety first'. He sent two money orders of over due rent in March and April 1974. In May 1975 he sent a cheque. These were not accepted by the landlady. The tenant was told that it was too late and that he had incurred the liability of ejectment.

22. In *Harihar Banerji v. Ramshashi Roy*, AIR 1918 PC 102 their Lordships of the Privy Council laid down the following as the principles deducible from English authorities on the subject: Notice to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances. Further, notices to quit are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat, quam pereat* (that an act may avail rather than perish).

23. But the above principles are only applicable to notices containing errors honestly but inadvertently made. The principles would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes. (See *Harihar Banerji's case*, AIR 1918 PC 102 (supra)). The principles will also not apply where the statute demands that the notice must make a demand of rent on a tenant who is in arrears of rent. That plainly is the object of the Rent Act, namely, to protect the tenant from eviction. "The guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home" (*Feyerseil v. Turnidge*, (1952) 2 QB 29 (37) per Denning, L. J.).

24. The counsel for the landlady has referred me to *Gurbux Singh v. Bhoorlal*, AIR 1964 SC 1810. This was

a case under Order 2 Rule 2, Code of Civil Procedure. The plaintiff brought two suits. The defendant said that the first suit operated as a bar. The Supreme Court held that in order to succeed the defendant had to show that the second suit was in respect of the same cause of action as that on which the previous suit was based. In the first suit the plaintiff had used the word 'mesne profits'. The second suit was for possession and mesne profits. It was held that what matters is not the characterisation of the sum demanded but what in substance is the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which the relief was sought. That was a case of pleadings. A notice it is true need not be couched with the particularity of a pleading. This case, therefore, is not of much help.

25. The counsel then cited *Nazir Ahmad v. Kanhaiya Lal*, 1972 Ren CJ 55 (All). In this case it was said that so long as the import of the notice is clear and it substantially fulfils the requirements of Section 106, Transfer of Property Act, no undue emphasis should be laid on the terminology of the notice and any unartfulness in expression or a slight inexactitude of terminology would not invalidate it unless the inexactness has the effect of depriving the tenant of the statutory benefit he is entitled to. The question in the present case is whether the import of the notice is clear and whether the tenant has been deprived of the benefit which he would have obtained by paying rent if the notice had been worded in clear terms as required by the Act.

26. The third ruling cited by the counsel is *The Life Insurance Corporation of India v. The Standard Button Agency*, 1972 Ren CJ 199 (Delhi). In this case the landlord gave an incorrect figure about the arrears of rent in the notice of demand. It was held that on that account the notice was not bad. This ruling also does not answer the point raised before me.

27. Lastly the counsel referred to *M/s. Pruthi Brothers v. Mangla Wati*, 1971 Ren CR 854 (Delhi) where a Division Bench of this court held that the notice has to be construed in a manner which would make it effective instead of the contrary. This principle is as old as 1918 when the Privy Council enunciated it in *Harihar Banerji v. Ramshashi Roy*, (AIR 1918 PC 102) (supra). In the instant case the Act must be followed

and notice must be couched in the language of rent and not damages.

28. I, therefore, hold that the notice is bad. It is not in conformity with the requirements of Section 14 (1) (a). The petition is, therefore, not maintainable. The landlady fails in limine.

29. For these reasons I would allow the appeal and set aside the orders of the rent control authorities and dismiss the respondent's petition. The parties will, however, bear their own costs throughout.

Appeal allowed.

AIR 1976 DELHI 261

AVADH BEHARI, J.

S. Surrinder Singh Rosha, Petitioner v. Rathi Steels, Respondent.

C. R. No. 424 of 1972, D/- 3-2-1976.*

(A) Arbitration Act (1940), Section 33 read with Section 2 (c) — Application under Section 33 seeking a declaration that there is no arbitration agreement between parties — Valuation for purpose of jurisdiction of court. AIR 1958 All 506, Dissented from.

In the instant case if there had been no arbitration agreement as was alleged by the applicant the only remedy for him was to file a suit for recovery of Rupees 66,000/-. Hence the subject matter of the reference, namely, the sum of Rs. 66,000/- will determine the pecuniary jurisdiction of the Court. This is clear from the definition of 'court' given in Section 2 (c). (Para 12)

In most cases under Section 33 of the Act the claim will always be for a declaration that the arbitration agreement does not exist. This is the common denominator. But the test laid down by Section 2 (c) is not this common denominator. The test is the subject-matter of the reference. Therefore, to say that because a simple declaration has been sought the party is free to value it at any amount he likes for purposes of jurisdiction is to fly in the face of the statute, 1950-1 Mad LJ 709 and AIR 1959 Punj 614, Relied on. AIR 1958 All 506, Dissented from. (Para 16)

Cases Referred: Chronological Paras AIR 1959 Punj 614 = ILR (1958) Punj 232

14

*(From order of Miss Kanwal Inder Sub. J., 3rd Class, Delhi, D/- 4-10-1972.)

AIR 1958 All 506

6, 15

(1950) 1 Mad LJ 709

13

G. R. Chopra, for Petitioner; V. P. Chaudhary, for Respondent.

ORDER:— This is a revision petition against the order of the Subordinate Judge dated October 4, 1972.

2. The respondent, Rathi Steels made an application under Section 33 of the Arbitration Act (the Act) against Sardar Surrinder Singh Rosha, the petitioner, praying that a declaration be made that there is no arbitration agreement dated September 15, 1970, executed between the parties and subsisting and binding on them.

3. In their application Rathi Steels alleged that they had an indent with M/s. Hindustan Steel Limited Calcutta which was rejected sometimes in March or April 1970. In September 1970, Rathi Steels approached Rosha and suggested to him that since he had good contacts with Hindustan Steel Ltd., he should get the rejected indent revived and a sale order issued in pursuance thereof. It was agreed between the parties that if Rosha gets the indent revived and the sale order issued Rathi Steels shall pay him Rs. 20/- per tonne on the quantity of the goods received.

4. Further it is the case of Rathi Steels that they gave four blank letter-heads duly signed to Rosha for making a representation on their behalf to Hindustan Steel Limited and on one of these blank forms an agreement has been written by Rosha in order to make a claim against them. A declaration is sought that there is no arbitration agreement between the parties. (Rathi Steels valued the application under Section 33 for purposes of jurisdiction at Rs. 500/- and filed the same in the court of the Subordinate Judge.

5. Rosha contested the petition. He raised a preliminary objection. He said that the pecuniary jurisdiction of the dispute between the parties is Rupees 66,000/- which is the subject-matter of the reference and therefore this petition under Section 33 was exclusively triable by High Court and not by the Subordinate Judge. The following issue was framed:

"Whether this court has no jurisdiction to try the suit? O. P. D."

6. The learned Subordinate Judge following Municipal Board v. E. U. P. E. Supply Co. Ltd., AIR 1958 All 506 held

that since the relief claimed in the application was merely a declaration about the existence of the arbitration agreement and its validity Rath Steel were entitled to put their own valuation for purposes of jurisdiction. She decided that she had jurisdiction to try the suit. Rosha has come now in revision.

7. By his letter dated December 27, 1971, Rosha wrote to Rath Steel that he had spent a sum of Rs. 66,000/- on the work entrusted to him and that he wanted this amount to be paid to him. Rosha said this:

"Disputes thus have arisen on your failure to pay the sum of Rs. 66,000/- under the agreement of reference dated 15th September, 1970. I now call upon you to join in reference and get the disputes adjudicated upon through the Sole Arbitrator, Shri G. R. Chopra, Advocate, 45, Darya Ganj, Delhi. If you do not take any steps within 2 weeks from date of receipt of this letter, the necessary steps will be taken under the Arbitration Act for enforcing the agreement of reference."

8. This letter gave rise to the necessity of filing the application under Section 33. It is referred to in para. 8 in the application and is marked as Annexure 'A' to it.

9. Now it is clear that the subject-matter of the reference is Rupees 66,000/-. This is the claim of Rosha against Rath Steel which he wants to be adjudicated upon in arbitration proceedings. If there had been no arbitration agreement as is now alleged by Rosha there can be no doubt that the only remedy for him was to file a suit for the recovery of Rs. 66,000/-. In my opinion the subject-matter of the reference, namely, the sum of Rs. 66,000/- will determine the pecuniary jurisdiction of the court.

10. Section 2 (c), Arbitration Act, says:

"'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under Section 21, include a Small Cause Court;"

11. Applying this definition of "Court" to the facts of the present case it is clear that the Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of the suit will be the proper court in which the

application under Section 33 ought to be made. Mr. V. P. Chaudhary on behalf of the respondent does not dispute that if the suit had been instituted for the recovery of Rs. 66,000/- it would have lain in this court.

12. In my opinion the definition given in Section 2 (c) is a clear answer to the question raised in this case. Applying this definition I find that the subject-matter of the suit if there had been no arbitration agreement would have been the sum of Rs. 66,000/-. The same would be the subject-matter of the reference. The High Court in that case will be the proper forum.

13. In a Division Bench ruling of the Madras High Court Balakrishna Ayyar, J., said:

"In order to determine which is the Court having jurisdiction in the matter, you should 'first of all ascertain what the questions are, which form the subject matter of the reference to arbitration. You then proceed to ask, supposing these questions had arisen in a suit, which is the Court which would have jurisdiction to entertain the suit? That Court would be the Court having jurisdiction under the Arbitration Act also.'"

(Venkatasamiappa v. Srinidhi Ltd., 1950-1 Mad LJ 709).

14. This is an admirable statement of the law. Falshaw, J., in *Inder Chand v. Pooran Chand*, AIR 1959 Punj 614 followed it. I am in respectful agreement with the exposition.

15. Mr. Chaudhary, counsel for Rath Steel, has referred me to *Municipal Board v. E. U. P. E. Supply Co. Ltd.*, AIR 1958 All 506. His submission is that all that has to be seen is the prayer in the petition. He says that he has claimed declaration simpliciter and the learned judges in the Allahabad decision have held that a petitioner or a plaintiff is free to value a claim for a declaration at any amount he likes.

16. I cannot accept this submission. In most cases under Section 33 of the Act the claim will always be for a declaration that the arbitration agreement does not exist. This is the common denominator. But the test laid down by Section 2 (c) is not this common denominator. The test is the subject-matter of the reference, to use the words of the statute. In order to find out the subject-matter of the reference the court asks itself the question. If the question forming the subject-matter of the reference had been the subject-matter of the suit

which will be the court to entertain that suit? Therefore, to say that because a simple declaration has been sought the party is free to value it at any amount he likes for purposes of jurisdiction is to fly in the face of the statute. I would, therefore, prefer to follow the Madras and Punjab decisions to the Allahabad decision:

17. For these reasons I set aside the order of the Subordinate Judge dated October 4, 1972, and allow the revision petition. I would uphold the preliminary objection and rule that the Subordinate Judge has no jurisdiction to entertain the application. The parties are left to bear their own costs.

18. The parties are directed to appear before the trial court on February 16, 1976.

Revision allowed.

AIR 1976 DELHI 263

YOGESHWAR DAYAL, J.

National and Grindlays Bank Ltd.,
Plaintiff v. M/s. World Science News and
others, Defendants.

Suit No. 449 of 1973, D/- 27-1-1976.

(A) Evidence Act (1872), Sections 85,
57 — "Notary Public" — Includes Notary
Public of foreign country also.

The purpose of Sections 57 and 85 of the Evidence Act is to cut down recording of evidence. For such matters, like the due execution of a power of attorney in the present day of international commerce, there is no reason to limit the word "Notary Public" in Section 85 or S. 57 to Notaries appointed in India only. If the interpretation of notary public is limited to notaries public appointed in this country only, it will become impossible to carry on commerce with foreign countries. Section 57 enjoins upon the Courts to take judicial notice of seals of Notary Public. Such judicial notice cannot be limited to Notaries appointed in India only. AIR 1971 SC 761, Followed.

(Para 11)

Cases Referred: Chronological Paras
AIR 1971 SC 761 = (1971) 1 SCR 38 11

Mahinder Narain, for Plaintiff; Rameshwar Dial (for Nos. 1 to 3) and C. L. Khanna (for No. 4), for Defendants.

ORDER:— The present suit was filed on behalf of the National and Grindlays Bank Limited, a banking com-

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pany incorporated in England, having its branch in Connaught Place, New Delhi, against the defendants for recovery of money on the basis of hypothecation of machinery etc., mortgage, guarantees and indemnity and for other reliefs.

2. The suit was filed through Mr. John Herbert Keeble, Manager, at that time of the Connaught Place Branch, who described himself as a duly constituted attorney and Principal Officer of the plaintiff-Bank, competent to sign the plaint and to institute the suit and also being conversant with the facts of the case. The plaint was signed and verified by the said Manager as constituted attorney, and the suit was filed through Advocates in this Court.

3. Later on, the plaint was amended as the name of the plaintiff-Bank had been changed into Grindlays Bank instead of National and Grindlays Bank.

4. In the amended written statement filed on behalf of defendants 1 to 3, a plea was taken that, "it is not admitted that the plaint has been properly signed and the suit has been instituted by a competent person and under proper authority. It is denied that Mr. John Herbert Keeble is a duly constituted attorney, entitled to institute the suit or sign the plaint. It is submitted that no suit could be instituted without a special Resolution of the Board of the Directors of the plaintiff-company."

5. In view of the plea one of the issues framed by this Court on 19th May, 1975, was as under:—

"Whether the plaint has been signed, verified and instituted by a duly authorised party? O. P. P."

6. The plaintiff had earlier filed a list of documents and also filed photostat copy of the original power of attorney in favour of the aforesaid Mr. John Herbert Keeble dated 7th November, 1962, executed in his favour by the plaintiff-Bank. This photostat copy of the power of attorney which had been granted by the National and Grindlays Bank Limited to John Herbert Keeble showed that it was executed before and authenticated by a Notary Public, namely, John Martyn Dimond of the City of London. In spite of it being a photostat copy, at the stage of admission and/or denial, the defendants denied the document. The plaintiff has accordingly filed the present application under Order XIV, Rule 5, Order VI, Rule 5 read with Section 151 of the Code

of Civil Procedure, for directing the defendants to give specific and definite particulars of their objections to para. 1 of the plaint, which is the relevant para, and also to recast issue No. 1 in such a way that the burden of proving the lack of authority to institute the suit is on the defendants.

7. The application has been opposed on behalf of the defendants.

8. At the time of hearing, Mr. Mahinder Narain, learned counsel for the plaintiff, produced before me the original Power of Attorney. This document shows that it is a power of attorney in favour of John Herbert Keeble executed on behalf of the plaintiff-Bank. It also bears the seal of the plaintiff-Bank as well as necessary authentication of due execution by the aforesaid Notary Public. It also bears the seal of the Notary Public. The authentication by the aforesaid Notary Public reads as under:—

"I John Martyn Dimond, of the City of London Notary Public duly admitted and sworn practising in the said City do hereby certify and attest that I was this day present at the registered Office of National and Grindlays Bank Limited situate at No. 26, Bishopsgate in the said City with the Right Honourable EDWARD FRANCIS BARON TWINING, G. C. M. G., M. B. E., a Director and HENERY DOUGLAS CAYLEY, The Deputy General Manager of the said Bank and did see the Seal of the said Bank affixed to or impressed on the foregoing Power of Attorney and that the Seal so affixed is the genuine Seal of the said Bank. And that the signatures "Twining" and "H. D. Cayley" severally and respectively subscribed at foot of the foregoing Power of Attorney are of the respective proper handwriting of the said the Right Honourable EDWARD FRANCIS BARON TWINING, G. C. M. G., M. B. E. and HENNERY DOUGLAS CAYLEY

In witness whereof I have hereunto set my hand and affixed my Seal of Office in London this seventh day of November One thousand nine hundred and sixty-two.

(Seal)

Sd/-

John Martyn Dimond
Notary Public."

9. As stated earlier, the authentication bears not only the seal, but also signatures of the Notary Public.

10. Section 85 of the Evidence Act provides as under:—

"85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, (Indian) Consul or Vice-Consul, or representative of the (Central Government), was so executed and authenticated."

11. The document in the present case is a power of attorney and again on the face of it shows to have been executed before, and authenticated by, a notary public. In view of Section 85 of the Evidence Act, the Court has to presume that it was so executed and authenticated. Once the original document is produced purporting to be a power of attorney so executed and attested as stated in Section 85 of the Evidence Act, the Court has to presume that it was so executed and authenticated. The provision is mandatory, and it is open to the Court to presume that all the necessary requirements for the proper execution of the power of attorney have been duly fulfilled. There is no doubt that the section is not exhaustive and there are different legal modes of executing a power of attorney, but, once the power of attorney on its face shows to have been executed before, and authenticated by, a notary public, the Court has to so presume that it was so executed and authenticated. The authentication by a Notary Public of a document, purporting to be a power of attorney and to have been executed before him is to be treated as the equivalent of an affidavit of identity. The object of the section is to avoid the necessity of such affidavit of identity. Under Section 57 sub-section (6) of the Evidence Act, the Courts have to take judicial notice of the seals of Notaries Public and when the seal is there, of which judicial notice is taken, there is no reason why judicial notice should not be taken of the signatures as well. What is argued by Shri Rameshwar Dial, learned counsel for defendants 1 to 3, is that the Notary Public in Section 85 or Section 57 of the Evidence Act merely means notaries appointed under the Notaries Act 1952. The argument is that where a document purports to be a power of attorney, before the Court can presume it to be so executed and authenticated as is contemplated by Section 85, it should have been authenticated by Indian Consul or Vice-Consul or the representative of the Central Government and not by a notary public of a foreign country. For one thing Notaries Act, 1952 was not there when Evi-

dence Act which was the first Act of 1872 was enacted. Secondly, the purpose of Sections 57 and 85 is to cut down recording of evidence. For such matters, like the due execution of a power of attorney in the present day of international commerce, there is no reason to limit the words "Notary Public" in Section 85 or Section 57 to Notaries appointed in India. The fact that notaries public of foreign countries have been recognised as proper authorities for due execution and authentication for purpose of Section 85 of the Evidence Act is illustrated by the Supreme Court in case *Jugraj Singh v. Jaswant Singh*, (1971) 1 SCR 38 = (AIR 1971 SC 761). In this case the Supreme Court held that a power of attorney executed and authenticated before a notary public of California satisfied the test of Section 85 of the Evidence Act and Section 33 of the Indian Registration Act. If the interpretation of notary public is limited to notaries public appointed in this country only, it will become impossible to carry on commerce with foreign countries. Surely, Section 57 of the Indian Evidence Act enjoins upon the Courts to take judicial notice of seals of Notary Public. Such judicial notice cannot be limited to Notaries appointed in India only. This seems clear if the entire sub-section is read. Once, this conclusion is reached, there is no reason to limit the meaning of the expression "Notaries Public" in Section 85 of the Indian Evidence Act to Notaries appointed in India only.

12. In this view of the matter, it must be presumed that the power of attorney in favour of John Herbert Keeble was duly executed and authenticated. This presumption, like other presumptions is rebuttable, but, once, the original power of attorney bearing the signature and seal of the notary public is produced, which expressly confers the power on the attorney to institute suits, the burden immediately shifts to the defendants, who dispute the execution of such a power of attorney. Therefore, instead of calling upon the defendants to give better particulars of their objections as to the proper institution of the suit, I think, it is fit and proper, if issue No. 1 is divided and the burden regarding the proper institution of the suit, by a duly authorised person, is placed on the defendants. Issue No. 1 is accordingly divided as under:—

1. Whether the plaint has been signed and verified by a duly authorised person? O. P. D.

2. Whether the suit has not been instituted by a duly authorised person? O. P. D.

13. The application is allowed to this extent. The Original Power of Attorney is returned for the present to Counsel for the Plaintiff.

14. Parties may appear before the Deputy Registrar for taking further directions in the suit on 4th February, 1976. Application allowed.

AIR 1976 DELHI 265

T. V. R. TATACHARI, C. J. AND
M. R. A. ANSARI, J.

Kishan Chand, Appellant v. Union of India and another, Respondents.

Second Appeal No. 230-D of 1966, D/- 20-1-1976.*

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Sections 34 (3), 3 (1) and 22 — Delegation of power — Section 3 (1) order empowering Additional Settlement Commissioner to hear appeals from orders of Managing Officer — No question of Section 34 (3) delegation arises.

Where the Central Government has under Section 3 (1) allocated the work of hearing appeals from orders of the Managing Officer to the Additional Settlement Commissioner, he can dispose of the appeals against the orders of the Managing Officer under Section 22. His power to dispose of the appeals cannot be challenged on the ground that there was no delegation in his favour by the Settlement Commissioner under Section 34 (3). When the allocation is made by the Central Government itself there is no need of any Section 34 (3) delegation.

(Para 18)

(B) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 34 (1) — Gazette Notification — Section 33 Revision disposed of by Dy. Secretary to Government — Plea that there was no Gazette Notification authorising him raised in grounds of first appeal but not pressed — It cannot be permitted to be raised in second appeal. (Civil P. C. (1908), Section 100.) (Para 20)

(C) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 33 — Revision — Orders of lower authority

*(Against order of M. L. Jain, Addl. Dist. J., Delhi, D/- 27-1-1966).

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ties affirmed in revision accepting the reasons given by them — Revisional authority need not repeat the reasons. AIR 1967 SC 1606, Followed. (Para 24)

Cases Referred: Chronological Paras

(1973) Suit No. 687 of 1967, D/- 8-1-1973 (Punj)	16
1972-74 Pun LR (D) 203 (FB)	2, 23
AIR 1967 SC 1606 = (1967) 3 SCR 302	24
(1967) C. W. P. No. 587-D of 1964, D/- 11-5-1967 (Punj)	2
AIR 1965 Punj 484 = 67 Pun LR 1072	14
(1965) 67 Pun LR (N) 15 P 8	11
(1964) 66 Pun LR 1055 = 1964 Cur LJ 424	16
(1964) 66 Pun LR (N) 11 P 5	11

Dina Nath Nijhawan, for Appellant; Mrs. Urmila Kapur (for No. 1) and R. P. Kathuria (for No. 2); for Respondents.

T. V. R. TATACHARI, C. J.:— This Regular Second Appeal has been filed against the judgment, dated January 27, 1966, of Shri M. L. Jain, Additional District Judge, Delhi, in Regular Civil Appeal No. 37 of 1965, dismissing the said appeal and confirming the judgment and decree of Shri Dev Raj Khanna, Subordinate Judge, 1st Class, Delhi, dated January 21, 1965, whereby the learned trial Judge dismissed Suit No. 97 of 1962.

2. The Regular Second Appeal came up for hearing originally before I. D. Dua, C. J., on January 19, 1968. One of the points raised in the Second Appeal related to the vires of Rule 104 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 (hereinafter referred to as "the Rules"). There was a decision of a Single Bench of this Court in *W. C. Rahbar v. Union of India*, C. W. P. No. 587-D of 1964, decided on May 11, 1967 (Punj), in which the aforesaid rule had been struck down as being ultra vires of S. 24 of the Displaced Persons (Compensation & Rehabilitation) Act No. 44 of 1954 (hereinafter referred to as "the Act"). It was submitted before the learned Chief Justice that the said decision was the subject-matter of Letters Patent Appeal No. 22 of 1968 which was pending at that time. In the circumstances, the learned Chief Justice directed that this Regular Second Appeal be posted before a Division Bench along with the aforesaid Letters Patent Appeal from the judgment in Civil Writ Petition No. 587-D of 1964. However, the said Letters Patent Appeal was heard and disposed of separately by a Division Bench, H. R. Khanna, C. J., and S. N. Shankar, J., on August 6, 1971, and the

learned Judges referred the matter to a Full Bench. The case was then heard and disposed of by a Full Bench consisting of V. S. Deshpande, P. S. Safer and B. C. Misra, JJ., on February 25, 1972 (vide 1972-74 Pun LR (Delhi) 203) holding that the said rule was intra vires Section 24 of the aforesaid Act. The Second Appeal has, therefore, come up for hearing before us now on the other points raised therein.

3. The appellant herein, Kishan Chand, claiming to be a displaced person with a verified claim and an allottee of the first floor of House No. III/474/979, Katra Shafi, Phatak Habbash Khan, Delhi, filed the aforesaid suit, No. 97 of 1962, for a declaration to the effect that an order of the Managing Officer, dated November 22, 1957, an order of the Additional Settlement Commissioner in appeal, dated January 31, 1958, an order of the Settlement Commissioner in revision, dated December 28, 1959, and an order of the Central Government in revision under Section 33 of the Act dated June 13, 1960, holding and ordering that Shrimati Attar Kaur, widow of Shri Ganesh Dass, was eligible for the transfer of the entire house in dispute, were all illegal, void, without jurisdiction, arbitrary, malicious, and against principles of natural justice, and hence inoperative and not binding on him. The Union of India through the Secretary, Ministry of Rehabilitation, was impleaded as defendant 1, and Shrimati Attar Kaur was impleaded as defendant 2 in the suit.

4. The house mentioned above was evacuee property and was acquired by the Central Government under Section 12 of the Act on June 3, 1955, and had been placed in the Pool under Section 14 of the said Act. The whole house was valued at Rs. 6,727/- and it is common ground that since the value was less than Rs. 10,000/-, the house was allotable and not saleable.

5. The case of Kishan Chand was that while he was allotted the first floor, Shri Ganesh Dass, husband of Shrimati Attar Kaur, who was also a holder of a verified claim, was allotted the ground floor of the aforesaid house, that on his death, the allotment, which was in the nature of a licence, came to an end, and that the occupation of the ground floor by Attar Kaur thereafter thus became unauthorised occupation and, as such, could not be regularised by the Managing Officer or any other Officer. Accordingly, Kishan Chand applied for transfer of the

whole house to him, or, in the alternative, for transfer to him of the first floor which, according to him, was an independent and separate unit, and for disposal of the ground floor according to law. He admitted that the verified claim was in the name of his father, but contended that the same was in respect of certain ancestral property to which he, as a member of the joint Hindu family, was also entitled, and that on the death of his father he became entitled to the same as an heir, and that in the circumstances it was incumbent and obligatory on the Government to permanently transfer the whole of the house or in any case to transfer the first floor to him and dispose of the ground floor according to law.

6. On November 22, 1957, the Managing Officer passed an order (Exhibit P-30) that the entire house be transferred to Shrimati Attar Kaur as the compensation due to her viz., Rs. 5,629/- was nearer to the value of the house viz., 6,727/-. Against that order, Kishan Chand filed an appeal under Section 22 of the Act. The appeal was heard by Mr. K. S. Kane, Additional Settlement Commissioner, who dismissed the same by his order, dated January 31, 1958 (Exhibit P-5). Against that appellate order, Kishan Chand filed a revision on October 8, 1959, under Section 24 of the Act, along with an application for condonation of the delay in filing the same. Shri G. B. Lalwani, Settlement Commissioner with delegated powers of the Chief Settlement Commissioner, by his order (Exhibit P-6) dated December 28, 1959, held that there was no sufficient ground for condonation of the delay, and that the revision which had to be filed within thirty days under Rule 104 of the Rules, was clearly barred by limitation. Kishan Chand then preferred a revision to the Central Government under Section 33 of the Act, and the same was rejected by Shri S. Prasada, Deputy Secretary to the Government of India, Ministry of Rehabilitation, by an order (Exhibit P-17) dated May 6, 1960.

7. Kishan Chand thereupon filed the suit, No. 97 of 1962, for a declaration that all the aforesaid orders were illegal and without jurisdiction and were not binding on him. The trial Court framed the following issues:—

"1. Whether the defendant No. 2 was lawful occupant of the portion in question at the time of allotment in her favour? O. P. D. 2.

2. Whether the first floor of the house was allottable and divisible property as alleged in para. 6 of the plaint? O. P. P.

3. Whether the order of the Managing Officer, dated January 22, 1957, that of the Additional Settlement Commissioner, dated January 31, 1958, that of the Settlement Commissioner, dated December 28, 1959, and the Deputy Secretary, dated June 13, 1960, are illegal, void, without jurisdiction and as such inoperative against the plaintiff on the grounds mentioned in para. 10 of the plaint? O. P. P.

(Note: This issue will also include as to whether the said grounds exist in fact?)

4. Whether the jurisdiction of the Civil Court is barred in view of the provisions of Act 44 of 1954? O. P. D.

5. Whether the plaintiff has no locus standi to file the suit? O. P. D.

6. Whether the notice under Section 80 Civil Procedure Code was served upon the defendant No. 1? If not, to what effect? O. P. D.

7. Whether the suit in the present form is hit by the proviso to Section 42 of the Specific Relief Act and as such the suit is not maintainable? O. P. P. (Onus objected to).

8. Relief."

8. By his judgment, dated January 21, 1965, Shri Dev Raj Khanna, Subordinate Judge 1st Class, Delhi, held that Shrimati Attar Kaur was a lawful occupant of the ground floor at the time of the allotment in her favour, that there was no ground to interfere with the view taken by the officers concerned that the house in question was not divisible, and they were, therefore, justified in allotting the entire house to Shrimati Attar Kaur, that the impugned orders were neither illegal nor without jurisdiction nor mala fide, that the jurisdiction of the Civil Court was barred under Section 36 of the Act, that the plaintiff, Kishan Chand, had locus standi to sue on the ground that the impugned orders were illegal and without jurisdiction, that notices under Section 80 of the Code of Civil Procedure were duly served on the first defendant, and that the suit was not hit by the proviso to Section 42 of the Specific Relief Act and as such was maintainable. In the result, he dismissed the suit.

9. Against that judgment and decree, Shri Kishan Chand preferred an appeal, R. C. A. No. 37 of 1965. By his judgment and decree, dated January 27,

1966, Shri M. L. Jain, Additional District Judge, Delhi, dismissed the said appeal. It is against that appellate judgment and decree that the present Regular Second Appeal has been filed by Kishan Chand.

10. The house in question, which is situate in an area of about 80 square yards, consists of a ground floor and a first floor. Admittedly, it was evacuee property and was acquired by the Central Government and placed in the pool under Section 14 of the Act. It is common ground that it was valued at Rupees 6,727/- and being less than Rs. 10,000/- it was allotable and not saleable. It appears from Exhibit P-30 that the father of the appellant Kishan Chand held a verified claim in respect of certain ancestral property alleged to have been left in Pakistan, that as per statement given by Kishan Chand there were five legal heirs to his father, and that Kishan Chand thus became entitled to a 1/5th share of the compensation viz., Rs. 2,630/8/- on his father's death. It is not disputed that Kishan Chand was an allottee of the first floor of the house. As regards Shrimati Attar Kaur, the case of Kishan Chand in his plaint was that the ground floor was allotted to her husband Ganesh Dass who held a verified claim, and that on the death of Ganesh Dass Shrimati Attar Kaur who continued to be in occupation of the ground floor was only an unauthorised occupant and as such was not entitled to the transfer of the ground floor. This aspect was the subject-matter of Issue No. 1, and both the trial Court and the lower appellate Court, on a consideration of the oral and documentary evidence adduced by the parties, held that Ganesh Dass had died long before the partition of the country in 1947, that it was Shrimati Attar Kaur herself who was the allottee of the ground floor and not her husband Ganesh Dass, and that she was a lawful occupant of the ground floor. Shri Nijhawan, learned counsel for the appellant, sought to question the said finding by pointing out that in Exhibit P-30 which is a note in the departmental file of the date November 22, 1957, it was observed that "Shri Ganesh Dass, the allottee, is dead". This description of Ganesh Dass as allottees was considered by both the trial Court and the appellate Court, and it was held that the said observation was obviously a mistake in view of the evidence on the record. In view of the concurrent finding that Ganesh Dass had died long before the partition of the country, the lower courts were

justified in considering that the description of Ganesh Dass as an allottee of the ground floor of the house was clearly a mistake. We find no valid ground for interfering with the concurrent findings of the lower courts on Issue No. 1 that Shrimati Attar Kaur was herself the allottee of the ground floor and was in lawful occupation thereof.

11. Shri Nijhawan next contended that the house was divisible and the first floor was an independent and separate unit having a separate stair-case, and that the officers of the Rehabilitation Department were not justified in holding that the house was indivisible. This aspect was the subject-matter of Issue No. 2 in the suit. Dealing with the said issue, the trial court referred to Exhibits P-25 to P-29 which are government instructions from time to time about the division of evacuee properties according to which the question of horizontal division of property is to be determined by the officers concerned under the Act. The trial Court observed that those officers have held that the house in dispute was not divisible and as such have allotted the same to Shrimati Attar Kaur as a whole, that the Civil Court would not substitute its own judgment in the place of the view taken by the officers, that under Section 27 of the aforesaid Act, the orders of those officers are made final and under Section 36 of the Act, the jurisdiction of a Civil Court to entertain any challenge to the orders has been taken away, that the determination as to whether a particular property is divisible or not should be left to the officers concerned unless some palpable and arbitrary discretion had been exercised by them or their order was otherwise mala fide or in breach of rules and that considering the small nature of the property in question, it was unable to hold that the view taken by the officers of the department was in any manner capricious or arbitrary. The appellate Court also took the same view placing reliance on the decisions in *Sobha Ram v. Union of India*, 1964-66 Pun LR (N) 11 P. 5 and *Jetha Ram v. State of Punjab*, 1965-67 Pun LR (N) 15 P. 8. The appellate Court also observed that no circumstance was pointed out to it which could lead it to hold that the view of the Rehabilitation authorities that the house was indivisible was illegal in any manner.

12. Shri Nijhawan sought to argue that although the question as to whether the house in question was divisible

or not was to be decided by the officers under the Act and the decision by the said officers was final under Section 27 of the Act, and although under Section 36 of the Act, the jurisdiction of a Civil Court to entertain any suit or proceeding in respect of any matter which the Central Government or any officer or authority appointed under the Act is empowered by or under the Act to determine was excluded, it has been well settled that a Civil Court would still have jurisdiction to entertain a challenge against the decision of an officer under the Act if he had acted without jurisdiction, that in the present case, it was the Managing Officer who decided that the house was indivisible, while the proviso to Rule 30 of the Rules empowered only the Settlement Commissioner to determine whether the house could be suitably partitioned, and that since the Managing Officer's determination was without jurisdiction, the lower Courts erred in observing that they could not interfere with the determination by the Managing Officer. This argument cannot be accepted for the following reasons. In the first place, the proviso to Rule 30 does not state in so many words that it is only the Settlement Commissioner that can determine whether the property in question can be suitably partitioned. Shri Nijhawan was not able to point out any other section or rule which specifically empowers any particular officer to determine the divisibility of a property. Secondly, the appellant has not brought any material on record to show that it was the Managing Officer who had determined that the house was indivisible. Thirdly, it does not seem to have been urged before the lower courts either that the indivisibility of the house was determined by the Managing Officer or that the Managing Officer had no jurisdiction to so determine. That was why, perhaps, the lower courts remarked in their judgments in a general manner that the house was held to be indivisible by the officers of the department, and that the jurisdiction of a Civil Court has been taken away by Section 36. That being the case, the opposite party had no occasion to explain or produce evidence to show which officer had determined that the house in question was indivisible, and also that the said officer had the power to so determine. In these circumstances, it has to be held that the basis for the argument sought to be advanced by the learned counsel is lacking,

and the argument cannot, therefore, be accepted.

13. We are unable to see any infirmity in the reasoning of the lower courts. We have, therefore, to proceed on the basis that the house was not divisible.

14. The third contention of Shri Nijhawan was that the valuation of the house in dispute was made by the Valuation Officer, whereas it should have been determined by the Settlement Commissioner. An argument was addressed before the lower courts under Issue No. 3 but in a different manner. The judgments of the two courts show that the argument before them was that the valuation was made by the Valuation Officer whereas it should have been made by the Managing Officer under the law. The learned Subordinate Judge rejected the argument pointing out that according to the testimony of P. W. 3, Anand Prakash, a clerk of the Regional Settlement Commissioner, it was the Managing Officer who directed the valuation of the property by him, the valuation was done by a Valuation Officer who was specially qualified for the purpose, and thereafter the Managing Officer approved that valuation. He also pointed out that D. W. 1, Ram Chand, Section Officer, deposed that it was the Managing Officer who approved and as such fixed the valuation. The learned Additional District Judge also rejected the argument pointing out that the appellant (plaintiff) Kishan Chand himself admitted in his statement that he never raised any objection with regard to the valuation of the house in dispute before any officer of the Rehabilitation Department, that even otherwise no objection was found to have ever been made by him regarding valuation, that as held in *Balwant Singh v. Deputy Chief Settlement Commissioner*, 1965-67 Pun LR 1072 = (AIR 1965 Punj 484), it was not necessary for the statutory authority to call the occupant at the initial stage before fixing the value in every case and it was necessary only if the occupant was found eligible for allotment of the house, that if the party had any objection to the valuation he could prefer his objection, and that Kishan Chand having not done so was not entitled to challenge the valuation made by the Valuation Officer and approved by the Managing Officer. We find that the appellant (plaintiff) merely pleaded in his plaint that the value of the property in question had not been assessed by a competent authority and did

not specify as to who was the competent authority. In the grounds of appeal in the lower appellate Court, the grievance made in ground No. 6 was that the valuation was not fixed by the Managing Officer. When plaintiff Kishan Chand (Appellant herein) had thus taken definite stand in the lower courts that the valuation should have been made by the Managing Officer and not by the Valuation Officer, it would not be fair to the opposite party if he is allowed to take a different stand in the second appeal and contend that the valuation should have been made by the Settlement Commissioner. If the said contention had been urged before the lower courts, the opposite party would have had the opportunity to meet the contention by showing that the approval of the Managing Officer was sufficient by itself because of some authorisation in that behalf or that there was in fact a valuation by the Settlement Commissioner himself by producing the necessary record. So far as the Managing Officer is concerned, both the courts have concurrently found that the valuation was initially made by the Valuation Officer and the same was approved by the Managing Officer. The proceedings before the Rehabilitation Department proceeded on the basis of the said valuation and the appellant (plaintiff) did not question either the quantum or the validity of the fixation of the valuation at any stage before the departmental authorities. It was of course open to him to challenge the quantum or the validity in the suit filed by him. But, as stated above, he did not put forward any specific plea that the valuation should have been determined by the Settlement Commissioner. On the other hand, he took the stand that it was the Managing Officer that had to determine the valuation, and the lower courts have found that the Managing Officer had in fact approved of the valuation made by the Valuation Officer and thus determined the valuation. We are therefore, unable to accept the contention of the learned counsel.

15. The fourth contention of Shri Nijhawan was that in the case of claimants who have verified claims, it is the Regional Settlement Commissioner or the Settlement Commissioner who has the power to determine the compensation and not the Managing Officer. The learned counsel referred us to Exhibit P-30. It appears to be a departmental note by some Assistant. It was stated therein

that he was called by the Regional Settlement Commissioner and ordered to report the eligibility to the property, that the property in question was declared evacuee property, that there were two occupants viz., Shrimati Attar Kaur and Kishan Chand, that the balance of compensation due to Shrimati Attar Kaur was Rs. 5,629/-, that Kishan Chand was himself a non-claimant, but his father was a claimant to the tune of Rupees 1,06,320/- for which compensation due was Rs. 21,151/-, that after some adjustments the balance due was Rs. 13,151/- that as per statement given by Kishan Chand there were five legal heirs (i.e., widow and four sons) and so the share of Kishan Chand would be Rs. 2,630/8/- only, that the Managing Officer might see that Shri Kishan Chand being an allottee, only his share had to be taken into account for determining eligibility, and if so, Shrimati Attar Kaur's compensation was nearer to the value of the property and she was thus eligible for allotment. The Managing Officer, Shri R. N. Malhotra, approved the said suggestion by writing the word "yes" at the bottom of the note. Relying on the said document, the learned counsel argued that the Managing Officer had no jurisdiction to determine the net compensation due to a claimant because under Sections 7 and 8 of the Act, it is the Regional Settlement Commissioner or the Chief Settlement Commissioner that has the jurisdiction to determine the compensation. Exhibit P-30 does not read like determination of compensation by the Managing Officer. An Assistant just reported setting out the facts including the amounts of compensation due to the two occupants, and making a suggestion that since Attar Kaur's compensation was nearer to the value of the property in question she would be eligible for the allotment. The said suggestion was approved by the Managing Officer by writing the word "yes" at the bottom of the note. Be that as it may, the point about want of jurisdiction or power to determine the compensation was not raised in the plaint specifically, no issue was got framed, and no such contention was urged before the trial court or before the lower appellate Court. The point involves consideration of facts and is not a pure question of law, and, as such, cannot be allowed to be raised for the first time in this second appeal.

16. The fifth contention was that no notice was issued and no hearing was given to either of the parties before de-

ciding the question of eligibility as was done in Exhibit P-30, and, therefore, the determination of eligibility in Exhibit P-30 was invalid. In support of his contention the learned counsel referred us to certain observations of Anand, J., in paragraphs 51, 71 and 89 of his judgment in Suit No. 687 of 1967, pronounced on January 8, 1973 (Punj) and also to the decision in Harnam Singh v. Government of India, Ministry of Rehabilitation, New Delhi, 1964-66 Punj LR 1055. This point again was not specifically pleaded in the plaint nor made the subject-matter of an issue nor urged before the lower courts. It cannot, therefore, be allowed to be raised for the first time in Second Appeal.

17. The sixth contention of the learned counsel was that under Section 22 of the Act, it is the Settlement Commissioner who can hear an appeal against an order of the Managing Officer under the Act, that Shri K. S. Kane, who heard the appeal filed by Kishan Chand against the order (Exhibit P-30) of the Managing Officer, dated November 22, 1957, was only Additional Settlement Commissioner, and was not, therefore, competent to hear the appeal, and that his order, dated January 31, 1958, (Exhibit P-5) was one passed without jurisdiction. This contention was urged before the lower courts and was rejected by them, in our opinion, rightly. It is true that under Section 22 of the Act, the appeal was to be heard by the Settlement Commissioner. Exhibit D-3 is a memorandum, dated April 3, 1957, issued by the Central Government, stating that it has been decided that Shri K. S. Kane, Asst. Settlement Commr., should be designated as Addl. Settlement Commr., that he will be responsible for the various items of work enumerated in the said memorandum under the overall supervision of the Custodian-cum-Regional Settlement Commissioner, and that he will also dispose of appeals and revisions from the orders of the Managing and Settlement Officers under the provisions of the Act. Exhibit D-2 (same as Exhibit P-14) is a Gazette notification, dated April 15, 1957, issued by the Central Government in exercise of the powers conferred by sub-section (1) of Section 3 of the Act appointing Shri Kane as Additional Settlement Commissioner for the purpose of performing the functions assigned to such Commissioner by or under the said Act with effect from the date he took over charge of his office. Subsequently, another Gazette notification, Exhibit D-1,

was issued on May 29, 1957, by which Shri Kane, Asst. Settlement Commr. in the Office of the Regional Settlement Commissioner, Delhi, was appointed as Additional Settlement Commissioner in the same office with effect from 1-4-1957, until further orders. The argument of Shri Nijhawan was that Section 34 (3) of the Act empowers a Settlement Commissioner to delegate all or any of his powers under the Act to an Additional Settlement Commissioner that no such order of delegation had been made in favour of Shri Kane who was only an Additional Settlement Commissioner, and that he was not, therefore, competent to hear the appeal filed by Kishan Chand under Section 22 of the Act. There is no force in the argument. Sections 3 (1) and 34 (3) of the Act read as follows:—

"3. Appointment of Chief Settlement Commissioner, etc.:—

(1) The Central Government may, by notification in the Official Gazette, appoint a Chief Settlement Commissioner, a Joint Chief Settlement Commissioner, a Deputy Chief Settlement Commissioner and as many Settlement Commissioners, Additional Settlement Commissioners, Assistant Settlement Commissioners, Settlement Officers, Assistant Settlement Officers and Managing Officers as may be necessary for the purpose of performing the functions assigned to them by or under this Act and may, by general or special order, provide for the distribution or allocation of work to be performed by them under this Act.

(2)..... 34. Delegation of powers—

(1) (2).....

(3) Subject to the provisions of this Act and of the rules and orders made thereunder, a Settlement Commissioner may, by general or special order, delegate all or any of his powers under this Act to an Additional Settlement Commissioner, an Assistant Settlement Commissioner, a Settlement Officer or an Assistant Settlement Officer, subject to such conditions, if any, as may be specified in the order."

18. Section 3 (1) of the Act empowers the Central Government to appoint various officers, inter alia, Additional Settlement Commissioners, and also to provide, by general or special order, for the distribution or allocation of work to be performed by them under the Act. It has to be noted that while Section 3 (1)

provides or requires appointments of the various officers to be made by notification in the Official Gazette, it provides that the distribution or allocation of work be made by general or special order. It is obvious that it was in the exercise of the said power under Section 3 (1) that the Central Government issued a memorandum (Exhibit D-3) dated April 3, 1957, allocating to Shri Kane the work of disposal of appeals and revisions from the orders of the Managing and Settlement Officers under the provisions of the Act. Thus, Shri Kane, who was appointed as Additional Settlement Commissioner by a notification (Exhibit D-2) published in the Official Gazette, was duly allocated the work of disposal of appeals from the orders of the Managing Officer by an order. When such allocation was made by the Central Government itself under Section 3 (1), there was no need for any delegation by the Settlement Commissioner under Section 34 (3). Under Section 3 (1), the Central Government can allocate work to the Settlement Commissioner as well as to the Additional Settlement Commissioner, and under Section 34 (3) the Settlement Commissioner can delegate what has been allocated to him under Section 3 (1) to an Additional Settlement Commissioner. Section 34 (3) clearly states that the said delegation is subject to the provisions of the Act, and, therefore, the delegation under Section 34 (3) is subject to the allocation of work by the Central Government under Section 3 (1) of the Act. It is thus clear that by reason of the allocation by the Central Government Shri Kane was quite competent to dispose of the appeal filed by Kishan Chand under Section 22 of the Act against the order (Exhibit P-30) passed by the Managing Officer.

19. The seventh contention was that the revision filed by Kishan Chand under Section 24 of the Act was to be heard by the Chief Settlement Commissioner, that Shri G. B. Lalwani, who disposed of the revision, was only Settlement Commissioner and was, therefore, not competent to hear and dispose of the revision, and that his order (Exhibit P-6), dated December 28, 1959, was consequently one passed without jurisdiction. It is true that Section 24 (1) confers revisional power on the Chief Settlement Commissioner. Exhibit P-15 is a Gazette Notification whereby Shri L. J. Johnson, the then Chief Settlement Commissioner, in exercise of the powers conferred by Section 34 (2) of the Act, delegated with

immediate effect to various marginally noted officers, including Shri G. B. Lalwani, Settlement Commissioner, the power to hear revisions under Section 24 of the Act. The power to hear revisions under Section 24 were thus duly delegated to Shri G. B. Lalwani by the Chief Settlement Commissioner by the aforesaid Gazette Notification in exercise of the power under Section 34 (2) of the Act. He was, therefore, quite competent to dispose of the revision filed by Kishan Chand. Shri Nijwahan pointed out that in signing his order (Exhibit P-6), Shri Lalwani described himself as Settlement Commissioner and not as Chief Settlement Commissioner. Shri Lalwani did the right thing in signing as Settlement Commissioner as Exhibit P-15 only empowered him to hear revisions and did not appoint him as Chief Settlement Commissioner. There is thus no force in the contention of the learned counsel.

20. The eighth contention of the learned counsel was that Section 33 of the Act empowered the Central Government to exercise revisional powers, that the revision filed by Kishan Chand under Section 33 of the Act was disposed of by Shri S. Prasada, Deputy Secretary to the Government of India, that the Central Government had not delegated its powers under Section 33 to him as provided in Section 34 (1) of the Act, that Shri Prasada was not, therefore competent to exercise the power of revision under Section 33, and that his order (Exhibit P-17), dated May 6, 1960, was consequently one passed without jurisdiction. There is no force in this contention also. Exhibit P-18 is an Office Order dated June 23, 1959, issued by the Secretary, Ministry of Rehabilitation, Government of India, whereby Shri S. Prasada, Deputy Secretary, Ministry of Rehabilitation, was authorised to deal with cases under Section 33 of the Act, with effect from March 12, 1959. When the aforesaid order was pointed out, the learned counsel sought to argue that it was only an office order and had not been gazetted as required by the provision in Section 34 (1) of the Act. It is true that Section 34 (1) empowers the Central Government to direct by notification in the Official Gazette that any power exercisable by it under the Act may be exercised by such officer subordinate to it as may be specified in the notification. But the plea that the authorisation was not gazetted was not taken specifically in the trial Court. In his plaint, Kishan Chand merely pleaded in

feel bothered. I repeat that this being not the pleading of the defendants that Upen-dra Chandra Das had purchased the land in terms of some fresh agreement reached between him and the vendor, and there being no evidence to sustain such a finding, the submission made by Shri Roy has to be negated.

18. In consequence of the conclusions reached above, the appeal fails and is dismissed with costs to the plaintiff-respondent.

19. In the case of Durga Prasad v. Deep Chand, AIR 1954 SC 75, the Supreme Court prescribed the form of a decree which should be passed in a case like the present one. The Supreme Court held that the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct, in addition, the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. This form of the decree was prescribed by the Supreme Court after studying the various forms which were then in vogue. I think that the direction of the Supreme Court has to be complied with and so I direct that the sale deed in favour of the plaintiff respecting 6 kanis of land shall be executed by Mangalia Munda, Nirmala Sundari and Shyam Lal. If, however, they fail to come forward to do the needful the Court shall execute the sale deed on their behalf in favour of the plaintiff.

Appeal dismissed.

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(AGARTALA BENCH)

R. S. BINDRA, J.

Makhan Lal Lodh, Appellant v. Union of India, Respondent.

First Appeal No. 4 of 1969, D/- 23-4-1974.*

(A) Arbitration Act (1940), Section 14 (2) — Filing of record of evidence — Omission to file with award, depositions and documents would not affect validity of award or jurisdiction of Court to pass decree in terms of award.

(Para 4)

(B) Limitation Act (1963), Art. 119 — Applies to application made by parties and

*(From order of S. M. Ali, Sub. J., Tripura in Arbn. Case No. 2 of 1968, D/- 21-2-1969).

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not to application made by arbitrator to file an award.

Article 119 relates to applications by a party who seeks some relief against another and since arbitrator is not interested personally in the award given by him, the Parliament could not have visualised an application by an arbitrator to the Court respecting an award made by him to fall within the ambit of Art. 119. The mere fact that the arbitrator was requested by the party to file the award in Court would not convert his act of filing the award to an application by that party. (AIR 1960 SC 629 and AIR 1948 Pat 171, Relied on). (Paras 5, 6)

(C) Arbitration Act (1940), Section 13 — Initiative in making reference by one party — Jurisdiction of arbitrator to entertain any claim made by other party.

A reference to arbitration is primarily a bilateral affair, one-sided reference can be made only if the other party refuses to join despite notice. Before proceeding with the work of arbitration, the arbitrator has to ascertain from the parties what are the points of conflict between them and he has to give his award on the disputes ascertained from questioning the parties or from their pleadings except in the case where the proceedings are ex parte. When the heads of dispute have been settled between the parties it is obligatory on the arbitrator to give his findings thereon in the award. The award would become enforceable against the vanquished party at the instance of the other irrespective of the fact who had taken the initiative in making a reference to the arbitrator. (AIR 1944 Lah 149 and AIR 1973 All 49, Relied on). (Paras 8, 10)

Cases Referred: Chronological Paras
AIR 1973 All 49 = ILR (1972) 1 All 500

8
AIR 1960 SC 629 = (1960) 2 SCR 810 6
AIR 1948 Pat 171 6
(1948) 2 All ER 186 = 64 TLR 337 12
AIR 1944 Lah 149 = 46 Pun LR 50 8
AIR 1941 Mad 266 = 1940 Mad WN 879

11
(1893) 68 LT 54 = 37 SJ 194 13

S. Deb, Advocate, for Appellant;
H. C. Nath, Advocate-General and R. Ghosh, Govt. Advocate, for Respondent.

JUDGMENT:— Shri Makhan Lal Lodh of Agartala entered into a contract with the Union of India for construction of barracks meant for bachelor officers at Agartala sometime in the year 1961-62. The formal agreement executed between the parties contained an arbitration clause

providing that in case of any dispute between the parties the matter shall be referred for arbitration to the Administrator of Tripura. It was also provided in that clause that if for any reason the Administrator found any difficulty to do the arbitration himself he could appoint some one else as an arbitrator. On 12th September, 1966, the contractor petitioned the Administrator "to arbitrate or kindly appoint some other person for the purpose", and mentioned in his petition the various heads of dispute which had cropped up between the parties. By an order dated 21-11-1966 the Administrator appointed Shri A. K. Dasgupta, Superintendent Engineer, Additional Circle, Agartala as sole arbitrator "for the purpose of making the award on the points of disputes referred to in the above petition". It was on 20th January, 1967, that Shri A. K. Dasgupta called upon the parties to submit statements of facts relating to the disputes between the parties. After receiving the statements of facts from the parties Shri A. K. Dasgupta heard the parties and gave his award which he happened to sign on 18-5-1967. The award was to the effect that it was the contractor who had to pay Rs. 10,093.06 to the Union of India. The arbitrator communicated the fact of his having signed the award to the parties and also sent to them each a copy of the award.

2. It appears that some officer of the Government wrote to the arbitrator on 12-9-1967 requesting the latter to file the award in Court so that a decree in terms thereof may be made in favour of the Government against the contractor. The arbitrator consequently moved the Court on 16-9-1967 but he produced the award in original before that Court on 15-1-1968. The Court apprised the parties that the arbitrator had filed the award in Court and called upon them to put in their objections, if any. The contractor filed objections challenging the validity of the award and contending that no decree in terms thereof could be made against him in favour of the Union of India. The Court on rejecting the objections filed by the contractor made an order on 21-2-68 making the award a rule of the Court and passing a decree in terms thereof. The present appeal by the contractor is directed against that order of the Court.

3. Shri S. Deb levelled a three-pronged attack on the order made by the Court and the award given by the arbitrator. In the first place he urged that the arbitrator having not forwarded to the Court, along with the award, the records of the arbitra-

tion proceedings the award is rendered irregular if not invalid, and as such it cannot form the basis of a decree against his client. The second point urged by the counsel was that the award having been filed in the Court more than 30 days after the date of service on the parties of the notice of making of the award, the Court should have rejected the prayer for making the award the rule of the Court rather entertain the proceedings and pass a judgment on the basis of that award. The last and the most important point urged by Shri Deb was that reference to the arbitrator having been made at the instance of the contractor the arbitrator lacked jurisdiction to entertain any claim made by the Union of India or to make an award in favour of Union of India. The learned Advocate-General entered the lists with Shri Deb on all the three points canvassed by the latter. I proceed to examine the validity or otherwise of those points seriatim.

4. The Advocate General did not dispute the point of fact that the arbitrator did not forward to the Court the records of arbitration proceedings along with the award. On the authority of sub-section (2) of Section 14 of the Arbitration Act, Shri Deb urged that the Court could not have taken note of the award submitted by the arbitrator or to pass any judgment on the basis thereof for the reason of non-submission of records to it by the arbitrator. Sub-section (2) of Section 14 provides that the arbitrators or umpire shall at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court and the Court shall thereupon give notice to the parties of the filing of the award. Indisputably sub-section (2) enjoins upon the arbitrator to send to the Court the "depositions and documents which may have been taken and proved before him along with the award. However, the section does not proceed to state further that if such depositions and documents are not forwarded to the Court along with the award, the award would lose validity or the Court would have no jurisdiction to adjudge claim based on the award. Indeed such a provision could not have been incorporated in section 14 for any lapse on the part of an arbitrator in the matter of despatch of depositions and documents to the Court along with the award cannot retrospectively have the effect of de-

priving the award of its validity, if it was otherwise valid by the time it was signed. The validity or otherwise of the award will have to be determined on the basis of factors and circumstances preceding the signing of the award rather than what follows that event. If, as in the present case, the arbitrator omits to send the depositions and documents to the Court along with the award it would at the best be a case of an inconsequential omission on the part of the arbitrator and such an omission can always be got over by the Court directing the arbitrator to produce the depositions and the documents either at the instance of the parties or even suo motu. Therefore, I see no merit in the first point canvassed by Shri Deb.

5. I now take up the second objection raised by Shri Deb, viz., that of limitation. Article 119 of the Limitation Act, 1963, relates to two varieties of applications, namely, (a) an application for the filing in Court of an award, and (b) an application for setting aside an award or getting an award remitted for re-consideration. The period prescribed for each application is 30 days and qua application of (a) variety the period begins to run from "The date of service of the notice of the making of the award", and in respect of applications of (b) variety the period begins to run from "The date of service of the notice of the filing of the award". The question for decision is whether Article 119 envisages an application by an arbitrator to the Court for taking proceedings to give practical shape to the award made by him. This Article falls under Third Division of the schedule appended to the Limitation Act and it bears the caption "Applications". Obviously the applications contemplated by Article 119 are those which may be made by a party who seeks some relief from the Court against another, and this conclusion I believe is in accord with the objective behind suits contemplated by First Division and the appeals contemplated by the Second Division of the schedule. Suits are filed by one party claiming relief against another except the suits falling in the category of interpleader suits, and likewise appeals are filed by one party claiming relief against another. In that background it is legitimate to presume that Article 119 relates to applications by a party who seeks some relief against another and since arbitrator is not interested personally in the award given by him, the Parliament could not have visualised an application by an arbitrator to the Court respecting an award made by him to fall within the ambit of Article 119. Respecting (a) variety of applications, the period of limitation, according to

column 3, begins from the date of the service of the notice of the making of the award. It looks clear from the wording of column 3 that an application under Article 119 (a) could be made only by a party to the award and not by an arbitrator because, firstly, no provision of the Arbitration Act enjoins service of notice of making of the award on the arbitrator and, secondly, the service of the notice of the making of the award on the arbitrator, the author of the award, makes no sense. An application of (b) variety can have for its objective either setting aside of the award or getting the award remitted for re-consideration. Arbitrator being not interested in the outcome of the award he is not expected to make an application to the Court for setting aside the award made by him. Nor can his prayer that the award be remitted to him for re-consideration sound rational or credible. Nor again there would be any purpose behind, or practical utility in, serving on the arbitrator a notice of the filing of the award as contemplated by entry in column 3 against entry in column 1 of Article 119 (b). Therefore, the intrinsic evidence furnished by the phraseology of Article 119 militates against the contention urged by Shri Deb.

6. The point at anvil is not barren of authority. The Supreme Court held in the case of Champa Lal v. Samrathbai, AIR 1960 SC 629, that Article 178 of the Limitation Act, 1908, applies to applications made by the parties and not to the filing of the award by the arbitrator. Article 178 of the old Act corresponds to (a) variety of applications mentioned in Article 119 of the new Act. Therefore, qua such applications the matter is concluded and so not open for debate. The applications of variety (b), as concluded already, can never be made by an arbitrator as the phraseology employed cannot sustain any other view. Therefore, on repelling the submission made by Shri Deb I hold that since the award had been filed in Court by the arbitrator and not by any of the parties to the dispute, the filing of the award is not hit by Article 119. The mere fact that the arbitrator had been requested by the Government to file the award in Court would not convert his act of filing the award in Court to an application by the Government within the meaning of Article 119. AIR 1948 Pat 171, Lachhmi Prasad v. Gobardhan Das, is an authority for the proposition that Article 178 Limitation Act, 1908, comes into play when one of the parties or both of them file an application in Court under Section 14 of the Arbitration Act and that that Article has no reference to the time when the arbitrators or umpire may be requested by the parties to file the award.

Therefore, the fact of the Union of India having requested the arbitrator to file the award in Court is of no legal consequence.

7. This takes me to the most knotty problem raised by Shri Deb, viz., that when initiative for arbitration is taken by one party the other party to the dispute cannot put any counter-claim. Shri Deb and the Advocate General very candidly conceded that they had not been able to lay hand on any judicial pronouncement, Indian or foreign, bearing on that proposition. In other words, according to them the proposition is *res integra* or *res nova*. Hence the reply to the proposition has to be found on examining the relevant provisions of the Arbitration Act and the facts of the case in hand.

8. The Indian Arbitration Act, 1899, which was repealed by the Arbitration Act of 1940, defined the word "submission" to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. That expression "submission" was held by the various High Courts in India as including an "agreement to refer to arbitration" and a "reference". However, the Act of 1940 has split up the term "submission" used in the previous Act and has separately defined an "arbitration agreement" and a "reference". According to Section 2 (a) of the new Act "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether the arbitrator is named therein or not, and in Section 2 (e) the expression "reference" is defined as meaning a reference to arbitration. The two legal expressions are clearly distinguishable for they relate to separate transactions. While arbitration agreement is a contract by which the parties undertake to submit their present or future difference to arbitration, a "reference" is a delegation of authority by the parties to an arbitration agreement to a named arbitrator with implied agreement that they shall be bound by his award. The arbitration agreement may precede a reference to arbitration or it may be simultaneously therewith but a reference to an arbitration like an arbitration agreement is normally a bilateral and not a unilateral act. Of course one can visualise cases where a party out to refer a dispute to the arbitrator fails to enlist the willing consent of the opposite party for joining him in making a reference to the arbitrator. In such an event the party out for settlement of dispute by arbitration will have to serve notice on the other party intimating him that in case the latter fails to join him in making the reference he would do so all by himself or

move the appropriate Court for making a reference to arbitrator. Arbitrator, it is common place to say, has to decide a particular dispute or disputes that have cropped up between the parties and have been referred to him and such dispute or disputes must fall within and not outside the ambit of the arbitration agreement concluded between the parties. It must, therefore, follow as a corollary that before the arbitrator proceeds with the work of arbitration he should ascertain from the parties what are the points of conflict between them, and this obviously can be done either by perusal of the joint reference made by the parties in conflict or by ascertaining points of dispute from questioning the parties or examining their pleadings, if any. In either eventuality the points of dispute have to be identified before the proceedings in the arbitration can be embarked upon with meaningful consequences. It may be that in some cases one of the parties chooses not to appear before the arbitrator despite notice, and in such an event the points of dispute may have to be ascertained *ex parte*. The High Court of Lahore held in *Punjab Province v. Dr. Lakhmi Dass*, AIR 1944 Lah 149, that when it is desired to take advantage of an arbitration clause, it is necessary that the party seeking the reference should first call upon the other party to join in the submission and that a one sided reference is illegal until and unless the other party has refused to join in the reference. I am in respectful agreement with these observations for they are clearly in accord with the natural principles governing arbitration. On page 68 of *Russell on Arbitration*, Eighteenth Edition, it is stated that a reference "of a cause" and "of all matters in difference in a cause", mean exactly the same thing, and only give the arbitrator power to decide on the questions raised by the pleadings which are necessary for the determination of the cause. All this discussion leads me to the conclusions that a reference to arbitration is primarily a bilateral affair, that one sided reference can be made only if the other party refuses to join despite notice, and that arbitrator has to give his award on the disputes ascertained from the parties pleadings except in the case where the proceedings are *ex parte*. Reference in this respect may usefully be made to AIR 1973 All 49, *Jagannath Kapur v. Premier Credit and Instalment Corporation (P) Ltd.*

9. Coming now to the factual part of the story between the parties I find that the contractor had set out in his petition dated 12-9-1966, addressed to the Administrator, the various heads of dispute and had requested the Administrator to act as an arbitrator between the parties respecting those

heads of dispute. The Administrator having authority in terms of the arbitration clause between the parties to appoint some one else as an arbitrator, he appointed Shri A. K. Dasgupta as the sole arbitrator by an order dated 21-11-1966. On 20th January, 1967, the arbitrator sent notices both to the contractor and the Union of India communicating to them that he had been appointed as an arbitrator by the Administrator and that he had entered upon the reference. He called upon the contractor to submit a clear and detailed statement of facts on the point or points of dispute together with copies of documents on which he intended to rely upon in support of his claim. He directed the contractor to furnish copies of the statement of facts and the documents on which he meant to rely to the Executive Engineer, Agartala Division No. II. The directive which the arbitrator issued per the same letter to the Executive Engineer was that within 15 days of the receipt by him of the statement of facts from the contractor he should submit counter-statement of facts on behalf of the Union of India supported by the copies of documents, if any. The Executive Engineer was also directed to furnish a copy of the counter-statement of facts as also the copies of the documents relied upon by him to the contractor. By para 3 of that notice the arbitrator told the Executive Engineer that the latter may also include in the counter-statement of facts the detailed statement of the case with regard to claim or claims, if any, which Union of India may have against the contractor, and that if any such counter-claim was made then the Executive Engineer shall send a copy of counter-statement of facts to the contractor. On receipt of the notices from the arbitrator, the contractor submitted his statement of facts to the arbitrator on 8-2-1967 and the Executive Engineer did so on 3rd/4th March 1967. Towards the close of his statement of facts submitted to the arbitrator, the contractor happened to state that "As Chief Commissioner wanted arbitration on points given by me, your Para (3) may not arise." The Executive Engineer laid a claim for recovery of Rs. 12,900.11 against the contractor in the statement of facts submitted by him to the arbitrator and a copy of which was forwarded by him to the contractor. The arbitrator then probably recorded some evidence and ultimately gave his award on 18-5-1967, holding that the contractor owed a sum of Rs. 10,093.06 to the Union of India.

10. Shri Deb was unable to satisfy this Court that his client had raised a dispute before the arbitrator that the Union of India could not make a counter-claim against the

contractor in view of the fact that it was he who had initiated the proceedings culminating in the award. The award itself is completely silent on that point. A relevant matter that requires emphasis is that the amount found due from the contractor to the Government is in respect of the heads of dispute mentioned by the contractor firstly in his petition, dated 12-9-1966 addressed to the Administrator and then in his statement of facts dated 8-2-1967 submitted by him to the arbitrator in response to the latter's notice. If the contractor did not raise issue relevant to the counter-claim made by the Union of India against him before the arbitrator and if the arbitrator gave his findings on the heads of dispute which had been referred to him by the contractor and on which the latter sought his adjudication, I find no merit in the contention of Shri Deb that the arbitrator had exceeded his jurisdiction in reaching the conclusion that actually some money was due by the contractor to the Union of India rather the other way about. The heads of dispute having been settled between the parties it was obligatory on the arbitrator to give his findings thereon, and if the findings were that the money was due from the contractor to the other party rather due to him from the latter, those findings had to be set out in the award. When such findings were actually incorporated in the award, the award would become enforceable against the vanquished party at the instance of the other irrespective of the fact who had taken the initiative in making a reference to the arbitrator. I see no escape from that conclusion.

11. The matter may appropriately be examined from another standpoint. The petition, dated 12-9-1966, addressed by the contractor to the Administrator cannot be described as a reference, strictly speaking. In the last para of that petition the prayer made by the contractor was: "Please arbitrate or kindly appoint some other person for the purpose." The Administrator undoubtedly had the right in terms of Clause 25 of the contract between the parties to do the arbitration himself or to name some one else as an arbitrator. The Administrator actually entrusted the job of arbitration to Shri A. K. Dasgupta and the latter after entering upon the reference called upon the parties to submit the statement of facts in regard to dispute or disputes between them. It is Shri A. K. Dasgupta who evidently acted as an arbitrator and not the Administrator. Shri A. K. Dasgupta very rightly called upon the parties to submit to him the points of dispute between them and he was equally justified in directing the parties to exchange their respective statements of facts and that was done.

It is out of those statements of facts of the parties that the arbitrator ascertained the points of dispute between them and then proceeded to determine the same. It is sheer coincidence that the heads of the dispute between the parties did not go beyond what had been set out by the contractor in his petition addressed to the Administrator on 12-9-1966, though under the same heads the Union of India laid claim for no less than Rupees 12,900.11 against the contractor. As mentioned above, the contractor does not appear to have raised an objection before the arbitrator that the latter could not look into and adjudicate upon the claim of Rs. 12,900.11 made by the Union of India against him (the contractor). Therefore, the history of the case leaves no room for doubt that the actual reference made to the arbitrator was whether any, and if so what, amount is due by the contractor to the Union of India or vice versa in respect of the heads of dispute mentioned in the statements of facts submitted by the parties to the arbitrator. The High Court of Madras held in the case of *Thirumalai v. Nanjaya*, AIR 1941 Mad 266, that reference to arbitration "should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties". Indeed, it should be so. By and large, the arbitration references are made to persons not trained in judicial proceedings and the parties before them seldom take help of Advocates, and so it is for the Courts to determine in the light of the available material what was the true intention of the parties respecting a particular reference.

12. Shri Deb cited 1948 (2) All ER 186, *Mediterranean v. Fortress*, in support of the contention that counter-claim cannot be subject of adjudication by an arbitrator. However, nothing said in the report lends weight to that contention. What happened in the case was that the sellers had claimed the price of the goods which they had agreed to sell to the buyers and of which the buyers had refused to take delivery on the contention that they were unmerchantable as well as unfit for the purpose for which they were required. The arbitrator reached the findings that the property in the goods had not passed to the buyers though the goods were clearly of merchantable variety. In consequence of these findings the arbitrator made an award in favour of the sellers declaring the latter entitled to certain amount not on account of the price of the goods but on account of damages for reason of non-acceptance of goods by the buyers. The buyers then moved the Court to set aside the award primarily on the footing that the sellers having claimed the price of the goods the arbitrator had no jurisdiction to award them

damages for breach of the contract. The High Court held, repelling the contention of the buyers, that the arbitrator was obviously right in forming the opinion that property in the goods having not passed to the buyers the sellers were not entitled to recover the price of the goods, and that since all disputes had been referred to him the arbitrator was well within his rights in awarding damages to the sellers for breach of contract committed by the buyers. The High Court observed that simply because the sellers had put forward a claim on a wrong basis it cannot be said that the arbitrator was not entitled to award compensation on the true basis. The actual decision in that case does not lend any help in finding solution to the point urged on behalf of the contractor. On the other hand, it lends support to the view that the arbitrator can go to the bottom of the dispute between the parties and find out which way the justice of the dispute lies, and this is exactly what appears to have been done by the arbitrator Shri A. K. Dasgupta of our case.

13. Shri Deb read to the Court number of passages from Russell's *Arbitration* in a bid to buttress his standpoint. I find that on page 68 of the book it is mentioned, on the authority of an old decision, that an arbitrator to whom all matters in difference in the action were referred had jurisdiction to deal with the counter-claim. The decision cited in support of this proposition is (1893) 68 LT 54, *Weall v. James*. It is a dispute or disputes between the parties which are referred for decision to the arbitrator, and obviously any question on which the parties join issue is raised to the level of a dispute or a difference within the meaning of the expression "arbitration agreement" as defined in Section 2 (a) of the Arbitration Act. Since the statement of facts submitted by the Government to the arbitrator contained a counter-claim made by it against the contractor and since that counter-claim was not contested before the arbitration as beyond his jurisdiction and he happened to adjudge that counter-claim, the arbitrator cannot be said to have acted beyond his jurisdiction. Therefore, the third and the last point raised by Shri Deb cannot be sustained like the other two points urged by him.

14. In the result, this appeal fails and is dismissed. However, I leave the parties to bear their own costs in this Court.

Appeal dismissed.

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(AGARTALA BENCH)

R. S. BINDRA, J.

Chandra Kumar Roy and another, Appellants v. Smt. Rajeswari Devi and others, Respondents.

First Appeals Nos. 14 of 1966 and 2 of 1967, D/- 20-5-1974*.

(A) Civil P. C. (1908), Section 11 — Word 'suit' — Meaning of — Divisibility of causes of action.

The expression "suit" used in Section 11, means the dispute as might have formed the subject of a separate suit independently of the provisions of the Civil Procedure Code which enable a person to unite several causes of action in one and the same suit. In other words, if it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. (1885) ILR 7 All 247 (FB) and Chitaley's Commentaries on Code of Civil Procedure, 8th Edition Notes 21, 80, 81 Relied on.

(Para 8)

Cases Referred: Chronological Paras
(1885) ILR 7 All 247 = 1885 All WN 15 (FB) 8

N. C. Roy (In F. A. No. 14 of 1966) and J. K. Roy and D. Purkayastha (In F. A. No. 2 of 1967), for Appellants; R. C. Bhattacharjee, M. R. Choudhury and M. N. Choudhury, for Respondents in both the Appeals.

JUDGMENT:— First Appeals Nos. 14 of 1966 and 2 of 1967, filed respectively by Chandra Kumar Roy and Birendra Bijoy Majumder, arise out of Title Suit No. 30 of 1964 instituted by Kashi Prasad Misra on 30th of November, 1964, for possession of certain properties comprised in jote No. 188, mouja Purba Debendra Chandra Nagar. All told there were 12 defendants in the suit including the two appellants who were respectively defendants Nos. 2 and 1. The suit was decreed against all the defendants by the trial Court and since defendants Nos. 3 to 12 have not come up in appeal this Court is not concerned with those parts of the properties which were in their occupation.

2. Feru Goala, by common agreement was the jotedar of lands covered by jotes Nos. 187, 188 and 189 of the mouja aforementioned.

* (From judgment and decree of S. M. Ali, Addl. Sub J., Tripura in T. S. No. 30 of 1964 (Renumbered T. S. No. 21 of 1966) D/- 12-10-1966).

ed. It is also not in dispute that Kashi Prasad Misra had secured a money decree against Feru Goala and that in execution of that decree all the three jotes were attached, Court-auctioned, and purchased by the decree-holder himself. The sale in favour of the decree-holder was confirmed by the Court on 29-3-1954 and according to the allegations made in the plaint the plaintiff had secured possession of the lands purchased by him on 2-10-1955 through the Court. He alleged further that he had made over the lands purchased by him to some of the defendants (other than the appellants) as labourers but since those defendants did not share the produce with him he was left with no alternative but to file a suit for possession of the lands. It was also alleged that Feru Goala had made a large number of alienations of the lands purchased by him (the plaintiff) that Feru Goala had no authority to make any transfers of the lands of which he had ceased to be the owner and that as such he was not bound by house transfers.

3. The defendants Nos. 1 to 4, 10 and 11 filed separate written statements. The burden of the defence adopted by defendants Nos. 1 and 2 was that the plaintiff did not continue to be the owner of the land purchased by him in Court auction because immediately after that purchase he had entered into same agreement with Feru Goala from whom he happened to secure some money in consideration of having relinquished his title to the land in his favour. To buttress this defence they pleaded that Feru Goala had made a large number of transfers of the lands covered by the three jotes and that the plaintiff had never taken any objections against those transfers. They further pleaded that it was Feru Goala or his family members including his sons-in-law who had been in possession of the lands right from the date the plaintiff had purchased the land in Court auction. The defendant No. 1 pleaded that he had purchased 1 drone 8 kanis and odd land from Feru Goala and his wife in good faith and for valuable consideration and that this sale was within the knowledge of the plaintiff. Another plea taken by him was that Feru Goala had sold the land to him after mentioning that fact to Kashi Prasad Misra. On the basis of this last mentioned allegation the defendant No. 1 pleaded estoppel and acquiescence against the plaintiff besides setting up the provisions of Section 41, Transfer of Property Act, in support of his title to the land.

4. The defendant No. 2 laid claim to 6 kanis of land in jote No. 188 qua which he had allegedly entered into agreement of sale with Feru Goala in Baishakh, 1353 B. S., and added that he had built his homestead

on 2 kanis out of the same. Another plea set up by him was that in respect of this 6 kanis of land he had filed Title Suit against Kashi Prasad Misra and Feru Goala who had respectively been cited in that suit as defendant No. 1 and defendant No. 2, that that suit was decreed in his favour, and that Second Appeal No. 19 of 1962 arising out of that suit was pending decision in the Court of the Judicial Commissioner.

5. As many as 11 issues were settled between the parties. Practically speaking all the issues were decided in favour of the plaintiff by the trial Court by its judgment dated 12-10-1966 and in consequence the suit was decreed in the form prayed for.

6. The plaintiff Kashi Prasad Misra died during the pendency of the suit and his widow Rajeswari Devi was brought on the record as his sole legal representative.

7. The dispute between the plaintiff and the defendant No. 2 Chandra Kumar Roy can be disposed of in a few words. It has been admitted by the counsel for the plaintiff-respondent that Second Appeal No. 19 of 1962 was remanded by the Judicial Commissioner to the trial Court for fresh decision after quashing the decrees made by the trial Court and the first appellate Court. Shri N. C. Roy, the learned counsel representing the appellant Chandra Kumar Roy, has placed on the record of this appeal the judgment dated 7-2-1967 passed by the Munsiff after remand of the suit as also a copy of the decree based on that judgment. The judgment and the decree bring out that the suit of Chandra Kumar Roy was decreed on the finding that he had purchased the land on payment of Rs. 2,400/- to Feru Goala. The Munsiff also held that Chandra Kumar Roy had acquired valid title to the property as a consequence of purchase from Feru Goala. In face of the judgment and the decree placed on the record of this appeal the controversy between plaintiff-appellant and Chandra Kumar Roy has come to an end in respect of 6 kanis of land. The judgment was given on 7-2-1967 and it is not the claim of Shri M. R. Choudhury, the learned Advocate representing the plaintiff-respondent, that any appeal had been filed against the decree following the judgment dated 7-2-1967. However, Shri Choudhury has urged that the decree of the Munsiff's Court is not binding on his client because she had not received any notice about the proceedings done in the suit after the Munsiff had received the file on remand from the Judicial Commissioner's Court. It may be so. But that fact does not deprive the judgment and the decree of their apparent value. If the plaintiff-respondent

wants to challenge the judgment and the decree, the proper course for her to follow is to move the Munsiff's Court under Order 9, Rule 18, of the Civil Procedure Code and pray for quashing the decree. Until that decree is set aside it carries full weight in the eye of law. Therefore, I have to assume the validity of the decree made by the Munsiff's Court and that decree having determined the dispute between the parties qua 6 kanis of land the plaintiff-respondent cannot be heard to lay claim to the same land over again. It may be mentioned that according to the decree the ownership of Chandra Kumar Roy over 6 kanis of land now in dispute was declared, his possession over that land confirmed, and that defendants, Feru Goala and Kashi Prasad Misra, were "restrained permanently from causing any disturbance to the plttf."

8. It may have been urged, though actually it has not been, that the Munsiff's jurisdiction being limited to Rs. 5,000/- and the value of the present suit being Rupees 6,000/- the decree in the previous suit does not operate as *res judicata* because the Munsiff could not have tried the present suit. However, that is not the position of law and this despite the fact that Section 11, Civil Procedure Code, provides, as a condition for operation of *res judicata*, that the Court which decided the first suit should be competent to try the subsequent suit and this is not so in the present case. The expression 'suit' used in Section 11 it is well settled, means the dispute as might have formed the subject of a separate suit independently of the provisions of the Civil Procedure Code which enable a person to unite several causes of action in one and the same suit. In other words, if it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. This principle may be illustrated to bring out its exact significance, and the illustration is furnished by a decision of a Full Bench of the Allahabad High Court reported in (1885) ILR 7 All 247 (FB), *Sheoraj Rai v. Kashinath*. The relevant facts of that case are that K sued S on two bonds and S contended that the two bonds sued upon as well as another two bonds had already been satisfied by him. This contention of S was found against him and a decree was passed in favour of K. Subsequently S sued K for return of the four bonds alleging that the same had been satisfied. The Court which tried the former suit had no pecuniary jurisdiction to try the subsequent

suit on the four bonds. The question that arose for decision in the second suit was whether it was barred in respect of two bonds on which K had founded his earlier suit against S. The answer was in the affirmative and the reason given in support of that finding was that the suit in respect of each of the bonds must be regarded as a separate suit inasmuch as they could have each formed the subject-matter of a separate suit. The subsequent suit, it was concluded, must be taken to consist of really two suits for the purpose of Section 11, one of which, namely, that in respect of two bonds in K's suit, was competent to be tried by the Court in the former suit and therefore the second suit, so far as those bonds are concerned, is clearly barred by res judicata. This aspect of the applicability of res judicata is discussed in notes 21, 80 and 81 of Chitaley's Commentaries on Code of Civil Procedure, 8th Edition. In note 81 the proposition stated is that the party who has lost in one Court cannot add some more causes of action to the original cause of action in the earlier suit for the purpose of swelling the amount of the valuation and then claim that the former Court being not competent to try the subsequent suit the decision given by it does not operate as res judicata. It is further mentioned in note 81 that if it were otherwise, any defeated party can, by merely adding another claim, re-agitate the same question in a fresh suit filed in a higher Court, and that for the purpose of deciding a question of res judicata each cause of action in the subsequent suit should be treated as a separate suit and if it is found that one of these causes of action is relied upon in the earlier suit, then, although taking all the causes of action together the second suit may be outside the jurisdiction of the former Court, the former decision will operate as res judicata in the subsequent suit. Shri M. R. Choudhury was unable to dispute the correctness of this proposition of law and so I hold that the decision in the former suit between Chandra Kumar Roy as plaintiff and Kashi Prasad Misra as defendant No. 1 and Feru Goala as defendant No. 2 respecting 6 kanis of land now in possession of Chandra Kumar Roy operates as res judicata.

9. This takes me to the thickness of the dispute which centers round the land measuring 1 drone 8 kanis and odd, jote No. 188, which is admittedly in occupation of the defendant No. 1 Birendra Bijoy Majumder. The stand of this defendant No. 1 at present is that though the plaintiff Kashi Prasad Misra had purchased the land in Court auction and the sale was confirmed in his name on 29-3-1954, he never entered into possession of the land and that actually he had surrendered

the land to Feru Goala in return for the money paid to him by the latter. It is Feru Goala or his relations who have been in occupation of the land. It is further urged by defendant No. 1 that those persons have been transferring the lands to various persons in their capacity as owners, he being one of them. According to defendant No. 1, he had purchased the lands in his occupation by two sale deeds, one dated 30th of September, 1963 and the other dated 30th of November, 1963, respectively marked as Ext. D-18 and Ext. D-17. Actually Ext. D-17 is a sale deed made by the wife and the minor son of Feru Goala but Feru Goala had executed the same in his capacity as guardian of his minor son. Shri Choudhury denied on behalf of the plaintiff-respondent that Kashi Prasad Misra had not secured possession of the land purchased by him, or that he had agreed to return the purchased property to Feru Goala, or that he had received any money from the latter. However, after examining the available data on the record in the light of the arguments addressed at the bar, I feel convinced that some understanding had been reached between Kashi Prasad Misra and Feru Goala on or before 2-10-1955, that some money had been paid by Feru Goala to Kashi Prasad Misra as price of the land of which Kashi Prasad Misra had acquired ownership consequent upon confirmation of the auction sale in his favour, and that the land which was the subject of auction sale never went into possession of the auction purchaser, the judgment-debtor having continued to enjoy its possession on the strength of the understanding reached between the parties. The material which has influenced me in reaching those conclusions I now proceed to detail.

10. In para 3 of the plaint Kashi Prasad Misra admitted that Feru Goala and his sons-in-law wanted to purchase the suit land from him, that negotiations were set afoot and that sometimes Feru Goala wanted to purchase the land in dispute while at others his sons-in-law would negotiate with him to purchase some part of it, that both sets of would-be-purchasers sought time from him to arrange money, and that as he "had no charm for the land he also allowed time to Feru Goala and to defendants Nos. 4 and 11". Ext. D-7 is a copy of the statement dated 22-1-1960, which Kashi Prasad Misra made in the Title Suit No. 71 of 1958 which Chandra Kumar Roy, the defendant No. 2 of the present suit, had filed against him respecting his 6 kanis of land now admittedly in his possession. In that statement Kashi Prasad Misra admitted that Feru Goala had negotiated with him for purchase back of the land sold in Court auction, that Feru Goala "has paid

some money to me", and that Mahadev, the son-in-law of Feru Goala, had taken the entire property purchased by him. It was further admitted that Kashi Prasad Misra had not taken possession of some portion of the land purchased by him. The importance of the statement made by Kashi Prasad Misra, on 22-1-1960, on solemn affirmation in a Court lies in the facts that he had been paid some money by Feru Goala for re-purchase of the land acquired by him in Court auction and that the whole of that property was then not in his possession. We have it from the statement of D. W. 12 Pares Nath Majumder, once a medical practitioner at Jirania and at present a farmer by profession, that he happens to be the attesting witness of the report Ext. P-6, dated 2-10-1955, which was prepared by the Bailiff to whom the writ Ext. P-5 for delivery of possession had been entrusted for execution, that the Bailiff never went to the spot for delivery of possession to the auction-purchaser and that instead Kashi Prasad Misra accompanied by the Bailiff went to his house, that it was then settled between Kashi Prasad Misra and Feru Goala that the latter would pay Rupees 7,000/- to the former, that Feru Goala paid that amount to Kashi Prasad Misra in two instalments within two months of that settlement. The witness affirmed that Feru Goala had taken him along with him to Kashi Prasad Misra at the time the money was paid. The witness also explained why the sale deed could not be executed. His version is that some disputes cropped up between Feru Goala and his sons-in-law and for that reason Kashi Prasad Misra "did not execute any deed." The statement of this witness has been disbelieved by the trial Court for reasons which do not appear to be convincing. The merit of testimony of Shri Pares Nath Majumder lies in the fact that it accords with the version given by Kashi Prasad Misra in his Court statement dated 22-1-1960 (copy Ext. D-7).

11. A large number of documents have been placed on record by defendants Nos. 1 and 2 in refutation of the claim of the plaintiff that he had never relinquished ownership of or possession over the land purchased by him. Those documents bring out that the auction purchaser never took any step to secure mutation of the land in his name, that he never paid rent of that land, that the rent was actually paid by Feru Goala even after the report Ext. P-6 was made by the Bailiff on 2-10-1955, and that the only document which Kashi Prasad Misra executed in respect of any part of the land purchased by him is the one, dated 7-8-1958, of which Ext. P-7 is the copy. This Ext. P-7

was executed by Kashi Prasad Misra in favour of Nibaran Chandra Das and Smt. Bindu Bala Das on 7-8-1958 and it relates to about 6 kanis of land covered by jote No. 189. According to the recitals in the document, Kashi Prasad Misra had sold this parcel of land to the two persons aforementioned for a sum of Rs. 2,500/- as far back as 30th of July, 1956, but at that time it was Feru Goala, the previous owner of the land, who executed the sale deed in favour of the vendees as agreed to by them and Feru Goala, and that since at present the vendees are "apprehending that I or my heirs may proclaim my or their right over the land described below and deny your title, or that somebody else may deny your jote title over the land described below, you having expressed this apprehension to me; I, the executant, in order to relieve you of such fear, do hereby execute this sale deed for 6 kanis and 5 gandas of land described in schedule below acknowledging receipt of the entire consideration, as given by you before and thereby give you all sorts of title". Evidently the land purchased by Nibaran Chandra Das and Smt. Bindu Bala Das had been sold to them by Feru Goala on 30th of July, 1956, and the document Ext. P-7 was secured by the vendees from Kashi Prasad Misra only to disarm him or his heirs from laying any claim to that land. Therefore, it is easy to conclude that it were Feru Goala and his family relations who were in actual enjoyment of the land despite the auction sale in favour of Kashi Prasad Misra and that it were they who had been not only enjoying the land but also making transfers of various parts of it. The plaintiff admitted in his own plaint itself that he had learnt that Feru Goala had been transferring parts of the land purchased by him in Court auction.

12. With a view to belittle the value of the testimony of D. W. 12 Pares Nath Majumder, an attesting witness of the report Ext. P-6 dated 2-10-1955, Shri Choudhury wanted this Court to accept as truthful the statement of P. W. 2 Mahendra Kumar Bhowmick, another attesting witness of Ext. P-6, who affirmed that he was present at the time of delivery of possession and that he had attested the report evidencing the fact of delivery of the possession at the spot. However, his testimony is clearly unconvincing. According to his version, Kashi Prasad Misra was present at the time of delivery of possession and he secured the possession by getting the land ploughed by Feru Goala and his sons-in-law in their capacity as bargadars. It looks odd that Kashi Prasad Misra should avail of the services of the judgment-debtor and his sons-in-law for securing delivery of

possession. Moreover, it was not urged at the bar by Shri Choudhury that Kashi Prasad Misra was present at the spot at the time of delivery of possession. According to P. W. 4 Jajneswar Nandi, one Akhil Bhattacharjee was present on behalf of Kashi Prasad Misra to secure the possession and that it was he (P. W. 4) who had been summoned by Akhil Bhattacharjee to plough the land. P. W. 2 Mahendra Bhowmick does not mention the presence of either Jajneswar Nandi or of Akhil Bhattacharjee at the time of the delivery of possession nor was Akhil Bhattacharjee examined by the plaintiff. Moreover, according to Mahendra Bhowmick the auction-purchaser had taken delivery of the entire 6 drones of land but it is no longer in dispute that possession of the entire land covered by jote No. 189 and of the homestead part of jote No. 188 was not taken. These facts are clearly deducible from the report Ext. P-6 and were admitted as correct by Shri M. R. Choudhury. Hence I cannot attach any value to the testimony of Mahendra Bhowmick and so the statement of Paresh Nath Majumder stands untarnished.

13. The conclusions reached above may now be summed up. Kashi Prasad Misra had undoubtedly purchased the lands covered by jotes Nos. 187, 188 and 189, that sale certificate had been issued in his name, that he had moved the Court for granting him possession of the land, that the possession was actually never taken by him at the spot though the report Ext. P-6 was prepared, that that report was drawn up at the house of D. W. 12 Paresh Nath Majumder, that in the house of that witness it was settled between Kashi Prasad Misra and Feru Goala that the former would sell the land to the latter for certain amount, that at least a part of that amount had been paid by Feru Goala to Kashi Prasad Misra, that Kashi Prasad Misra never bothered to secure possession of the land, and that he raised no objection to various transfers of his land made by Feru Goala or his sons-in-law.

14. The question that arises for determination at this stage is what is the consequence of the set of facts outlined in the last paragraph. Shri J. K. Roy, the learned Advocate representing Birendra Bijoy Majumder, submitted that those facts along with another fact mentioned by his client in his statement as D. W. 8 leave no room for doubt that the plaintiff is estopped from bringing the suit and that, in addition, the provisions of Section 41, Transfer of Property Act, stand in his way in claiming any right to the land in occupation of Birendra

Bijoy Majumder. The fact which emerges from the statement of this defendant is that Feru Goala had taken him in the month of October, 1963, to Kashi Prasad Misra and that he had mentioned to the latter that he wanted to sell his land to him (Birendra Bijoy Majumder). The relevant part of the statement of Birendra Bijoy Majumder is that he had purchased 1 drone 9 kanis 15 gandas from Feru Goala in one transaction and he had also secured another sale deed from Feru Goala and the latter's wife and minor son. The witness said further that he had paid Rs. 16,000/- to Feru Goala in connection with the sale deed Ext. D-17. The witness also testified that he had undertaken some enquiry respecting the land and that it never came to his knowledge that Kashi Prasad Misra had taken over possession of the land after auction purchase, and he added that Feru Goala went to Kashi Prasad Misra accompanied by him "in order to negotiate regarding sale and purchase" and that at that time Kashi Prasad Misra did not tell him that he had "auction-purchased this land". The witness stated further that Kashi Prasad Misra did not get his name mutated. Though Shri M. R. Choudhury challenged the veracity of the averments of this witness but he could advance no convincing reason in justification of his contention. He invited the Court's attention to the statement of D. W. 4 Nepal Chandra Goala, the defendant No. 11 of the suit, who appeared as a witness in support of his own case. During the course of his cross-examination by the plaintiff this defendant No. 11 happened to state that the fact of Kashi Prasad Misra having purchased the land in Court auction was "fully within the knowledge" of defendant No. 1. This fact, it has to be emphasised, was not mentioned by the witness during the course of his examination-in-chief. I have studied the statement of this witness very carefully and have reached the conclusion that it is not safe to rely upon him. During cross-examination by the defendant No. 1 the witness said that he had some talk with defendant No. 1 and it is in the course of that talk that the defendant No. 1 learnt that Kashi Prasad Misra had taken possession of the land. However, significantly enough, he did not clarify what was the occasion of the talk between him and the defendant No. 1. This Nepal Chandra Goala, it may be mentioned, is the son-in-law of Feru Goala and he frankly admitted that there had been long drawn-out litigation between him and the defendant No. 1. Another vital fact which requires mention is that Nepal Chandra Goala did not contest the suit. Equally significant is the fact that Jajneswar Nandi P. W. 4 conceded that he had been requested by the

sons-in-law of Feru Goala to appear as witness for the plaintiff. In the background of the facts that there has been long drawn-out litigation between defendant No. 1 on the one hand and the sons-in-law of Feru Goala on the other, that the sons-in-law of Feru Goala did not contest the suit, and that they went a step further in requesting Jaineswar Nandi P. W. 4 to appear as witness for the plaintiff, I find considerable substance in the contention of Shri J. K. Roy that Nepal Chandra Goala and his brothers-in-law are in collusion at present with the plaintiff and that it is they who have instigated this litigation, their object being to secure more land which once belonged to Feru Goala. If I reject the statement of Nepal Chandra Goala to the effect that defendant No. 1 had knowledge of the ownership of and possession over the suit land of Kashi Prasad Misra, I see no difficulty in taking the testimony of defendant No. 1 at its face value. If defendant No. 1 had been taken by Feru Goala to Kashi Prasad Misra before he purchased the land in November, 1963, and if Kashi Prasad Misra did not state that he was the owner of the land when Feru Goala sought his permission to sell the land, surely the defendant No. 1 could assume that Kashi Prasad Misra had no title to the land. Kashi Prasad Misra would in such an event be estopped from laying claim to the land after defendant No. 1 had purchased the same by paying no less than Rs. 16,000/-. I, therefore, hold that the plaintiff is estopped from claiming the ownership or possession of the land which had been sold by Feru Goala after the latter had visited him in company with defendant No. 1. Obviously the land which was purchased by Feru Goala after October, 1963, is the land mentioned in the sale deed Ext. D-17, dated 30th of November, 1963. This land had been sold by Feru Goala's widow and son to the defendant No. 1 and Feru Goala had executed the deed in his capacity as the guardian of his minor son. However, the plea of estoppel is not available to defendant No. 1 in respect of the other sale deed Ext. D-18, dated 30th of September, 1963, because Feru Goala had exchanged talks, according to defendant No. 1, with Kashi Prasad Misra in October, 1963, and therefore those talks could have relevancy only to the sale deed dated 30th of November, 1963.

15. As a result of the conclusions reached above, I allow the appeal No. 14 of 1966 and on quashing the decree of the trial Court re. 6 kanis of land in occupation of the defendant No. 2 Chandra Kumar Roy, dismiss the plaintiff's suit in relation thereto. I also allow appeal No. 2 of 1967 of Birendra Bijoy Majumder, the defendant No. 1, in

respect of land covered by sale deed Ext. D-17, dated 30th of November, 1963, and on quashing the decree of the trial Court respecting that land dismiss the plaintiff's suit in relation thereto. However, I dismiss that appeal in respect of the land covered by sale deed Ext. D-18, dated 30th of September, 1963. Taking all the factors into consideration, I leave the parties to bear their own costs in both the Courts.

Order accordingly.

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M. C. PATHAK C. J. AND D. M. SEN J.

U. Doley Singh, Petitioner v. The Chief Executive Member, District Council, Shillong and others; Respondents.

Civil Rule No. 187 of 1972 D/- 29-4-1975.

(A) United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (2 of 1959) (as amended by Amending Act of 1968), Sections 6 (i) and 3 (2) — Removal and suspension of Chiefs — Grounds — Expression "losing confidence of majority of electors" in Section 6 (i) — Interpretation of — Subjective opinion of Executive Committee not formed on basis of Section 6 — Opinion is without jurisdiction and liable to be quashed — (Constitution of India, Article 226).

The expression 'losing of the confidence of the majority of the electors or of the people of the Elaka' in Section 6 (i) means losing of the confidence of the majority of the total electors or the total people of the Elaka entitled to vote and does not mean losing confidence of the majority of the electors present in the meeting or Durbar called for the purpose. In the absence of Rules under Section 3, the electors of Langrin Syiemship are by customary law the adult males of the Langrin State and following that custom an electoral roll has been prepared by the Executive Committee itself including all the adult males of the Langrin State. The subjective opinion of the Executive Committee and the action in pursuance thereof for removal and suspension of a Chief must be formed and taken on the basis of the provisions laid down in Section 6 itself. If the subjective opinion cannot be said to have been formed on the basis of the provisions of Section 6, such a subjective opinion will be without jurisdiction and as such invalid and liable to be quashed in an application under Article 226 of the Constitution.

(Paras 13 and 15)

HS/HS/C850/75/GMJ

Where, in the instant case, the Executive Committee had prepared a list of eligible voters and the number was 645, the petitioner, who was the Syiem cannot be said to have lost the confidence of the majority of the total electors when 282 voters only had cast their votes expressing lack of confidence in the petitioner. So, the order passed by the Executive Committee, which had been approved by the District Council, removing the petitioner from the office of Syiem of Langrin Syiemship was not in conformity with Section 6 (i) and cannot be sustained. AIR 1965 Assam and Nagaland 49 Foll; Civil Rule No. 407 of 1961 D/- 18-5-1962 (Assam) Distinguished, AIR 1971 Assam and Nagaland 109 Ref. (Paras 10 and 13)

Cases	Referred:	Chronological	Paras
AIR 1971 Assam 109 = Assam LR (1971) Assam 49			17
AIR 1965 Assam 49 = (1965) Civil R. No. 177 of 1963 D/- 5-2-1964			11, 12
(1961) Civil R. No. 407 of 1961 D/- 18-5-1962 (Assam)			14, 16
(1961) Civil R. No. 131 of 1960 D/- 27-4-1961 (Assam)			2
(1959) Civil R. No. 14 of 1959 (Assam)			2

D. C. Goswami, for Petitioner; M. M. Lahiri, Advocate General, and A. Sarma, Govt. Advocate, for Respondent.

PATHAK, C. J.:— By this application under Article 226 of the Constitution of India the petitioner has challenged the order of the Executive Committee of the Khasi Hills District Council, approved by the District Council, by which the petitioner has been removed from the office of Syiem of Langrin Syiemship.

2. This case has a chequered career. The facts of the case are as follows:—

Petitioner U. Doley Singh was nominated as Syiem of Langrin Syiemship and took over charge of the Syiemship on 2-8-1948. By an application dated 28-3-1955 U. Zibon Roy Myntri and others filed a petition before the Chief Executive Member, District Council, making some allegations of misappropriation of money of the Syiemship against the petitioner. Similarly, one U Ron Singh filed another application on 9-5-1956 bringing in some charges against the petitioner. The Executive Committee of the District Council made an enquiry into those charges levelled against the petitioner through Mr. Pyngrope, the then Assistant Revenue Officer who held an elaborate enquiry into the charges levelled against the petitioner and submitted a report to the executive Committee on 12-6-1957 stating that the allegations made against the petitioner

were baseless and maliciously engineered to oust the petitioner from Syiemship. The Secretary, Executive Committee, informed the petitioner on 18-5-1958 that the District Council had decided to hold a referendum to ascertain the views of the people as to whether they wanted the petitioner as the Syiem of the Elaka or not.

The petitioner moved the High Court in Civil Rule No. 14 of 1959 against the order of holding the referendum. But the High Court dismissed the application and, accordingly the referendum was held in Langrin Syiemship on 12-8-1960 and on 16-8-1960 the petitioner was asked to show cause why he should not be removed from the office of Syiem of Langrin Syiemship. The petitioner submitted his explanation on 18-4-1960 and the Executive Committee of the District Council submitted a report on 29-7-1960 to the District Council recommending removal of the petitioner. The District Council endorsed the action of the Executive Committee for removal of the petitioner and the Executive Committee by its Purwana dated 25-8-1960 asked the petitioner to appear before the Executive Committee on 16-9-1960. The petitioner submitted his explanation before the Executive Committee of the District Council on 16-9-1960 and the Executive Member Incharge of Rural Administration, District Council, passed the order on 16-9-1960 removing the petitioner from the office. The petitioner then filed an application before the High Court against that order of removal and the High Court by its order dated 27-4-1961 in Civil Rule No. 131 of 1960 (Assam) quashed the order of removal on the ground of violation of the principles of natural justice, leaving the Executive Committee at liberty to take appropriate measures afresh. Thereafter a referendum was held and in that referendum, it is found from Annexure 'A' to the petition, the petitioner got 220 votes whereas 150 votes were against the petitioner. One U Marily Singh Thongai submitted an application on 28-4-1967 for removal of the petitioner before the Executive Committee which rejected the petition by order dated 11-9-1967. Thereafter on 24-2-1969 U Marily Singh Thongai along with others filed another application making some allegations against the petitioner. The petitioner was asked to show cause against that allegation by Memo dated 27-3-1969 and the petitioner filed his explanation on 16-4-1969.

Thereafter the Executive Committee registered a case against the petitioner, and heard him. The Chief Executive Member passed orders for holding a referendum to ascertain the wishes of the people as to whe-

ther they wanted the petitioner as the Syiem. Against this order of the Chief Executive Member the petitioner again moved the High Court which rejected the petition. Thereafter on 21-12-1970 the Executive Committee issued a notice for holding a referendum by counting of heads on 21-1-1971 at village Phlangiloin. The petitioner objected to the holding of the referendum at village Phlangiloin and prayed for two other centres for counting of heads. But the Executive Committee rejected his petition without giving him any hearing as alleged. Accordingly the referendum was held on 21-1-1971. Before holding the referendum the Executive Committee prepared a list of voters which was finally accepted. It is found that in the referendum held altogether 493 persons took part in voting out of which 10 were found to have no right of voting, 210 persons voted in favour of the petitioner and 283 persons voted against him. Out of the 210 votes cast in favour of the petitioner, 9 votes were rejected and out of the 283 votes cast against the petitioner, 1 vote was rejected. Thus 201 persons voted for the petitioner and 282 persons voted against him. It may be stated here that the electoral roll prepared by the Executive Committee and finally accepted after disposing of the objections, shows the total number of electors as 645. Thereafter a notice was issued to the petitioner to show cause why he should not be removed from the office of Syiemship. The petitioner showed cause and the Executive Committee came to the decision that the petitioner should be removed from his office and the matter was placed before the District Council. The District Council, however, did not accept the recommendation of the Executive Committee and after long deliberation remanded the matter of removal of the petitioner to the Executive Committee for reconsideration in the light of the discussion in the meeting of the District Council. Thereafter the Executive Committee reconsidered the matter and decided removal of the petitioner from the office of Syiemship and submitted the case for approval before the District Council which approved the decision of the Executive Committee removing the petitioner from the office of Syiem of Langrin Syiemship by resolution dated 22-11-1971. In this writ petition the said order of removal dated 22-11-1971 has been challenged.

3. At this stage it will be convenient to notice the relevant provisions for appointment and removal of a Syiem.

4. Section 3 of the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959, as amended by the United

Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) (Amendment) Act 1968, reads as follows:—

“3. Nomination and appointment of Chiefs and Headmen:—

(1) Subject to the approval of the District Council, the Executive Committee may make Rules governing the nomination and appointment of Chiefs and Headmen:

Provided that separate Rules may be made for each Elaka.

(2) Pending making of such Rules all nominations and appointment of Chiefs and Headmen shall, subject to the provisions of this Act, be in accordance with the existing customs prevailing in the Elaka concerned and duly approved by the Executive Committee, the decision of which is final.”

5. The learned Advocate General, Meghalaya, submits that no rules have been framed under Section 3 of the Act and that being the position the appointment will be regulated by the existing custom prevalent in the Elaka concerned and duly approved by the Executive Committee.

6. The relevant provision of Section 6 of the Act, as amended by the Amendment Act of 1968, reads as follows:—

“6. Removal and Suspension of Chiefs.— The Chief may be removed from office or suspended by the Executive Committee if in its opinion—

(a) xxxx xxxx

or

(i) he has lost the confidence of the majority of the Electors or of the people of the Elaka;

xxx

Provided that every such case shall be placed before the Council in its next Session;

Provided further that no Chief shall be removed from office or punished with suspension unless he is given an opportunity of being heard:

xxxxxxxxxx”

In the instant case, it is common case that the petitioner has been removed under Section 6 (i) of the Act. The question that arises for determination is whether the petitioner has lost the confidence of the majority of the electors or of the people of the Elaka.

7. The present case deals with the Syiemship of Langrin. At page 74 of the Book “The Khasis” by Major P. R. T. Gurdon, we find the following passage:

“In Langrin there are, as in Maharam and Nobosohpoh, two main branches of the Siem family, i. e. the “Black” and the “White” Siems. Here there is no special electoral body; all the adults of the State have the

right to vote at the election of a Siem."

At page 69 of the same book, we find the following passage:

"A further step towards the recognition of the public will in the nomination of a Siem has been the introduction of popular elections, at which all the adult males vote. Such popular elections were very greatly due to the views held by Colonel Bivar, who was Deputy Commissioner of the Khasi and Jaintia Hills from 1865 to 1877. These elections have been, in many States, an innovation which is hardly in accord with public sentiment, and in many cases the voters have done no more than confirm the selection of a special electoral body. It is, however, clear that the idea of popular elections is not one with which the people are unfamiliar, e. g. in Langrin State, where all the adult males customarily vote at an election of a Siem."

8. In the Report on succession to Siemships in the Khasi States by D. Herbert, Deputy Commissioner, Khasi and Jaintia Hills, we find the discussion of Langrin State at page 41. At page 43 we find the following passage:

"The custom of the Langrin State in appointing the Siems is different from that of other Khasi States. The State Durbar consists of all the adult males of the State, and they are all entitled to vote in the election of their Siems. The result is that, on a vacancy occurring in the Siemship, a general election should be held."

9. From the above discussion it is found that the Siem of Langrin Siemship is elected by the adult males of the Langrin State. That is the custom of election of the Siem of Langrin Siemship and under Section 3 of the Act the election of the Siem of Langrin Siemship is to be held according to this custom and this custom is also found to have been approved by the Executive Committee, since it has prepared an electoral roll before the referendum in question was held.

10. Mr. D. C. Goswami, the learned counsel appearing for the petitioner, submits that on a proper interpretation of S. 6 (i) of the Act in the instant case the petitioner cannot be said to have lost the confidence of the majority of the electors or of the people of the Elaka and that being the position, the impugned order of the Executive Committee and the District Council approving the same being against the provisions of Section 6 (i) of the Act or being not in accordance with the provisions of section 6 (i), is liable to be quashed. The submission of the learned counsel is that in the referendum 282 persons voted against the petitioner for his re-

moval, but the total number of electors is admittedly 645, as would appear from the electoral roll prepared and accepted by the Executive Committee. 282 votes, the learned counsel submits, do not represent the majority of the total votes numbering 645. In other words, the submission of the learned counsel is that when clause (i) of Section 6 speaks of losing confidence of the majority of the electors or of the people of the Elaka, it means losing confidence of the majority of the total electors or total number of people of the Elaka entitled to vote. In the instant case, the Executive Committee has prepared a list of eligible voters and the number is 645 and that being the position, the petitioner has not lost the confidence of the majority of the total electors when 282 voters only have cast their votes expressing lack of confidence in the petitioner.

11. Mr. N. M. Lahiri, the learned Advocate General, Meghalaya, appearing on behalf of the respondents, submits on the other hand, that 'losing confidence of the majority of the electors or of the people of the Elaka' means losing confidence of the majority of the electors present in the meeting or Durbar called for the purpose. In support of his submission the learned counsel for the petitioner has referred to a decision of this Court in *Edwingson Bareh v. Henry Cotton*, reported in AIR 1965 Assam and Nagaland 49, wherein Rule 22 (1) of the Assam Autonomous Districts (Constitution of District Council) Rules, 1951 has been interpreted. Rule 22 (1) of the said Rules reads as follows:—

"22 (1) The Executive Committee shall be collectively responsible to the District Council and may be removed on a vote of no confidence passed by a majority of the members of the District Council at a meeting specially convened for the purpose."

This Court in its decision in AIR 1965 Assam and Nagaland 49 (supra) has interpreted the expression "the majority of the members of the District Council" as meaning the majority of the total members of the District Council. It has been observed in that decision as follows:—

"The contention of Dr. Medhi for the opposite parties is that the no confidence motion could be passed by the majority of the members present at the meeting. The question centres round the interpretation of rule 22 (1) of the Rules. If the interpretation put by the counsel for the opposite parties is accepted, then the words 'a majority of the members present' will have to be inserted in place of the words 'a majority of the members of the District Council' in the rule. The language

in our opinion, is clear and unless the resolution is passed by a majority of the members of the District Council, it cannot be said that it has been validly passed. Dr. Medhi contends that if the framers of the rule intended that it has to be passed by a majority of the members of the District Council, then the language would have been as "the majority of the total number of members of the District Council". As we have already indicated, the use of the words "a majority of the members of the District Council" clearly implies that it is not to be passed by a simple majority of the members present at the meeting. In the rules, it would appear that wherever the framers of the rules have intended that a resolution should be passed by the majority or certain percentage of the members present, they have used that expression clearly such as in rule No. 71 (2), which provides that if the Chairman is of opinion that the motion is in order, he shall read the motion to the Council and shall request those members who are in favour of leave being granted to rise in their places and, if not less than one fourth of the members present rise accordingly, the Chairman shall, intimate that leave is granted and that the motion will be taken on such day, not being more than two days and not less than twenty four hours from the time at which leave is asked for as he may appoint. Reliance is then placed on rule 25 which reads as follows:

"Save as otherwise provided in the Constitution and in these rules, all questions at any sitting of a District Council shall be determined by a majority of the votes of the members present and voting other than the Chairman, or person acting as such....."

This clause only says that a simple majority of the members present can pass a resolution only if it is not otherwise provided in the Constitution and in these rules. In our opinion rule 22 (1) deals with passing of a no confidence resolution against the Executive Committee and Rule 25 is subject to the provision of the rule 22 (1). In rule 25 also the framers of the rules have used the words "a majority of the votes of the members present and voting". Those words are absent in rule 22 (1)".

12. The above decision of this Court was given in Civil Rule No. 177 of 1963 on 5-2-1964 = (AIR 1965 Assam 49). The United Khasi Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act was enacted for the first time in 1959. Thereafter in 1969 the Act was amended by the Amendment Act of 1968 (Act

I of 1969). In the original Act of 1959, Clause (b) of Section 6 was as follows:—

"6. Removal and suspension of Chiefs.—The Chief may be removed from office or suspended by the Executive Committee if in its opinion.—

xxx

xxxx

(b) he has lost the confidence of the majority of his electors or the people of his Elaka."

In the Amendment Act of 1968, clause (b) of Section 6 has been described as clause (i) and the same language has been retained. So, when this amendment in 1969 was made the District Council was quite aware of the interpretation of this Court given to Rule 22 (1) of the Rules in 1964. Since the language of clause (i) of the amended Section 6 is exactly same as that of clause (b) of Section 6 of the original Act, it can be safely presumed that the intention of the legislature is that the expression 'losing of the confidence of the majority of the electors or of the people of the Elaka' means losing of the confidence of the majority of the total electors or the total people of the Elaka entitled to vote. Following the reasons given in this court's decision reported in AIR 1965 Assam and Nagaland 49 (supra), we hold that in order to remove or suspend a Chief under clause (i) of Section 6 of the Act, as it was in 1969, it must be established that Chief has lost the confidence of the majority of the total electors or of the total people of the Elaka entitled to vote. In the instant case, the electors of Langrin Syiemship are by customary law the adult males of the Langrin State and following that custom an electoral roll has been prepared by the Executive Committee itself including all the adult males of the Langrin State, and after inviting objections and disposal thereof, the Executive Committee has accepted that electoral roll, wherein we find the total number of electors as 645. Admittedly, at the referendum held only 282 persons voted against the petitioner who was the Syiem.

13. Under Sections 3 and 4 of the Act a Syiem is appointed. It is submitted by the learned Advocate General that no rules have been framed under Section 4. Considering the provisions of election and appointment of the Chiefs and Headmen in the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959, as amended, it is found that this appointment is a mixture of nomination or election by the electors and appointment by the Executive Committee subject to approval of the District Council. So, the removal of the Chief is like recalling an elected member by the electors

2. In this election petition the petitioner challenges the election of the respondent on three grounds, namely:—

(1) that in the first and second re-count the Returning Officer illegally accepted in favour of the returned candidate, some votes which he ought to have rejected and rejected, in favour of the respondent, some votes which he ought to have accepted under law;

(2) that the failure of the Returning Officer to re-scrutinize the rejected votes in the first and second re-counts is illegal; and

(3) that ten votes which were tendered during the polling and which were marked as tendered votes have to be scrutinized and counted as the respondent has been returned by a majority of only two votes.

3. The respondent raised a preliminary issue, namely, whether the petition is bad and not maintainable in law for non-compliance with the statutory requirement of Section 83 (1) (a) of the Representation of the People Act 1951 (hereinafter referred to as "the Act"), for not setting out material facts in respect of each of the allegations made in the petition.

4. The allegation regarding the improper reception and rejection of votes by the Returning Officer, which appeared in the petition reads as follows:—

"Some votes were accepted in favour of the returned candidate which should have, in law, been rejected, and further that some votes were rejected which should have, in law, been accepted as valid in favour of the petitioner, resulting in improper acceptance and rejection of votes, and also materially affecting the result of the election."

5. The word "material" in the expression "material facts", occurring in Section 83 (1) (a) of "the Act", means, as was held in *Hari Vishnu Kamath v. Election Tribunal*, Jaipur 14 Ele. LR 147 = (AIR 1958 Madh Pra 168), necessary for the purpose of formulating a complete cause of action.

6. In *Ram Sewak Yadav v. Hussain Kamil Kidwai*, AIR 1964 SC 1249, Hussain Kamil Kidwai filed an election petition, inter alia, on the following grounds:—

(1) that there had been improper reception, refusal and rejection of votes at the time of counting, and in consequence thereof the election was materially affected; (2) that tendered votes were wrongly rejected by the returning officer and on that account the election was materially affected; (3) that counting of votes of Bhitauli Assembly Unit continued till 8.30 p. m. in insufficient light notwithstanding the protest lodged by the petitioner; and (4) that on a true count he (Kidwai) would

have received a majority of valid votes and that he was entitled to be declared duly elected.

Kidwai claimed that he would be able to establish his case on the first and fourth grounds from the ballot papers and applied for their inspection. The application was rejected by the Election Tribunal, but granted by the High Court. Before the Supreme Court the only question for determination was whether the Election Tribunal had erred in declining to grant an order for inspection of the ballot papers. In the judgment delivered by the Supreme Court Their Lordships observed that in considering that question the provisions of Section 83 (1) (a) of "the Act" which require an election petition to contain a concise statement of the material facts on which the petitioner relies, were relevant; that an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts; that the case of the petitioner must be set out with precision supported by averments of material facts; that to establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted, but that a mere allegation that the petitioner suspects or believes that there has been an improper reception or rejection of votes would not be sufficient to support an order for inspection. Their Lordships held that the allegation of Kidwai that he was satisfied that on inspection and scrutiny of ballot papers, he would be able to demonstrate that there had been wrong counting on account of improper reception or rejection of votes was wholly insufficient to justify a claim for inspection. They therefore dismissed Kidwai's appeal.

7. *Dr. Jagjit Singh v. Giani Kartar Singh* AIR 1966 SC 773, the next case relevant to the present inquiry, was also a case where the question as to whether inspection should be granted or not was considered. The Tribunal granted inspection of the ballot boxes and examination of the voting papers. The High Court found that the Tribunal was at error and reversed the order. In this case also the Supreme Court, in appeal, remarked, in agreement with the High Court, that Section 83 (1) (a) of "the Act" requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies and that in every case where a prayer is made by the petitioner for the inspection of the ballot boxes, the Tribunal must inquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies; and that vague or general allegations

that valid votes were improperly rejected, or invalid votes were improperly accepted would not serve the purpose which Section 83 (1) (a) has in mind. Their Lordships examined the Conduct of Election Rules, 1961 made under "the Act" (which shall hereinafter be referred to as "the Rules") relevant to that case. Under Rule 53 candidates, their election agents or counting agents are admitted to the place fixed for counting of votes. Rule 56 provides for the scrutiny and rejection of ballot papers. Rule 56 (1) lays down that the ballot papers taken out of each ballot box shall be arranged in convenient bundles and scrutinized, then objections are raised as specified by Sub-rule (2) and are dealt with in accordance with the provisions of the other Sub-rules of R. 56 (2). It is thus clear, Their Lordships stated, that the scheme of R. 56 is that every ballot paper can be examined by the counting agent and objections can be raised in respect of it if the election agent feels that a valid objection can be raised; that it is after these objections are examined and dealt with according to R. 56 that the stage of counting votes arrives; that even after the completion of the counting, it is open to a candidate or his election agent to apply in writing to the Returning Officer for a re-count of all or any of the ballot papers already counted stating the grounds on which he demands such re-count and that, according to Their Lordships, is the effect of R. 63 (2). After all this procedure has been gone through, the Returning Officer completes the result sheet in form 20 and signs it. Once that is done no application for re-count shall be entertained. Their Lordships referred broadly to the scheme of "the Rules" as mentioned above, to emphasize the point that the election petitioner who is a defeated candidate has ample opportunity to examine the voting papers before they are counted and in case the objections raised by him or his election agent have been improperly overruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related. The learned Judges went on to say, "it is in the light of this background that Section 83 (1) of the Act has to be applied to the petitions made for inspection of ballot boxes. Such an application must contain a concise statement of the material facts." After briefly referring to Kidwai's case Their Lordships proceeded to examine "whether the appellant's petition contained a concise statement of material facts on which a claim for ins-

pection of ballot papers could be justified." Dr. Jagjit Singh, the appellant, has urged that in the election petition filed by him it had been averred that a very large number of votes purported to have been cast in favour of the appellant had been improperly rejected and that has materially affected the result of the election and he added that there was also an allegation in the petition that a large number of votes which were invalid had been improperly accepted in favour of respondent No. 1 which has also materially affected the result of the election. The application further sets out the appellant's version that the Returning Officer disclosed a partisan attitude and the counting and examination of votes was done in a very irregular manner. Whilst rejecting the contention of the appellant that the Tribunal, on considering the evidence in the light of the allegations made by the appellant, was satisfied that an inspection should be ordered in the interests of justice and that the High Court was at error in reversing the order of the Tribunal, the judgment of the Supreme Court states:—

"The order passed by the Tribunal clearly shows that the Tribunal did not apply its mind to the question as to whether sufficient particulars had been mentioned by the appellant in his application for inspection. All that the Tribunal has observed is that a *prima facie* case has been made out for examining the ballot papers; it has also referred to the fact that the appellant has in his own statement supported the contention and that the evidence led by him *prima facie* justifies his prayer for inspection of ballot papers. In dealing with this question, the Tribunal should have first enquired whether the application made by the appellant satisfied the requirements of Section 83 (1) of the Act; and, in our opinion, on the allegations made, there can be only one answer and that is against the appellant. We have carefully considered the allegations made by the appellant in his election petition as well as those made by him in his application for inspection, and we are satisfied that the said allegations are very vague and general"

8. *Tribeni Ram v. Satyadeo Singh*, AIR 1966 All. 20, was a case where election petition was filed before the Tribunal for declaring the election of respondent No. 1 void and the appellant elected. The grounds on which the petition was based were:—

(1) that the respondent No. 1 was declared elected by improper reception and improper rejection of votes and by reception of void votes; (2) that the Returning Officer did not comply with R. 56 of Conduct of Election Rules, 1961, relating to scrutiny and rejection of ballot papers and his failure to do so resulted in wrong admission of invalid votes in favour of respondent No. 1 and wrong rejection of invalid votes cast in favour of the petitioner; (3) that several persons whose names appeared on the electoral roll were either dead or were not present on the date of the poll and their votes were cast in favour of respondent No. 1 by others who impersonated for them; and (4) that in fact the appellant received a majority of valid votes. The Tribunal came to the conclusion that no case for re-counting of votes had been made out and disallowed the prayer of the petitioner in that behalf. The only issue before the High Court was whether a case for re-counting of votes had been made out by the appellant. Before proceeding to inquire in what circumstances a re-count is permissible and whether such circumstances existed in that case, Their Lordships of the Allahabad High Court made the following observation:—

"The grounds on which an election petition may be filed and the powers exercisable by an election tribunal in dealing with it must be regarded as having been exhaustively dealt with by the Act and the rules made thereunder, and general equitable considerations which are not recognized or supported by the Act or by the rules framed thereunder cannot be imported into proceedings relating to election petition. They relied on 'Jagan Nath v. Jaswant Singh', AIR 1954 SC 210, where Their Lordships of the Supreme Court emphasized the feature of law relating to elections in the following words:

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the Court possesses no common law power".

Bearing the above observations in mind, the Allahabad High Court proceeded to find out if any case for a re-count unconnected with and independent of improper reception or rejection of votes, had been made out by the appellant. The Learned Judges who delivered the judgment observed:

"It cannot be disputed that a mere assertion or an expression of a suspicion by a petitioner that there has been a mistake in counting is not sufficient to justify a re-count or an inspection of ballot papers which a re-count necessarily presupposes."

They then relied on Kidwai's case. The whole argument before the High Court on behalf of the appellant centered around the discovery and rectification of a mistake made in the counting or, more strictly speaking, in the sorting of ballot papers at one stage, but rectified later. That was the sole basis of the claim of the appellant for a re-count. Their Lordships observed:

"The whole process of counting was being closely watched by the candidates and their agents and carefully supervised by the Returning Officer. In this situation on a single mistake detected in the sorting of votes and rectified before the finalisation of Form 20 cannot, in our opinion, be regarded as having robbed the counting of the presumption of correctness and to have by itself rendered an inspection of ballot papers and a re-count imperative or expedient."

9. From this very Court we have the decision given in *Madhav Upendra Talaulicar v. Yashwant Sitaram Dessai* AIR 1968 Goa 53. Various preliminary issues were raised in that petition. Preliminary issue No. 5 was whether the election of respondent No. 1 to the local Legislative Assembly can be challenged on the grounds pleaded in the petition. S/Shri S. K. Kakodkar and Surlikar urged that the pleadings adopted by the petitioner do not fall within the ambit of the provisions relied upon by his advocate Shri Gaitonde. In the opening part of para 5 of that petition, it was stated that the election of the respondent No. 1 is void because of the improper reception, refusal or rejection of votes, because of non-compliance with the provisions of "the Act" and "the Rules." In para 7 of that petition the grievance voiced was that the Returning Officer had improperly rejected not only the application of the petitioner for re-count of the votes, but also the application for re-count of the candidatewise bundles made of the votes cast. It was further alleged in that paragraph that there was marked chaos and confusion in the counting hall; that at one stage disorder inside the hall reached a pitch where Shri D. K. Das, the Returning Officer, for the Parliamentary Constituency, had to personally in-

tervene and bodily remove certain persons out of the hall and that in consequence of such confusion, chaos and disorder the petitioner apprehended that there may have been some mistake in the counting and that it was the statutory obligation of the Returning Officer under Rule 63 to order the re-count and this having not been done, the result of the election had been materially affected warranting an order setting aside the election of respondent No. 1 and declaring the petitioner as duly elected member of the Assembly. In *Madhav Talaulikar's* case reliance was placed on '*Pethu Reddiar v. V. A. Muthiah*', AIR 1963 Mad 390; '*Tribeni Ram v. Satyadeo Singh*' AIR 1966 All 20 and '*Ram Sewak v. Hussain Kamil Kidwai*', AIR 1964 SC 1249. The learned Judge then concluded:

"When the allegations made by Shri Talaulikar in his petition are examined in the light of principles set out above, I feel satisfied that no case has been made out for directing recount of the votes. If recount cannot be claimed by the petitioner or ordered by the Court, to proceed further with the petition would be a sheer exercise in futility, a pastime in which the Courts of the country of the stature of India cannot afford to indulge." It is pertinent to note that in Talaulikar's case the Returning Officer has rejected the application of the petitioner for re-count and that rejection was sought to be made the basis for the re-count to be made by the High Court. The learned Judge found that the prayer made in the petition for re-count by the High Court was devoid of force. It was observed in that judgment that the wording of Sub-rule (3) of Rule 63 of "the Rules" clearly arms the Returning Officer with the discretion to accept or reject the application for re-count and that the only obligation he is placed under is that his decision shall be in writing and shall contain reasons therefor. The petition of Talaulikar was dismissed at the preliminary stage.

10. It is argued by Dr. Lobo that the cases of Kidwai and Dr. Jagjit Singh involve the question of inspection of the ballot papers but in both the cases it was considered that a statement of material facts in the petition was essential. It was stated by the learned Judges of the Allahabad High Court in *Tribeni Ram's* case that a re-count necessarily presupposes an inspection of the ballot papers. Besides, *Tribeni Ram's* case and *Madhav Talaulikar's* case are cases which like

the present one, were in relation to the re-count of the ballot papers. No separate inspection of the ballot papers as a preliminary stage to re-count was asked for in these two last mentioned cases.

11. Dr. Lobo himself has relied on *H. R. Gokhale v. Noshir C. Bharucha*, AIR 1969 Bom. 177, a case where inspection of the ballot papers was asked for. In that case the contention was that serial numbers of the ballot papers, improper acceptance or rejection of which is sought to be called in question by the petitioner, must be specified in the petition and that unless that is done, it cannot be said that there is an adequate statement of material facts as required by Section 83 (1) (a) of "the Act." *Vimadallal J.*, who delivered the judgment in that case observed that it is open to the petitioner to give such particulars other than the serial numbers of the ballot papers, the validity of which he challenges, as the court might consider to be adequate, having regard to the facts of the same. He relied on '*Harish Chandra v. Triloki Singh*', AIR 1957 SC 444 and he held that an adequate statement of material facts does not require that the serial numbers of ballot papers should be given. It is needless to say that the facts in *Gokhale's* case are different from those in the present one.

12. '*Manphul Singh v. Surinder Singh*', AIR 1973 SC 2158. The judgment in this case was delivered in an appeal arising out of the election petition in which *Manphul Singh*, the appellant, was declared elected, on receiving 24,064 votes as against 23,975 votes received by the respondent. The petition was based on corrupt practices alleged to have been committed by the respondent. The practices alleged were detailed in various paragraphs of the petition. In short, the grounds given were that 20 votes of dead voters were polled; that absentees, missing persons or sick in hospitals or convicts lodged in jails and deserted ladies were impersonated; that about 158 Government servants were not present and were impersonated; that same votes were registered in two or more different places; and that 149 persons voted twice and in some cases more than twice. Details of these corrupt practices were given. It was alleged on behalf of the appellant that issues relating to the facts mentioned above should not have been allowed to be raised as the election petition did not contain enough material for the case. Five schedules had been attached to the election petition giving names

and various details about the facts. On facts Their Lordships gave the finding that extreme care had been taken in drawing up that petition and minute details had been given. Their Lordships observed:

"Whereas Section 83 (1) (a) contemplates giving concise statement of the material facts on which the petitioner relies, the argument of the counsel for the appellant really amounted to saying that the petition should contain not only material facts but also the evidence on which he relied to prove those material facts."

I do not see how in face of such detailed particulars given in the election petition filed by Manphul Singh that case can in any way have a bearing on the question to be decided by me.

13. Lastly Dr. Lobo relies on *Laxminarayan v. Returning Officer*, AIR 1974 SC 66. One of the grounds of challenge of the election in that case was that the result of the election of the returned candidate had been materially affected by the improper reception, refusal and rejection of votes. It was stated in the election petition in that case, that votes were counted in the Y. M. C. A. hall on April 19, 1971; that there were no proper arrangements for admission of the candidates and their counting agents; that at the counting a large number of people had entered into the hall; that the counting was not completed on the said date; that there was some counting on the day following, i. e. on April 20, 1971; that the re-count showed that 14 votes were missing; that many rejected votes were counted as valid and that there was a difference in the aggregate of different candidates. The petition lastly states that it is clear that the votes have not been properly counted as valid or invalid; that they were counted without the proper scrutiny required under law and that that had very much materially affected the result of the election. R. C. Sharma, the candidate who obtained the next highest votes after J. Dhote, the returned candidate, made an application for re-count to the Returning Officer. It was stated in that application that more than 7,000 votes were declared invalid; that they were not shown to the applicant (Sharma) nor to his agent; that lighting arrangements were not satisfactory so that marks could not be properly read at the counting; that many unauthorised persons entered the hall and were interfering with the process of counting; that

the votes declared invalid were not so declared in accordance with the prescribed procedure; and that the "admitted disputed votes" were not admitted according to the prescribed procedure. So, a prayer for re-counting of votes was made. The re-count was made of the votes of Dhote and Sharma only and not of the other candidates. The re-counting had no effect on the result of the election. The contention raised in *Laxminarayan's* case and which was rejected by the Returning Officer, the High Court and the Supreme Court, was that the votes of all the candidates and not of Dhote and Sharma only, should be counted. We see from this fact that that case is not relevant to the questions involved in the instant case. As for the material facts alleged in the petition and in the application for re-count, we find that they were abundant and perhaps more than sufficient for ordering the re-count that was ordered. Those material facts were, to my mind such as would entitle a petitioner in any election petition to have the votes re-counted. It would be unnecessary to state that the present case stands on an altogether different footing.

14. On the argument that having regard to the small margin by which the first respondent got elected, it was held in *N. Pethu Reddiar v. V. A. Muthiah*, AIR 1963 Mad 390, that no election can be set aside on mere suspicion; and that the mere fact that the successful candidate secured only a small number of votes over his closest rival does not necessarily mean that there was something wrong about the election. To the same effect is the dictum in *Tribeni Ram's* case (*supra*), wherein it was held that the closeness of the voting or the narrow majority of votes does not in itself justify a recount.

15. What is said about the first ground of this election petition holds good as far as the second ground is concerned.

16. In view of the law as stated above, I hold that the petitioner failed to give material particulars in respect of the first and second grounds of this election petition. The petition does not disclose a cause of action as far as the re-counting of the votes polled and accepted or rejected is concerned. He is therefore not entitled to an order of this Court to re-count the votes polled, both, received as well as rejected.

17. However, as regards the "tendered votes," the position is different. Rule 42 of "the Rules" bears the cap-

tion "tendered votes" and it reads as under:—

"R. 42: Tendered Votes:— (1) If a person representing himself to be particular elector applies for a ballot paper after another person has already voted as such elector, he shall, on satisfactorily answering such questions relating to his identity as the presiding officer may ask, be entitled, subject to the following provisions of this rule, to mark a ballot paper (hereinafter in these rules referred to as a "tendered ballot paper") in the same manner as any other elector.

(2) Every such person shall, before being supplied with a tendered ballot paper, sign his name against the entry relating to him in a list in Form 15.

(3) A tendered ballot paper shall be the same as the other ballot papers used at the polling except that:

(a) such tendered ballot paper shall be serially the last in the bundle of ballot papers issued for use at the polling station; and

(b) such tendered ballot paper and its counter foil shall be endorsed on the back with the words "tendered ballot paper" by the presiding officer in his own hand and signed by him.

(4) The elector, after marking a tendered ballot paper in the voting compartment and folding it, shall, instead of putting it into the ballot box, give it to the presiding officer, who shall place it in a cover specially kept for the purpose."

In a Full Bench decision given by the Punjab and Haryana High Court in *Rameshwara Nand v. Madho Ram*, AIR 1968 Punj 173 (FB) it was held that apart from R. 42 there is no other provision either in "the Act" or in "the Rules" with regard to the use to be made of the tendered votes; that it would be for the High Court in the election petition to determine how many of the tendered votes are valid and how many are invalid and then decide whether any evidence and how much evidence should be allowed to be produced with regard to those votes; that at no prior stage could it be determined either by the Presiding Officer or by the Returning Officer as to how many votes out of the tendered votes have been cast validly and could be taken into account. In view of the provisions of R. 42 and of the finding in *Rameshwara Nand's* case the mere mention that the vote is a "tendered vote" is sufficient disclosure of facts material within Section 83 (1) (a) of the Act provided of course, that, the number of ten-

dered votes is higher than the difference between the votes polled by the petitioner and those polled by the respondent. As long as there is a possibility of the counting of tendered votes upsetting the result of the election, the mere mention of the existence of tendered votes furnishes material particulars. The basic difference is that in cases of tendered votes what is asked for is the counting and not the re-counting of the votes and it is elementary that every candidate had the right to the counting of the votes polled and the tendered votes may have to be counted if their number is such that a possibility exists of changing the result of the count by the Returning Officer. Therefore regarding the question of "tendered votes" I hold that material facts as required by Section 83 (1) (a) of "the Act" have been given and a cause of action is fully disclosed. In regard to "tendered votes" the preliminary objection is rejected.

18. The hearing of the petition shall therefore proceed accordingly.

Order accordingly.

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TITO MENEZES J, C.

Jagannath Parulekar, Applicant v. Uday Mandrekar, Respondent.

Civil Revn. Appln. No. 93 of 1975, D/-11-2-1976.

(A) Civil P. C. (1908), O. 40, R. 1 — "Just and convenient" — Suit for possession and injunction — Defendant in enjoyment of property in dispute — Receiver whether can be appointed.

The appointment of a receiver should not cause the loss of possession of the suit land which a party to the suit has, prior to the suit, unless it is proved that the party in possession causes or is likely to cause damage to the subject-matter of the suit. (1853) 4 HLC 997, Rel. on.

(Para 7)

The receiver, if appointed in a particular case, must be appointed on the principle that the property must be preserved pending the litigation which is to decide the right of the litigants. In such cases, the Court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer. Where the property is, in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is in the common interest of

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all the parties that the Court should prevent a scramble. But where the object of the plaintiff is to assert a right to the property, of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court, by taking possession at the instance of the plaintiff may be doing an irreparable wrong to the defendant. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may, by its interference, have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation. (Para 7)

Cases Referred: Chronological Paras
(1853) 4 HLC 997 = 10 ER 752 . 7

U. S. Kolwalkar, for Applicant; S. N. Kerkar, for Respondent.

ORDER:— This application arises from the order of the District Judge, Panaji, dated October 10, 1975, dismissing the appeal filed by the applicant/original defendant against the order of the trial Court appointing a Receiver to take charge of the suit land.

2. The suit was filed by the respondent against the applicant for obtaining recovery of possession of a liquor shop with furniture, fittings, glasses and so on, and also to restrain the applicant by a "mandatory" injunction from interfering with such possession".

3. The case of the plaintiff is that he is the owner in possession of a house situated at Maimolem, Vasco; he used to run a liquor shop in the front portion of the house; the rear portion of the house was occupied free of charge by the defendant who is his brother-in-law; the liquor business is carried on by him for the last three years under a licence obtained by him from the Excise Commissioner, Panaji; there is a communicating door between the liquor shop and the portion of the premises occupied by the defendant; taking advantage of this position, the defendant started wrongfully interfering with the business of the plaintiff and started giving others the impressions that he, the defendant, was the owner of the business; since April 15, 1975, the defendant actually deprived the plaintiff from the possession of the liquor shop; the plaintiff reported this fact to the Excise Commissioner, Panaji, who advised him to seek remedy in Court; he therefore filed the present suit on 12-5-1975.

4. On 21-6-1975 an application was made to the trial Court by the plain-

tiff praying for the closing down of the liquor shop or in the alternative for the appointment of a receiver in respect of the liquor shop. It was stated, inter alia, in the said application that loss and harm was being caused to the property. The application was supported by an affidavit of the plaintiff. The defendant opposed the application for appointment of receiver, filed an affidavit in reply to the application of the plaintiff and supported it by five documents namely an account book, three receipts and a letter regarding electric connections. After the arguments before the trial Court were over, the plaintiff filed another affidavit. The trial Court then passed the order appointing a Receiver. The defendant appealed to the District Court. The learned District Judge came to the conclusion that the documents filed by the plaintiff suggested that the plaintiff was the owner of the shop and had the possession of it prior to April 15, 1975; that the documents filed by the defendant suggested that the defendant was the owner of the shop and that he was in possession of it after 15-4-1975. The learned District Judge therefore concluded that the shop was in medio, and dismissed the appeal.

5. The order of the two Courts below is assailed on various grounds. It is argued on behalf of the defendant, the present applicant, that the defendant not only claimed the ownership of the shop, but has proved that he was in possession of the shop at least from 15-4-1975. Therefore, Shri Kolwalkar, learned advocate for the defendant states that the learned District Judge completely misdirected himself when he held that the liquor shop was in medio. I agree with Shri Kolwalkar that from the facts on record and even from the findings of the learned District Judge, it is not possible to conclude that the property was in medio. His decision is based on the fact that the property in dispute was in medio and is therefore based on a non-existing fact.

6. The next contention of Shri Kolwalkar is that the second affidavit and the documents on which the plaintiff relied in support of his case were produced after the arguments were heard and the hearing was over and further, that these documents were not placed on record; but were merely shown to the two Courts below and taken back by the plaintiff. The said documents were not at all shown to the defendant and the defendant was not given an opportunity to rebut their veracity or their probative

value. It is admitted by Shri Kerkar, learned advocate for the plaintiff that this position was factually correct. He however, contends that it was not possible for the plaintiff to keep the documents in Court because they were needed by him for daily use. It seems to me that even if it were so, it was the duty of the plaintiff to place on record certified copies of the documents on which he relied or at any rate give the defendant inspection of them or a fair opportunity to challenge their veracity and probative value.

7. The next contention of Shri Kolwalkar is that there was no specific statement on the part of the plaintiff that the liquor shop was being damaged and that it was necessary not only that a specific statement should be made to that effect but also that it should be proved by affidavits or otherwise that damage was being caused to the liquor shop by the defendant. The statement made by the plaintiff is not that damage was being caused to the liquor shop by the defendant, but that "loss and harm is being caused to the property". Besides, there is no averment in support of the statement that damage was being caused to the liquor shop. The property was not in medio. Admittedly the shop was in possession of the defendant. Had it not been so, this suit for recovery of possession by the plaintiff would not lie. It is a well known principle of law that the appointment of a receiver should not cause the loss of possession of the suit land which a party to the suit has prior to the suit, unless it is proved that the party in possession causes or is likely to cause damage to the subject-matter of the suit. It was held by Lord Cranworth, L. C. in (1853) 4 HLC 997 (1032) that the receiver, if appointed in a particular case, must be appointed on the principle that the property must be preserved pending the litigation which is to decide the right of the litigants. In such cases the Court must, of necessity, exercise a discretion as to whether it will or will not take possession of the property by its officer. Where the property is, in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is in the common interest of all the parties that the Court should prevent a scramble. But where the object of the plaintiff is to assert a right to the property, of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court, by taking possession

at the instance of the plaintiff may be doing an irreparable wrong to the defendant. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may, by its interference, have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation.

8. In the circumstances, the order appointing the receiver is set aside. The costs of this application shall await the outcome of the suit.

Application allowed.

AIR 1976 GOA, DAMAN & DIU 72

TITO MENEZES, J. C.

Visvamber Vithol Kanecar and another, Appellants v. The Maharashtra State Road Transport Corporation and others, Respondents.

Second Appeal No. 25 of 1973, D/-9-2-1976.

(A) Houses and Rents — (Goa) Decree No. 43525, Art. 2 — Word 'estabelecimento' — Meaning of.

The word "estabelecimento" occurring in Article 2 denotes the stability of the activity carried on by the tenant on a vacant plot and that as long as the commercial or industrial activity is carried on a vacant plot by an established commercial or industrial concern, such concern is entitled to the protection whether the activity is carried on in a permanent building or structure or in a shed. The word does not mean a house, building or permanent structure. It means the "settlement" of a commercial or industrial concern in business or commerce.

(Para 3)

Cases Referred: Chronological Paras
AIR 1964 SC 1317 = 1964 Cur LJ (SC)
106 3.4

P. Mulgaokar, for Appellants; M. S. Usgaokar, for Respondents.

JUDGMENT:— This is a plaintiff's second appeal against the order of the District Judge dismissing his first appeal, by which the present appellants challenged the order of the trial Court dismissing their suit for eviction of the respondents who were the original defendants.

2. The plaintiffs filed a suit to evict the defendants from an open plot of land which they had leased out to the defendants for the construction of a

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building. In their defence, the respondents claimed protection under the Decree No. 43525 (hereinafter for brevity's sake referred to as the "Old Act"). The trial Court held that the defendants were protected tenants under the Law and dismissed the suit of the plaintiffs. The lower appellate Court concurred with the trial Court. The only point for my determination is whether the defendants are protected tenants under the Law, and whether for that reason they are not liable to be evicted.

3. During the pendency of this proceeding, the "Old Act" which gives protection to building tenants was repealed by the Goa, Daman and Diu Buildings (Lease, Rent and Eviction) Control Act, 1968 (hereinafter called the "New Act"). The first question that would ordinarily arise would be as to which of the two Acts, the old or the new, is applicable. To decide this question, it must be found out, in view of the decision of the Supreme Court in *V. K. Verma v. Radhey Syam*, AIR 1964 SC 1317, whether the "New Act" substantially differs from the "Old Act". This again takes us to the question as to whether or not tenants of vacant plots are protected under the "Old Act" and under the "New Act". It has to be ascertained therefore whether the "Old Act" gives protection to tenants of vacant plots or not. The Article of the "Old Act" which deals with this question is Art. 2, which reads as under:—

"Art. 2. Estao sujeitos as disposicoes deste diploma os arrendamentos de predios rusticos que nao se destinem a fins produtivos ou em que funcionem, com asentimento do senhorio, estabelecimentos comerciais ou industriais, desde que os respectivos contratos revistam a forma externa que por asses motivos lhes competir segundo o artigo 10."

The Article lays down that "predios rusticos" of which term the agreed translation is "vacant land" are covered by the provisions of the "Old Act" when commercial or industrial establishments function thereon. It is the contention of Shri Mulgaonkar, learned advocate for the plaintiffs that the Maharashtra State Road Transport Corporation who are the defendants in this case are not a "estabelecimento comercial ou industrial" within the meaning of Article 2 of the "Old Act". His contention is that what is meant by the words "estabelecimento comercial ou industrial" is a permanent building or structure lying on the vacant plot where-

in a commercial or industrial concern functions. Shri Mulgaonkar argues that the defendants are housed in a temporary shed built on the vacant plot which is the subject-matter of the suit and that therefore there is no "estabelecimento" within the meaning of Art. 2. The contention of Shri Mulgaonkar is that the word "estabelecimento" denotes some permanent occupation of land by means of a building or structure of a lasting nature. I see no reason for equating a commercial or industrial establishment to the building of permanent nature, wherein the establishment functions. The question as to whether the subject-matter of the lease is covered by some protective legislation or not cannot be decided by the length of the lease as is sought to be argued by Shri Mulgaonkar. If the vacant plot comes under the purview of the "Old Act" a tenant of such plot will be protected whether his lease is for one month or a number of years. To my mind, the word "estabelecimento" occurring in Article 2 denotes the stability of the activity carried on by the tenant on a vacant plot and it seems to me that as long as the commercial or industrial activity is carried on a vacant plot by an established commercial or industrial concern, such concern is entitled to the protection of the "Old Act" whether the activity is carried on in a permanent building or structure or in a shed. This is evident from the words "em que funcionem" occurring in Article 2. These words indicate that what is essential is that an established commercial or industrial concern should function on the vacant plot. The word "estabelecimento" preceding the words "comercial ou industrial" does not mean a house, building or permanent structure. It means the "settlement" of a commercial or industrial concern in business or commerce. The establishment must be essentially in the commercial or industrial circle and incidentally on the land where it functions. I am fortified by the opinion expressed by Jose Pinto Loureiro in his Treatise on "Locacao". At page 142 of his Treatise the learned jurist deals with the Juridical concept of "estabelecimento" and its essential ingredients. He states in the passage at page 142 that stress was laid by Article 9 of Law No. 1662 of 1st September, 1924 on the distinction between the building and establishment. This distinction is stated to be the same as the one that exists between the container and the content. From this discussion I conclude that the suit land which is oc-

cupied by the construction wherein the defendants function is covered by Art. 2 of the "Old Act" and the defendants are protected tenants under the "Old Act" even if the premises wherein they function is not permanent.

4. In view of this finding, I need not ascertain whether the "New Act" affords protection to the defendants or not because if it does, there would be no substantial change between the old and the new Act within the purview of the ruling in AIR 1964 SC 1317, and the "Old Act" would therefore be applicable in view of the provisions of Section 59 of the "New Act". In case the "New Act" did not afford protection to tenants in the circumstances in which the defendants are, the "New Act" would substantially depart from the "Old Act" and would again for the same reasons be not applicable to the present case. I therefore hold that the defendants are protected tenants under the Law and that the findings of the two Courts below are correct.

5. In the circumstances, I dismiss this appeal with costs.

Appeal dismissed.

AIR 1976 GOA, DAMAN & DIU 74

TITO MENEZES, J. C.

Anant Balkrishna Naik, Petitioner v. Govind Datta Gaundalkar, Respondent.

Civil Revn. Appln. No. 51 of 1975, D/- 31-1-1976.

(A) Civil P. C. (1908), O. 6, R. 16 — Striking out pleadings — Power should be exercised with great care and caution.

The power to strike out under this rule is a discretionary one. It should be exercised with great care and caution. It should be exercised only when some substantial objection to the pleading complained of or some real embarrassment is shown. Thus, a written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the action, and which, if not struck out, would unnecessarily delay the suit. (Para 5)

Cases Referred: Chronological Paras
(1913) 2 Ch D 464 5
(1888) 38 Ch D 262 5
(1876) 1 QBD 374 5

S. A. Dessai with B. S. Govenkar and S. P. Raiturkar, for Petitioner; S. V. Joshi with Towar Dias, for Respondent.

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ORDER :— The plaintiff Anant Balkrishna Naik has come before me with this revision application praying that the order of the Addl. Civil Judge, Senior Division, Margao dated April 3, 1975 be set aside and certain statements contained in the written statement of Govind Datta Gaundalkar, the defendant in the suit and respondent in the present petition be struck out in the exercise of the Court's power under Order 6, Rule 16 of the Civil Procedure Code, 1908.

2. The plaintiff filed a suit against the defendant, being suit No. 8/74 in the Court of Addl. Civil Judge, Senior Division, Margao claiming from the defendant Rs. 5,000/- by way of damages in respect of a shed allegedly belonging to the plaintiff. In his written statement the defendant made certain statements at paragraph 8 thereof which according to the plaintiff are irrelevant, unnecessary, scandalous and tending to prejudice plaintiff's case. The statement reads as under :—

"With this motive the plaintiff's son has filed a Criminal Complaint against the defendant at Bombay on the false ground of defamation on the basis of a statement which is true and bona fide made by the defendant to protect his own interest in his reply being Exhibit 1 hereto to the plaintiff's attorney's letter dated 16th October 1973, but the same was subsequently settled after plaintiff's son caused the defendant severe hardship and inconvenience and after compelling him at great cost and inconvenience to attend the Criminal Court at Bombay." The plaintiff moved the trial Court for striking out the said statement in exercise of its power under Order VI, Rule 16, Civil P. C. His application was rejected. He now files this revision application.

3. In reply to the application of the plaintiff the defendant states that the passage which according to the plaintiff contains statements which are unnecessary, scandalous and so on was, a portion of paragraph 8 of his written statement; that the plaintiff has deliberately suppressed the remaining averments in paragraph 8; that read as a whole the averments in paragraph 8 do not come within the purview of O. VI, Rule 16; that the plaintiff and his son Arvind are doing everything possible to harass him with a view to bring pressure on him to settle the suit on terms favourable to the plaintiff, that the plaintiff and his son Arvind have always acted in concert with regard to the subject-matter of the suit; that on several occasions Arvind had

intervened with him and his brother; that Arvind had stated to Jagdish the brother of the defendant that he as an Advocate could, through a solicitor in Bombay bring pressure upon the defendant to vacate the shed; that to harass him the plaintiff instituted false contempt proceeding which was dismissed after it was heard; that Arvind adopted criminal proceedings against him only to harass him and to bring pressure on him to settle suit No. 107/71; that therefore the statements contained in paragraph 8 of his written statement were relevant to show that the plaintiff is in the habit of instituting proceedings like the present suit, which is vexatious.

4. I have no doubt that the matter is not scandalous. The plaintiff does not say that it tends to prejudice, embarrass or delay the fair trial of the suit. What he states is that the matter tends to prejudice the petitioner's case. The petitioner also does not state that the statement tends to embarrass the fair trial of the suit. What he says is that the statement tends to embarrass. Therefore the only question for my determination is whether the statement is unnecessary. It is the case of the defendant that the suit No. 8/74 is frivolous and vexatious and that it was filed with the ulterior motive of bringing pressure on the defendant to vacate the shed of the hosiery factory and that the plaintiff is harassing the defendant in every possible way with a view to compelling the defendant to hand over the shed to the plaintiff. The defendant states that the averments which are said to be unnecessary are made to exemplify the allegation that the plaintiff is trying to obtain the possession of the shed by means of frivolous and vexatious proceedings and the resulting harassment.

5. As I have already stated the only question which I have to ascertain is whether the statements in question are unnecessary. It is not stated by the plaintiff that the plea of the defendant that the first suit is frivolous and vexatious and without any substance could not be taken by the defendant. If that is so it cannot be said that the statements contained in the passage of paragraph 8 reproduced above are unnecessary. The power to strike out or compel amendment under this rule is a discretionary one (1876-1 QBD 374). It should be exercised with great care and caution. It will be exercised only when some substantial objection to the pleading complained of

or some real embarrassment is shown (1913-2 Ch D 464). Thus, a written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the action, and which, if not struck out, would unnecessarily delay the suit. In *Knowles v. Roberts*, (1888) 38 Ch D 262 cited by Shri Dessai, the facts were different from the facts in the instant case. Bowen, L. J. held in that case that in an action to enforce the compromise of a former action brought in assertion of rights of water, as to which disputes had arisen, plaintiff will not be allowed, by setting out in his statement of claim the allegations as to his right and the corresponding liabilities of the Defendant which were contained in his former statement of claim, to relitigate the questions raised in the former action, and intended to have been finally disposed of by the compromise. The learned Judge ordered in that case the allegations to be struck out. In the present case, the object of the defendant in referring to some statements made by him in the previous criminal case filed by the plaintiff against him, was not to re-agitate the dispute in the previous criminal case but merely to give an instance of his contention made in the present case that the plaintiff whilst filing the present suit was motivated by the desire to harass and not to obtain redress to the wrong done to him.

In the circumstances, I dismiss this Revision Application with costs.

Revision dismissed.

AIR 1976 GOA, DAMAN & DIU 75

TITO MENEZES, J. C.

Anant Balkrishna Naik, Petitioner v. Govind Datta Gaundalkar, Respondent.

Civil Revn. Appln. No. 50 of 1975, D/- 31-1-1976.

(A) Civil P. C. (1908), Section 115 — Revision — Question of court-fee.

Revision will lie against the decision on the question of adequacy of court-fee at the instance of the defendant where the question of court-fee involves also the question of jurisdiction of the Court. AIR 1961 SC 1299 and AIR 1973 SC 2384, Relied on. (Para 4)

CT/DT/A760/76/JHS

Cases Referred: Chronological Paras

AIR 1973 SC 2384 = 1973 SCD 844	4
AIR 1962 Ker 84 = 1961 Ker LT 325	4
AIR 1961 SC 1299 = (1961) 3 SCR 1015	4

Barrister S. A. Dessai with B. S. Govenkar and S. P. Raiturkar, for Petitioner; S. V. Joshi, with Tovar Dias, for Respondent.

ORDER:— This Revision Application is filed by Anant Balkrishna Naik, the defendant in suit No. 5/73 in the Court of the Addl. Senior Civil Judge, Margao. The Revision Application was directed against the order of the lower Court dated March 13, 1975, dismissing the application of the defendant for an order of the Court directing the plaintiff to pay court-fee on Rs. 58,094.26. Govind Datta Gaundalkar filed this suit against Naik and prayed inter alia:— (1) that the defendant be ordered and directed to pay such sums which in view of the pleadings, the Honourable Court deems appropriate with interest from date of suit to that of actual payment; (2) In the alternative, that it be declared that the partnership was dissolved on January 5, 1970; (3) that accounts be taken.

2. The defendant raised the preliminary objection that the suit should be valued for the purpose of court-fee and stamp at Rs. 58,094.26 and not at Rs. 200/-, as it was valued by the plaintiff.

3. At paragraph 9 of the plaint the plaintiff states:—

"The plaintiff says that as the defendant failed and neglected to pay plaintiff's dues and as the plaintiff was incurring heavy losses by reason of the money being locked in the shed and machinery, the plaintiff, in disregard of said agreement made "inter alia" a proposal to the defendant to buy his land. The defendant did not accept the offer. Thereafter, the defendant filed a suit against the plaintiff in the Court of the Civil Judge, Senior Division at Margao, being Reg. Civil Suit No. 107/71, wherein he falsely alleged that this plaintiff was a trespasser in respect of the said shed and prayed for his eviction therefrom. The defendant further obtained a temporary injunction to prevent this plaintiff from using the shed. In the circumstances, the plaintiff is entitled to recover and the defendant is liable to pay the said sum of Rs. 31,895.44 P. and Rs. 15,947-72 P. aggregating Rs. 47,843-16 P. and interest on the said sum of Rs. 31,895-44 P. at the rate of 15% per annum from October 10, 1970. The plaintiff says that there is a

sum of Rs. 58,094.26 due and payable by the defendant to the plaintiff as per the particulars of claim annexed hereto".

In view of the averments in paragraph 9 it is evident that the present suit is for the recovery of a definite sum of money, namely, Rs. 58,094.26 which the plaintiff states was due by the defendant to the plaintiff as per the particulars annexed to the plaint. The suit does not cease to be a suit for recovery of a certain sum merely because the plaintiff also prays for accounts of a partnership which he alleges to exist between him and the defendant. It may be that the present suit was filed for the recovery of the definite and ascertained sum of Rs. 58,094.26 as the existence of the partnership was not admittedly by the defendant.

4. It is argued by Shri Joshi that a revision application does not lie against an order of the Court dismissing an objection regarding court-fee. Shri Joshi relies on Sri Rathnavarmaraja v. Smt. Vimla, AIR 1961 SC 1299. In that case the High Court of Madras held that the provisions of the Madras Court-fees Act do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court for revision against an order determining court-fee. However, in that case the question of court-fee did not affect the jurisdiction of the Court. If the suit is valued at Rs. 200/- as was done by the plaintiff the Junior Civil Court will acquire jurisdiction to hear it and the jurisdiction of this Court to hear any appeal that may be filed will be taken away. It is true that the plaintiff had tried to circumvent this difficulty by giving a different valuation for the purpose of jurisdiction. But this is certainly a suit which under the provisions of Section 8 of the Suits Valuation Act has to be valued at the same amount for the purpose of court-fees and jurisdiction. In Shamsher Singh v. Rajinder Prashad, AIR 1973 SC 2384, a preliminary objection was raised based on the observation made by the High Court in Rathnavarmaraja v. Smt. Vimla, AIR 1961 SC 1299 that whether a proper court-fee is paid on a plaint or not is primarily a question between the plaintiff and the State and that the defendants who may believe and even honestly that proper court-fee has not been paid by the plaintiff, has still no right to move the superior Courts by appeal or in revision against the order adjudging payment of court-fee payable on the plaint. Their Lordships of the Supreme Court quoted with approval the

observations of the Kerala High Court in *Vasu v. Chakki Mani*, AIR 1962 Ker 84 where it was pointed out that no revision will lie against the decision on the question of adequacy of court-fee at the instance of the defendant unless the question of court-fee involves also the question of jurisdiction of the Court. The Supreme Court remarked that the decision of the Kerala High Court correctly interpreted the ruling in AIR 1961 SC 1299.

5. In the circumstances I grant the Revision Application and set aside the order of the trial Court dated March 13, 1975. The respondent shall pay court-fee on Rs. 58,094.26. The costs of this Revision Application shall be the costs in the cause.

Revision allowed.

AIR 1976 GOA, DAMAN & DIU 77

K. N. SHUKLA, ADDL. J. C.

Vithal Mahambre and another, Petitioners v. Union of India and others, Respondents.

Special Civil Appls. (Writ Petns.) Nos. 143 of 1975 and 15 of 1976, D/- 30-1-1976.

(A) Constitution of India, Article 226 — Stay order — Removal of petitioner from office of councillor of municipal council challenged — Prima facie case made out — Operation of order stayed till disposal of petition to avoid unsavoury situation. (Para 5)

S. C. A. (W. P.) 143 of 1975

S. V. Joshi, for Petitioner; J. Dias, Govt. Advocate, for Respondents.

S. C. A. (W. P.) 15 of 1976

B. F. D'Souza, for Petitioners; J. Dias, Govt. Advocate, for Respondents.

ORDER:— This interim order shall govern Special Civil Application No 143/75 and Special Civil Application No. 15/76 with regard to the prayer of the petitioners for staying the operation of the impugned orders dated 16-10-1975.

2. Petitioners in both the writ petitions were duly elected councillors of the Panaji Municipal Council. They were detained under the Maintenance of Internal Security Act, 1971 by the Government and are still in jail. During their detention notices in the name of the Director of Municipal Administration were issued to them calling upon them to

show cause why an order should not be passed removing them from the office of a councillor of the Panaji Municipal Council. Time limit of three days was set for sending replies. Petitioners submitted their replies and challenged the right of the Director to remove them from the said office. Thereafter on 16-10-1975 Government of Goa, Daman and Diu passed the impugned orders in the name of the Administrator of Goa, Daman and Diu, respondent No. 2.

3. It is submitted by the petitioners that there is a prima facie case to show that the impugned orders are ultra vires, invalid and void. They have set out various grounds in support of their applications, one of them being that no notice contemplated under Section 44, sub-section (3) of the Goa, Daman and Diu Municipalities Act, 1968 was served on them. Petitioners' learned counsel submit that the notices given by the Director of Municipal Administration cannot be considered as notices by the Government which acts in the name of the Administrator.

4. I am satisfied that there is a prima facie case and the admission of the writ petitions for final hearing is a proof thereof.

5. If the impugned orders are implemented in full, several complications will arise. Follow up action will become necessary under Section 50 of the Act to fill up the vacancies and in the event of petitioners succeeding, an unsavoury situation will arise. It would be proper therefore to stay the operation of the impugned orders till the disposal of the writ petitions.

6. A preliminary objection was raised by the learned Government Advocate about the maintainability of the petitions in view of the proclamation of Emergency under which Fundamental Rights under Article 14 of the Constitution have been suspended. Learned counsel for the petitioners in reply argued that the petitions should not be treated as under Article 14 of the Constitution nor they are pressing their Fundamental Rights thereunder. According to them their prayer is confined to a declaration that the impugned orders are ultra vires of the Goa, Daman and Diu Municipalities Act for reasons stated therein and for non-compliance with the rules of natural justice.

7. In view of this submission of the learned counsel for the petitioners I do not think that the petitions are in-

competent and liable to be dismissed in limine as contended by the learned Government Advocate.

8. Accordingly operation of the impugned orders and all further acts or proceedings in pursuance of the said orders are stayed till the disposal of these writ petitions.

Order accordingly.

AIR 1976 GOA, DAMAN & DIU 78

TITO MENEZES, J. C.

John Francisco D'Cunha and another, Appellants v. Shantabai Parshekar and another, Respondents.

Second Appeal No. 13 of 1974, D/- 28-1-1976.

(A) Civil P. C. (1908), Section 47 — Question relating to execution, discharge or satisfaction of decree — Decree alleged to be based on a compromise to which defendant was not a party — Question invoked being of validity of decree itself can be agitated only by means of an appeal and not in execution proceedings. AIR 1931 All 490 (FB), Relied on.

(Para 4)

Cases Referred: Chronological Paras
AIR 1958 Andh Pra 1 = 1957 Andh LT 489 (FB) 4
AIR 1931 All 490 = 1931 All LJ 715 (FB) 4

P. Prabhu Desai, for Appellants; Pinto Menezes, for Respondent No. 1.

JUDGMENT:— This is an appeal of the plaintiffs. The order challenged is the order of the District Judge, Panaji, dated February 12, 1974. By the said Order, the decree which was obtained by the plaintiffs in the trial Court was set aside by the lower appellate Court.

2. The plaintiffs who are the present appellants have filed a suit against Arjun Parshekar for obtaining the vacant possession of a kitchen wherein the defendants were residing. During the pendency of the suit, Arjun died. The plaintiffs made an application to bring his widow Shantabai who is the respondent No. 1 and his daughter Premabai, respondent No. 2, on record as party defendants. A notice was served on Shantabai and Premabai to appear and show cause why they should not be impleaded as defendants. Shantabai received the notice, but did not appear in Court. Premabai appeared and submitted to a decree on be-

half of herself and her mother Shantabai upon time being given to them to vacate the premises. An order was accordingly passed. Thereafter a decree was drawn against Shantabai and Premabai evicting them from the premises. Execution of the decree was then applied for by the plaintiffs. Shantabai resisted the execution on the ground that the decree was not binding on her because she had not authorised her daughter to submit to a decree. The application of Shantabai objecting to the execution of the decree was dismissed by the learned Senior Civil Judge, Mapusa. Premabai did not resist the execution. There is nothing on record to show that Shantabai had given the authority to Premabai to submit to a decree. The fact however remains that Shantabai was served, but did not remain present on the day on which the decree was passed.

3. The argument of Shri Pinto de Menezes, learned advocate for the defendants is that the decree having been passed in terms of a compromise to which Shantabai was not a party, the decree is void and inoperative in law as far as Shantabai is concerned. On behalf of the plaintiffs it is argued by Shri Prabhu, their learned advocate, that the decree was not passed on a compromise. Assuming without admitting, Shri Prabhu states, that the decree was a compromise decree, what was challenged in the Execution proceedings was the validity of the decree itself. Such a challenge could not be taken in Execution proceedings.

4. There is a decree of the Court against the two defendants. The defendant No. 2 Premabai does not challenge it. Shri Pinto Menezes, learned advocate for the defendant No. 1 states that the question raised by the defendant No. 1 is a question raised not as a third party but as a party to the suit. A question raised by a party to the suit can be raised in execution only if it relates to the execution, discharge or satisfaction of the decree within the meaning of Section 47 of Civil P. C., 1908. The question involved in the present context is as to the nullity of the decree on the ground that the decree is based on a compromise to which the defendant No. 1 was not a party. Such a question is not a question relating to the execution, discharge or satisfaction of the decree. It is a question of nullity of the decree, pure and simple. A question of this type can be agitated only by means of an appeal against a decree and not in execution proceedings. I am fortified in my view by the ruling of the

Andhra Pradesh High Court in *A. Venkatasheshayya v. A. Virayya*, AIR 1958 Andh Pra 1 (FB). That was a decision of a Full Bench. Their Lordships held in that case that the question raised by the plaintiffs did not relate to the execution of the decree for they attacked the decree itself on the ground that it was void. Subba Rao, C. J. who spoke for the Court referred to the correct principle stated by Suleiman, C. J. in *Mahabir Singh v. Dip Narain Tewari*, (AIR 1931 All 490) (FB), where the learned Judge observed:

"I am therefore clearly of opinion that where the question is either that a decree was passed against a dead person or was not passed against him at all and therefore it is a nullity, pure and simple, the dispute does not relate to the execution of the decree but aims at its utter destruction. The dispute as to the execution of a decree contemplates the existence of a valid decree. Where a decree is without jurisdiction or is otherwise utterly null and void, and can therefore be ignored by a person, his protest is not merely as to its execution but he impeaches the decree itself. Such a dispute, in my opinion, is not within the purview of Section 47 at all."

5. It appears that the learned District Judge totally lost sight of the fact that the appeal before him was an appeal under Section 47 of Civil P. C. and the only question that he and the Court a quo could decide was a question regarding the execution, discharge or satisfaction of the decree. The learned District Judge acted without jurisdiction. The learned Senior Civil Judge Mapusa was right in dismissing the question raised by the defendant No. 1 in execution. I, therefore, quash the order of the District Judge, Panaji and restore the order of the Senior Civil Judge, Mapusa, dismissing the objection in execution raised by the defendant No. 1. The defendant No. 1 shall pay the costs throughout.

Ordered accordingly.

AIR 1976 GOA, DAMAN & DIU 79

TITO MENEZES, J. C.

Chandrasen Ramnath Raikar, Appellant v. Marmagao Municipal Council, Respondent.

Second Appeal No. 8 of 1974, D/- 24-1-1976.

(A) *Reforma Administrativa Ultramarina*, Articles 651, 661 (a) — Suit for annulment of the public auction — Jurisdiction of Civil Court is barred.

A suit for declaration of annulment of public auction held for selection of a person with whom a contract for collecting municipal fees in the market would later on be entered into is not a suit wherein a question regarding the validity of the contract within the meaning of Article 651 is involved. An auction is an act of the Municipality covered by Article 661 (a) and, therefore, any challenge to the auction must be made in the Administrative Tribunal. (Para 5)

S. K. Kakodkar, for Appellant; M. P. Shinkre, for Respondent.

JUDGMENT:— The order in appeal challenged in this proceeding is the order of the District Judge, Panaji dated August 20, 1975. By the said order the learned Judge allowed the first appeal filed against the decree of the original Court given in favour of the plaintiff, the appellant herein.

2. The plaintiff Chandrasen Ramnath Raikar filed a suit against the respondent, the Marmagao Municipal Council for obtaining a declaration that a certain public auction held by the Municipality Vasco da Gama, on June 10, 1965 is null and void ab initio and for a decree and order of the Court directing and ordering the defendants to pay to the plaintiff the sum of Rs. 5,000/- together with interest thereon. The plaintiff also prayed for a decree and order directing the Municipality to refund and pay to the plaintiff the sum of Rs. 5,000/- together with interest thereon. The suit was decreed by the trial Court. In appeal the District Judge reversed the finding of the trial Court and dismissed the suit on the ground that the Civil Court had no jurisdiction to entertain the suit.

3. It is argued by Shri Kakodkar learned Advocate for the plaintiff that the present suit is a suit for obtaining a refund of the sum of Rs. 5,000/- paid to the Municipality under a mistake. It is contended by Shri Kakodkar that the plain-

tiff was under the impression that the auction was for the period of one year only and not for nine months; that the two contesting parties viz., the plaintiff and the defendants were not ad idem as to the period for which the contract was to last and that therefore there was no contract entered into between the plaintiff and the defendant. Now, the contract about which the parties are said to be of divergent mind is the contract whereby the right to collect Municipal fees in the Market was to be given. No step whatsoever is taken regarding that contract. The deposit of Rs. 5,000/- was not made under that contract. That contract which is still to be entered into is not at all the subject-matter of the suit. The subject-matter of the suit is the public auction.

4. The defendants are the owners of the Vasco da Gama Municipal Market. On April 22, 1965 the defendant published a notice in the local newspaper announcing the auction of the right to collect fees from users of the market for the year 1965-66. As the plaintiff wanted to participate in the said auction he deposited on June 10, 1965 the sum of Rs. 5,000/- in terms of the second paragraph of the notice. It is alleged by the plaintiff that he was given to understand by the office of the defendants that the lease was for the period of one year. The auction did not take place on May 13, as scheduled. By notice No. 4 of April 30, 1965 the defendants postponed the auction without changing its terms and conditions. The auction finally took place on June 10, 1965. The plaintiff offered the highest bid of Rs. 1,09,500/-. The second highest of Rs. 1,09,000/- was offered by one Sitaram Pandit. It is alleged by the plaintiff that soon after the auction was over the Secretary of the defendants brought to the notice of the bidders concerned that the lease was to be not for the period of one year, as had been given to understand, but for a period of nine months; that as a result of the said mistake of fact the plaintiff as well as Sitaram Pandit refused to sign the contract and insisted that the contract could be only for one year as per the representations made by the defendants and which preceded the auction; that thereafter, by their notice No. 7 dated June 19, 1965 the defendants again announced that a new auction would be held on July 15, 1965 for giving away the right of collection of the Municipal fees for the use of the market for the period from August 1965 to March 1966;

therefore, the petitioner states, the auction held on June 10, 1965 is bad in law and void ab initio.

5. The present suit is filed by the plaintiff for a declaration that the said auction held on June 10, 1965 was null and void. The consequential relief of payment or refund of the sum of Rupees 5,000/- to the defendants is also prayed for. Therefore, in my opinion the present suit is for the annulment of the auction. The auction is stated by the plaintiff to be bad because of certain material procedural irregularities. An auction is not a contract. By the said auction the defendants wanted to select the highest bidder with whom the contract for collecting municipal fees in the market would later on be entered into. Even after the auction was over a selection could be made by the defendants irrespective of the auction. There was no obligation on the part of the defendants to give the right of collection of municipal fees in the market to the highest bidder. The declaration sought for in the suit was not therefore a question regarding the validity of the contract within the meaning of Article 651 of the "Reforma Administrativa Ultramarina". An auction is an act of the Municipality covered by Article 661 (a) of the "Reforma Administrativa Ultramarina" and therefore any challenge to the auction must be made in the Administrative Tribunal. The provisions of Article 661 of the "Reforma Administrativa Ultramarina" which was admittedly in force at the time of the challenge to the auction was made, must be interpreted in accordance with the principles of the Administrative Law and not of Civil Law. If so interpreted the jurisdiction given to the Administrative Tribunal under Article 661 is exclusive not only in the light of the Portuguese Civil Procedure Code but also of Section 9 of the Indian Civil Procedure Code, 1908.

6. For reasons which I have stated above I reject the contention of the plaintiff that the Civil Court has jurisdiction to annul the public auction by the defendants on June 10, 1965. In the result the appeal is dismissed with costs.

Appeal dismissed.

fore us and which arose before the Division Bench in *Ratilal v. Ranchhodhai* (AIR 1968 Guj 172) did not in terms arise before the Supreme Court in *Nanji Pancha v. Daulal* (1970) 11 Guj LR 285 (supra). There was no question of payment of standard rent and permitted increases by the tenant during the pendency of the appeal. We see no basic conflict between the two decisions, namely, *Ratilal v. Ranchhodhai* on the one hand and *Nanji Pancha v. Daulal* on the other. If at all there is any conflict between these two decisions, we would in the light of the observations of the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi* be inclined to accept the view taken in *Ratilal v. Ranchhodhai* rather than conflicting view, if any; expressed in *Nanji Pancha v. Daulal*.

12. Miss Shah for the petitioner has relied upon the decision of T. U. Mehta J., in Civil Revision Application No. 1215 of 1968 = (reported in (1974) 15 Guj LR 238). In paragraph 16 of his judgment, our learned brother, after referring to the decision in *Ratilal v. Ranchhodhai*, (AIR 1968 Guj 172) (supra), has observed—

“This decision is binding on me sitting as a Single Judge and, therefore, it should follow that the deposits which are contemplated by clause (b), are required to be made regularly even in the appellate Court till the appeal is finally decided. But the question which now arises before me is whether the tenant would lose the protection of clause (b) of Section 12 (3) if he deposits the rent in an irregular manner in absence of any suitable directions by the Court. The proper answer to this question would be found on proper interpretation of the language of clause (b), which is quoted above. This clause (b) does contemplate some directions of the Court and that fact is evident by reference to the last words “as directed by the Court,” which are found at the end of the clause.”

The contention of Mr. Shah for the petitioner in that case however was that the directions contemplated by these words are the directions relating to the payment of costs and not to the payment or tender of standard rent and permitted increases or to the regularity of the said payment or tender. In other words, his contention was, that the Court's directions are required only with reference to the costs of the suit and not to any other matter referred to by clause (b). On close scrutiny of the language employed by the legislature in clause (b) the Court found that it was not possible to agree with the interpretation canvassed by Mr. Shah. After considering the entire language, he held that the words “as directed by

the Court” govern the whole of clause (b) and not merely the question of costs. He went into the question of intention of the Legislature and ultimately held in paragraph 20—

“Under these circumstances, I conclude that the expression ‘as directed by the Court’ applies not only to the payment of costs, but also to the quantum of rent and permitted increases to be deposited, and the day on which the tenant should continue to make that deposit in order to make it ‘regular.’”

With great respect to our learned brother, we are unable to agree with his conclusions. The last portion of Section 12 (3) (b) runs: “and also pays costs of the suit as directed by the Court”. Now a complete new notion is introduced by these last words, namely payment of the costs and it is with reference to this payment of costs that the words “as directed by the Court” have been provided by the Legislature. Obviously until an order for costs is actually drawn up, a litigant will not know what costs he has to pay or tender or deposit in Court and hence, if the Court so directs, he has to pay the quantum of costs as directed by the Court. It is only for this limited purpose of payment of costs that the words “as directed by the Court” have been laid down by the Legislature. Whatever doubt there might have been regarding the interpretation of these words “as directed by the Court” occurring in the language of Section 12 (3) (b), has been removed by the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi*, (AIR 1964 SC 1341) (supra). In paragraph 9 of the judgment at page 61 Shah J. has observed—

“To bring his claim within Section 12 (3) (b) the tenant must pay or tender the standard rent and permitted increases on or before the first day of hearing, or on or before such other date as the Court fixes, and also costs of the suit as may be directed by the Court.” It has also been observed at page 61—

“In these cases (in cases falling under Section 12 (3) (b)) the tenant may claim protection by paying off or tendering in Court on the first day of the hearing of the suit or such other date as the Court may fix the standard rent and permitted increases and continuing to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also by paying costs of the suit as directed by the Court.” In view of these two passages from the decision of the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi* (supra) it is obvious that the words “as directed by the Court” occurring at the end of S. 12 (3) (b) merely governed the costs of the suit and not any other

portion of Section 12 (3) (b). With respect, we are unable to hold that the words "as directed by the Court" refer to the question of regularity of the payment because the Court has not to direct regularity of the payment. If the standard rent and permitted increases were not previously fixed by the Court, the Court may, as pointed out by the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi* take up the issue of standard rent at the first opportunity and decide what the standard rent and permitted increases are and once it so decides and fixes the standard rent and permitted increases, it must also fix the date on or before which the standard rent and permitted increases must be paid and thereafter, in order to earn the benefit of Section 12 (3) (b), the tenant must continue to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided. In our opinion, after the date fixed by the Court as referred to in the judgment of the Supreme Court, there is no question of any other direction having to be given by the Court in any other connection. The Court has done its work by fixing the standard rent and permitted increases and in order to be fair to the tenant since the first date of hearing would already be gone, it has to fix a date on or before which the tenant must pay the standard rent and permitted increases and all arrears thereof and thereafter the tenant must go on paying regularly or tendering in Court regularly such standard rent and permitted increases. We are unable to understand, in the light of the decision in *Vora Abbasbhai v. Haji Gulamnabi* as to what other directions regarding the payment of standard rent and permitted increases the Court is expected to give in order to enable the tenant to pay. It is in accordance with the grammatical meaning of Section 12 (3) (b) that the costs of the suit as directed by the Court may have to be paid by the tenant even before the decree is passed. Ordinarily the amount of costs would be known only after the decree is passed and the amount of costs is fixed by an order of the Court but S. 12 (3) (b) contemplates that the tenant, in order to earn the benefit of Section 12 (3) (b), over and above the amount of the standard rent and permitted increases may have to pay the costs of the suit also. Since the amount of costs is not known to the tenant in advance, that is, before the suit is decided and the decree of the trial Court is passed, the Court may have to give directions regarding the quantum of costs and if the Court gives directions as to costs, the tenant has to pay such costs also before the suit is decided. The words "as directed by the Court", therefore, can only apply to the costs and not to any other part of Section 12

(3) (b). Under these circumstances, we are unable to agree with the conclusions of our learned brother T. U. Mehta J., that even as regards the regularity of the payment, the directions have to be given by the Court and if directions are not given, the tenant is not bound to pay regularly.

13. Miss Shah for the petitioner before us has also relied upon the decision of M. P. Thakkar J., in Civil Revision Application No. 1208 of 1969 decided by our learned brother on July 18, 1973. Our learned brother observed after referring to *Ratilal v. Ranchhodbhai* (AIR 1968 Guj 172) (supra).

"Now, the expression 'first day of hearing' embodied in Section 12 (3) (b) is referable to the date on which the issues are framed in a suit. So far as an appeal is concerned, there cannot be a first day of hearing. When the matter comes up for admission it cannot be said that it is the first date of hearing for on that date the Court might even summarily reject the matter. When the matter, however, is admitted, a notice is issued on the other side and thereafter the matter would come up for final hearing. It is not possible to posit that this would be the first date of hearing in the case of an appeal. It is possible to argue that the requirement regarding deposit of future rent will apply only during the pendency of the suit and not during the pendency of the appeal. It can be argued that a tenant cannot at all comply with the provision to deposit the rent falling due from time to time regularly in the Court in some situations. For instance, in a case where the landlord has appealed against a decree dismissing the suit, the preparation of the certified copies may take some time and the matter may come up for admission after a few months. How is the tenant expected to know that the landlord has appealed and that he is required to deposit the future rent from month to month regularly? And in which Court should he deposit the amount even if he were considered liable to deposit it in anticipation of such an appeal? The decision in *Ratilal's* case may well require reconsideration".

With respect to our learned brother, it must be pointed out that the main idea behind Section 12 (3) (b) as it stands on the statute book is to see that the tenant pays and continues to pay regularly the amount of standard rent and permitted increases after the trial Court has once decided the quantum of standard rent and permitted increases. Once that amount is fixed, it is not open to the tenant to decline to pay or tender in Court the standard rent regularly and still claim the benefit of Section 12 (3) (b). If the appeal is filed and the tenant comes to know about it, he has to

pay or tender in Court regularly at the appellate stage the standard rent and permitted increases as fixed by the trial Court and if the appellate Court enhances the quantum of standard rent and permitted increases, he has to pay the difference on or before such other date as the Court may fix. It is obvious that if he has not been paying regularly the standard rent and permitted increases during the pendency of the appeal, there will be no question of his paying the difference in the event of the appellate Court enhancing the standard rent and permitted increases. In view of the observations of the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi* (AIR 1964 SC 1341) no difficulty whatsoever would arise. The tenant, in order to earn the benefit for himself, must go on paying regularly even during the pendency of the appeal. We do not see any reason to reconsider the effect of the decision in *Ratilal v. Ranchhodbhai* (AIR 1968 Guj 172) (supra) because, in our opinion, what has been laid down in that decision of the Division Bench, fully carries out the effect of Section 12 (3) (b) as explained by the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi*. Under these circumstances we are unable to agree with our learned brother M. P. Thakkar J. that requirement regarding deposit of future rent will apply only during the pendency of the suit and not during the pendency of the appeal. In view of the decision of the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi* that contention must be rejected and any such possible argument cannot be entertained.

14. Lastly Miss Shah for the petitioner drew our attention to the decision of the Supreme Court in *Abdul Hamed Yousuff Sait v. Smt. Kalavati*, 1969 Ren CJ 1 (SC). The Supreme Court in that case was dealing with the provisions of Section 29 of the Mysore Rent Control Act, Sub-section (4) of Section 29 was as follows:—

"If any tenant fails to pay or deposit the rent as aforesaid, the Court, the District Judge, or the High Court, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the premises or dismiss the appeal or revision petition, as the case may be."

Dealing with this provision it was held that failure to pay rent by the tenant during the pendency of the revision petition filed by the landlord is not covered by Section 29 (4) of the Act. It was found that there was no provision in the Act before the Supreme Court empowering the Appellate Court or the High Court to do so. We are unable to see how this decision of the Supreme Court based on the

particular language of another statute can be binding on us when we have a clear decision of the Supreme Court directly dealing with the provisions of Section 12 (3) (b) and the effect thereof. Under these circumstances we are unable to accept the contention of Miss Shah that the tenant is not required in the light of this decision of the Supreme Court in *Abdul Hamed Yousuff Sait v. Smt. Kalavati* to deposit in Court or to pay regularly the standard rent and permitted increases during the pendency of the appeal.

15. Our conclusion, therefore, is that the Division Bench in *Ratilal v. Ranchhodbhai* (AIR 1968 Guj 172) has correctly explained the legal position and the provisions of Section 12 (3) (b) and the decision of T. U. Mehta J., in Civil Revision Application No. 1215 of 1968 = (reported in (1974) 15 Guj LR 238) was, with respect to him, not correct. We are also unable to agree with the observations of M. P. Thakkar J. in Civil Revision Application No. 1208 of 1969.

16. In the light of the above discussion we hold that Section 12 (3) (b) of the Rent Act applies even at the appellate stage and the words "till the suit is finally decided" occurring in Section 12 (3) (b) refer also to the decision of the suit in appeal by the appellate Court when an appeal is preferred by the landlord against a decree passed by the trial Court dismissing his suit and the question arises before the appellate Court whether the tenant is entitled to the protection of Section 12 (3) (b), the appellate Court would have to consider whether the tenant has, after paying or tendering in Court the arrears of standard rent and permitted increases on the first day of hearing of the suit or on or before such other date as might have been fixed by the Court, continued to pay or tender in Court regularly the standard rent and permitted increases till the decision of the appeal. If he has not paid the amount of standard rent and permitted increases as fixed by the trial Court and in case the appellate Court has enhanced the standard rent and permitted increases has not paid the difference arising because of such enhancement on or before such date as the appellate Court might fix and after such date continued to pay regularly the enhanced rent and permitted increases, the tenant would be deprived of the protection of Section 12 (3) (b). In the light of the historical background and in the light of the decisions which we have referred to above, this is the only conclusion which can be drawn. The matter will now go back before the learned Single Judge taking up Civil Revision Applications for final decision in the light of our judgment. Costs of the hearing before the Full Bench to be costs in the Civil Revision Application.

17. After the above judgment was delivered, Miss Shah for the petitioner orally applied for leave to appeal to the Supreme Court under Article 133 (1) of the Constitution. Though the question regarding the applicability of Section 12 (3) (b) at the appellate stage is a substantial question of law, in our opinion, since the matter is covered by a decision of the Supreme Court in *Vora Abbasbhai v. Haji Gulamnabi*, (AIR 1964 SC 1341) (supra) it cannot be said that the question is one which is needed to be decided by the Supreme Court. Miss Shah has stated that against the decision of T. U. Mehta J., in Civil Revision Application No. 1215 of 1968 which we have overruled by this judgment, an appeal with special leave granted by the Supreme Court has been filed and is pending before the Supreme Court and we should, therefore, grant leave to appeal to the Supreme Court. However, the decision in *Vora Abbasbhai v. Haji Gulamnabi* (Supra) was not considered by T. U. Mehta J., and the full impact of that decision of the Supreme Court was not appreciated by T. U. Mehta J. Since in our opinion the point is already covered by a decision of the Supreme Court, we are rejecting this application. This oral application is, therefore, rejected.

Order accordingly.

AIR 1976 GUJARAT 132

P. D. DESAI J.

Ajam Mohammad Hatia and another, Petitioners v. Yusuf Mohammad Bharucha and others, Respondents.

Special Civil Appln. No. 948 of 1974, D/-10-1-1975.*

(A) **Bombay Public Trusts Act (29 of 1950), Section 47 (1) (g)** — Removal of a trustee for becoming unfit to act in the trust — Term “unfit” does not include unfitness arising out of conviction under Act.

The opening part of Section 47 makes it clear that both the Charity Commissioner as well as the beneficiary are entitled to apply to the Court for the appointment of a new trustee. Therefore, on the ground of unfitness, both the Charity Commissioner as well as the beneficiary could move the Court under Section 47. If the word “unfit” embraced within its fold unfitness arising on account of conviction under the Act, the Charity Commissioner would have been entitled to approach

the Court under Section 47 itself for the removal of a trustee who has been so convicted. However, the legislature has introduced a separate section 47AA by Bombay Act VI of 1960 which takes care of such a situation. This gives a clear indication that it was not contemplated that the word “unfit” would include unfitness arising on account of conviction for an offence under the Act. If the Charity Commissioner already had the right to move the court for appointment of a new trustee on the ground that a trustee has been convicted for an offence under the Act, there was no need to enact Section 47-AA and confer such right separately upon him under a special provision. (Para 5)

(B) **Bombay Public Trusts Act (29 of 1950), Section 47-AA (as amended by Act 6 of 1960)** — Application for appointment of a new trustee on the ground that present trustee has been convicted for an offence under the Act — Charity Commissioner alone competent to move Court.

The provisions of Section 47AA are clear and specific and it is for the Charity Commissioner to move the Court for the appointment of a new trustee thereunder. No application for appointment of a new trustee on the ground that a trustee has been convicted of an offence punishable under the Act would, therefore, be maintainable at the instance of a beneficiary. Since the Act creates offences and prescribes penalties for many kinds of defaults on the parts of trustees all of which may not warrant their removal from the office of a trustee the Charity Commissioner alone would be the best Judge. (Para 4)

G. N. Desai with S. H. Sanjanwala, for Petitioners; Mrs. K. A. Mehta, for A. H. Mehta (for No. 1), K. G. Sheth, for S. B. Majumdar (for No. 2), B. J. Shelat, (for No. 3) and S. R. Divecha, (for No. 4), for Respondents.

ORDER:— This writ application arises out of an application under Sections 47 and 47AA of the Bombay Public Trusts Act, 1950 (hereinafter referred to as the Act) made by the petitioners to the District Court for the removal of the first respondent and one Kasam Mahmad Ajam Ismail (since deceased) as trustees and appointment of new trustees of a public trust which is registered under the Act as “Sheth Azam Aref Bham 1/3 Wakf, Rander”. Since the other trustee whose removal was sought by the applicants died pending the application, the only question which survived for consideration of the District Court was whether any ground for the removal of the first opponent as a trustee was made out and the learned Assistant Judge found that no such ground was made out under Section 47 and that an application for removal of the first op-

* (To Set aside judgment and decree of Extra Asst. J. Surat in M. C. A. No. 3 of 1972 D/-29-4-1974).

ponent as a trustee under Section 47-AA was not maintainable at the instance of the petitioners. It is this decision which is under challenge in the present petition.

2. Now, the application for removal of the first opponent as a trustee was made on two grounds: first, that the said opponent was physically incapable to manage the trust on account of his old age and affliction by paralysis and, secondly, that the said opponent was convicted for an offence punishable under the Act. Paragraphs 4 and 5 of the application make it clear that for the purposes of the first ground of removal Section 47 was invoked and for the second ground Section 47-AA was invoked. As regards the first ground the learned Extra Assistant Judge recorded the following finding:

"The opponent No. 1 by appearing before the Court to give evidence has displayed his physical capacity. He has also displayed his mental ability by his forthright manner of giving the evidence before the Court. Not a single instance has been cited by the applicant No. 1 wherein the work of the trust might have suffered because of the physical or mental inability of the opponent No. 1. I have seen him in the witness box giving evidence with sufficient physical and mental ability. . . . I am inclined to believe him that he is physically capable of managing the affairs of the trust."

In view of this finding, the learned Extra Assistant Judge held that the first ground for removal was not made out. As regards the second ground, the learned Extra Assistant Judge found that an application for removal of a trustee on the ground that he was convicted for an offence punishable under the Act was maintainable under Section 47-AA at the instance of the Charity Commissioner alone and that the petitioners, who claim to be the beneficiaries of the trust, could not invoke the aid of the said section and seek removal of the first opponent on such a ground.

3. So far as the question of removal on the ground of physical inability is concerned, there is a clear finding of fact recorded by the learned Extra Assistant Judge and I am unable to see my way to interfere with the same. In fact, Mr. Sanjanwala, learned Advocate appearing on behalf of the petitioners, fairly stated that in view of the said finding, it was not possible for him to assail the impugned decision so far as it related to the first ground.

4. As regards the second ground, it is not in dispute that the first opponent was convicted for an offence punishable under the Act in his capacity as a trustee of another public trust. The question which arises for

consideration, however, is whether it is open to the petitioners to seek the removal of the said respondent on that ground and to apply for the appointment of a new trustee under Section 47-AA. A bare reading of the said section makes it clear that such a relief cannot be obtained by the petitioners and that an application under the said section is maintainable only at the instance of the Charity Commissioner. Section 47-AA reads as under:—

"47-AA. Where a trustee of any public trust is convicted of an offence punishable under this Act or any amount is surcharged on him under sub-section (1) of Section 41, the Charity Commissioner may apply to the Court for the appointment of a new trustee, and thereupon the provisions of sub-sections (3), (4), (5) and (6) of Section 47 shall apply as they apply to an application made under sub-section (1) of that section."

The provisions of the section are clear and specific and it is for the Charity Commissioner to move the Court for the appointment of a new trustee thereunder. No application for appointment of a new trustee on the ground that the trustee has been convicted of an offence punishable under the Act would, therefore, be maintainable at the instance of a beneficiary. This provision has obviously been made with a definite object in mind, namely, that proceedings for removal of a trustee and appointment of a new trustee on the ground of conviction of the trustee for an offence punishable under the Act should be allowed to be initiated by the Charity Commissioner alone since the Act creates offences and prescribes penalties for many kinds of defaults on the parts of trustees all of which may not warrant their removal from the office of a trustee. The Charity Commissioner, who is the supervisor of all public charities, would be the best person to judge whether or not the removal of a trustee who has been convicted for an offence under the Act is warranted in the facts of a given case. It is, therefore, left to him to move the Court so that a trustee may not be unnecessarily dragged to a Court of law at the instance of any other person even if the conviction has been for a default which may not be serious. In my opinion, therefore, the learned Extra Assistant Judge was right in taking the view that an application for removal of the first opponent on the ground that he was convicted for an offence under the Act was not maintainable at the instance of the petitioners.

5. Mr. Sanjanwala, however, urged that even apart from Sec. 47-AA, an application for removal of the first opponent on the said ground was maintainable under Section 47 (1) (g) and that the learned Extra Assistant

Judge ought to have considered the matter from that aspect. Now, I do not think that the removal of a trustee on the ground that he has been convicted for an offence under the Act can be sought under Section 47 (1) (g) as contended on behalf of the petitioners. The relevant provision reads as under:—

“47 (1) Any person interested in a public trust or the Charity Commissioner may apply to the Court for the appointment of a new trustee, when a trustee of such trust—

- | | | |
|--------|----|----|
| (a) xx | xx | xx |
| (b) xx | xx | xx |
| (c) xx | xx | xx |
| (d) xx | xx | xx |
| (e) xx | xx | xx |
| (f) xx | xx | xx |

(g) becomes in the opinion of the court unfit or physically incapable to act in the trust or accepts a position which is inconsistent with the trust; or

xx xx xx”

The argument of Mr. Sanjanwala was that the word “unfit” is a word of wide import and it would include unfitness arising on account of conviction for an offence under the Act and that, therefore, it was competent to maintain an application for removal of the first opponent on that ground under the aforesaid provision. I am unable to agree. In the first place, as observed earlier, the legislative object appears to be clear to reserve the right to move the court for removal of a trustee on the ground of conviction under the Act to the Charity Commissioner alone. In the next place, the argument ignores Section 47-AA and in order to accede to this contention it would be necessary to ascribe to the legislature tautology or superfluity. It is well-known that the construction of a statute is best made *ex visceribus actus*, that is, by taking all parts of the statute together and not by looking at one part itself. Now, the opening part of Section 47 makes it clear that both the Charity Commissioner as well as the beneficiary are entitled to apply to the Court for the appointment of a new trustee. Therefore, on the ground of unfitness, both the Charity Commissioner as well as the beneficiary could move the Court under Section 47. If that be the true legal position and about that there is no doubt in my mind and if the word “unfit” embraced within its fold unfitness arising on account of conviction under the Act, the Charity Commissioner would have been entitled to approach the Court under Section 47 itself for the removal of a trustee who has been so convicted. We have, however, a separate Section which takes care of such a situation and that provision is S. 47-AA which has been reproduced

earlier. S. 47-AA was introduced by Bombay Act (Act VI of 1960) that is, it is a later addition to the Act. This gives a clear indication that it was not contemplated that the word “unfit” would include unfitness arising on account of conviction for an offence under the Act. That apart, in my opinion, to accede to the argument of the petitioners would, as stated earlier, amount to imputing to the legislature tautology or superfluity since it would mean that both Ss. 47 (1) (g) and 47AA operate on the same field and take care of the same situation. The Court would be loath to put such a construction, for, it would render S. 47-AA which was introduced by way of amendment, superfluous. If the Charity Commissioner already had the right to move the Court for appointment of a new trustee on the ground that the present trustee has been convicted for an offence under the Act, there was no need to enact section 47AA and confer such right separately upon him under a special provision. In my opinion, therefore, the contention urged on behalf of the petitioners based upon the word “unfit” occurring in Sec. 47 (1) (g) is unsound and it must be rejected.

6. No other ground was urged and since otherwise there is no merit in this petition, it is rejected. Rule discharged with costs. The costs of the Charity Commissioner to be paid by the petitioners.

Rule discharged.

AIR 1976 GUJARAT 134

A. D. DESAI AND T. U. MEHTA, JJ.

Manilal Bhanabhai Patel, Petitioner v. Kaul and others, Respondents.

Special Civil Appln. No. 166 of 1970, D/- 3-9-1974.

(A) Customs Act (1962), Sections 124 (a), 122 — Show cause notice — Who can issue — Authority issuing show cause notice and authority conducting adjudication proceedings need not be the same.

The scheme of the Act as revealed from Secs. 110, 124 and 122 does not show that the issuance of a show cause notice is part and parcel of adjudication proceedings held under Section 122. (Para 13)

Different ranks of officers authorised to act under Section 122 may or may not be having first hand knowledge about the circumstances under which goods are seized under Section 110. They can therefore supply the grounds for confiscation in a show cause notice only after studying materials placed before them. It would therefore be a mistake to hold

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that they are the only authorities who can issue show cause notices under Section 124 (a). (Para 14)

Under these circumstances, it is not necessary that the authority giving show cause notice under Section 124 (a) should be the same which can undertake adjudication proceedings under Section 122. (Para 17)

If this view is taken, it cannot be said that the officer conducting the adjudication proceedings would be bound by the grounds given by the officer who may be subordinate to him. Section 124 does not restrict the power to issue a show cause notice to only a particular officer. Therefore, the officer conducting the adjudication proceedings is not prohibited from supplying fresh grounds to the person proceeded against. (Para 15)

I. M. Nanavati, for Petitioner; G. N. Desai, Govt. Pleader, for Respondent No. 1.

MEHTA, J.:— The simple question which is involved in this petition is whether the authority issuing show cause notice contemplated by Section 124 of the Customs Act, 1962 (which is hereinafter referred to as "the Act") should be the same which can conduct adjudication proceedings contemplated by Section 122 of the said Act. Such a show cause notice under Section 124 of the Act has been issued in this case by Assistant Collector of Customs, Central Excise, Surat on 31st January, 1969 requiring the petitioner and others to show cause why the silver weighing 2770 Kgs. valued at Rs. 16,07,127.00 seized on 27-8-1968 from the premises of one Shri Manilal Jaganji Desai of village Tukwada, should not be confiscated under Section 113 (c) of the Act and why penalty should not be imposed under Section 114 of the Act. The petitioner has approached this court by this petition making a grievance against this show cause notice principally on the ground that looking to the value of the silver which is seized it is only the Collector of Customs or a Deputy Collector of Customs who is authorised under Section 122 (a) of the Act to conduct the proceedings regarding confiscation and penalty and, therefore, the show cause notice, which is contemplated by Section 124 of the Act, ought to have been issued only by the Collector of Customs or the Deputy Collector of Customs authorised to hold the adjudication proceedings, and not by the Assistant Collector of Customs. The petitioner in his petition has raised various other points but none of these points are pressed for the purpose of this petition with the result that the only point which is indicated above remains to be considered in this petition.

2-3. Short facts leading to this petition are that the petitioner is an agriculturist

but claims to be dealing in silver. He is a resident of village Dabhel and claims to have entered into partnership with one Kadirbhai Ismailbhai of village Chikhali for carrying on the business of silver and silver bullion. According to him, document of partnership between the two was executed on 7-6-68 and it was decided to carry on the business of silver bullion, silver ornaments and silver articles in the name of M/s. Manibhai Kadirbhai and Co. at village Vapi. The petitioner further claims that this partnership was registered with Registrar of firms on 28th July, 1968. He has further averred that this firm is now dissolved and the assets and the liabilities thereof have been taken over by him.

4. It is further contended by the petitioner that usually silver bullion is purchased in big lumps and thereafter cut into small pieces at refineries situated at Navsari. According to the petitioner he had made some arrangements with one Gulabbhai Dajibhai Patel of Navsari to act as his commission agent for selling the silver after getting it cut into small pieces at the refineries at Navsari.

5. The petitioner further claims that on 26th August, 1968 he purchased the silver, which is seized by the customs department, from Bombay, and as he was transporting that silver from Bombay to Navsari, for the purpose of getting it cut into different small pieces, the truck in which the said silver was loaded failed near village Tukwada. According to the petitioner he was travelling along with this silver bullion by the same truck. Village Tukwada where the truck is said to have failed is situated at a distance of about 3 miles north of Vapi. He, therefore, sought the aid of one Bhagwanji Gulabbhai, who was his friend. It is contended by the petitioner that since it was now possible to get the truck repaired immediately, through the help of his friend Bhagwanji Gulabbhai, he unloaded the silver from the said truck into the house of one Manilal Jaganji Desai situated at a distance of one or two furlongs from the highway. The case of the petitioner is that he intended to take this silver to Navsari on the next day. However, during the night intervening between 27th and 28th August, 1968, officers of the customs department at Vapi raided the house of Manilal Jaganji Desai at Tukwada, where the silver bullion, was stored for the night. As a result of this raid the whole quantity of silver was seized under Section 110 of the Act under a panchnama which is dated 27th August, 1968.

6. The record of the case reveals that this silver was seized as it was liable to be confiscated under Clause (c) of Section 113 of the Act, which says that any dutiable or

prohibited goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land-customs station or a customs port appointed for the loading of such goods, shall be liable to confiscation. It is not in dispute that the silver which is seized was, at the relevant time, a prohibited goods which could not be exported.

7. After the above referred silver was seized on 27th August, 1968, the Assistant Collector of Customs at Surat, issued the above referred show cause notice on 31st January, 1969 under Section 124 of the Act. In response to this show cause notice the petitioner claimed that the seized articles belonged to him and that they were not liable to confiscation. Before the adjudication proceedings contemplated by Section 122 of the Act could be undertaken, the petitioner has approached this court and has challenged the adjudication proceedings on the ground that show cause notice under Section 124 of the Act has not been issued to him by the proper authority.

8. As against this, the respondents do not admit that the petitioner is a bona fide merchant dealing in silver or silver bullion. Briefly stated, the case of the respondents is that the customs department received reliable information that good deal of quantity of silver which was meant for illegal export, was secreted at the house of Manilal Jaganji Desai at Tukwada and on that information, the house of said Manilal Jaganji Desai was raided under a search warrant issued by the Superintendent of Customs, Vapi. On search, the seized quantity of silver was found from that house. During the course of the inquiry which was made at that time, Manilal Jaganbhai Desai, from whose house this silver was seized, was not found in possession of any documents such as purchase bill or any other papers explaining his possession of the seized silver. It is contended by the respondents that at the time of the seizure and even subsequent to that, the petitioner was not found present. According to the respondents, the silver was liable to be confiscated under Section 113 (c) of the Act, because, it was meant for illegal export through the tidal river Kolak which is about two furlongs from the place of detection. On further search it is said to have been revealed that one Sukkar Naran of Daman had engaged some labourers with instructions that their services would be required to lift the seized silver during the night between 27th and 28th August, 1968. It is said that it was on these facts that the silver was seized under a reasonable belief that it was liable to be confiscated.

9. As already noted above, the only question of law which arises to be determined

in this petition is whether the show cause notice contemplated by Section 124 of the Act could be issued by an authority which is not entitled to conduct the adjudication proceedings contemplated by Section 122 of the Act for the purpose of confiscation and penalties. In order to understand this contention of the petitioner, it would be necessary to make a reference to sections 122 and 124 of the Act. Both these sections are placed in Chapter XIV of the Act which deals with confiscation of goods and conveyances and imposition of penalties. Section 111 which is the first section of this Chapter speaks about the confiscation of improperly imported goods. We are not concerned in this case with this section because here the proposed confiscation is under Clause (c) of Section 113 which contemplates confiscation of the goods meant for export. We have already made a reference to the provisions of Clause (c) of Section 113. The next relevant section of this Chapter is Section 122 which is in the following terms:

"122. In every case under this Chapter in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged:

(a) without limit, by a Collector of Customs or a Deputy Collector of Customs;

(b) where the value of the goods liable to confiscation does not exceed ten thousand rupees and where the penalty proposed to be imposed does not exceed two thousand rupees, by an Assistant Collector of Customs;

(c) where the value of the goods liable to confiscation does not exceed one thousand rupees and where the penalty proposed to be imposed does not exceed two hundred rupees, by a gazetted officer of customs lower in rank than an Assistant Collector of Customs."

It is evident from a bare perusal of the provisions contained in this section that adjudication proceedings for confiscation and imposition of penalty can be undertaken only by the officers specified in cls. (a), (b) and (c) of the section and that too if the value of the goods which are liable to confiscation and the proposed amount of penalty do not exceed the limits specified in these clauses. The point to be noted is that Assistant Collector of Customs can hold adjudication proceedings only if the value of the goods liable to confiscation does not exceed Rs. 1,000/-. It is an admitted position in this case that the value of the goods proposed to be confiscated, does exceed Rs. 1,000/- and, therefore the adjudication proceedings which are proposed to be conducted in this case, would fall under cl. (a) and would be required to be conducted only by the Collector or the Deputy Collector of Customs

whose pecuniary jurisdiction to conduct such proceedings is without any limit.

10. Section 123 which follows Section 122 provides for a rule of evidence inasmuch as it casts the burden of proving that the seized goods are not smuggled goods on the person from whose possession the goods are seized. For the purpose of this petition, we are not concerned with this section. Then follows Section 124 which is in the following terms:

"124. No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person—

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter;

Provided that the notice referred to in cl. (a) and the representation referred to in cl. (b) may, at the request of the person concerned, be oral."

Reference to this section shows that it incorporates therein the rules of natural justice inasmuch as it provides not only for a show cause notice but also for an opportunity of making a representation as well as of being heard in the matter. It should be noticed at this stage that this S. 124 does not specifically provide as to which authority should issue a show cause notice contemplated by it.

11. Now the contention of Shri Nanavati, who appeared on behalf of the petitioner was that show cause notice which is contemplated by Section 124 (a) refers to a proposal to confiscate the goods as well as to impose a penalty and since the adjudication as regards the said confiscation and imposition of penalty can be made only by the specified authority as mentioned in Section 122 of the Act, issuance of show cause notice is an integral part of the adjudication proceedings contemplated by S. 122, and therefore, the authority which issues show cause notice under Section 124 cannot be different from the authority which can undertake the proceedings for adjudication under Section 122. According to Shri Nanavati therefore, though Section 124 does not specifically state which authority should issue the show cause notice contemplated by it, it necessarily follows by reference to the provisions contained in Section 122 that show cause notice can be issued by the same authority

which can undertake the proceedings of adjudication under Section 122. Elaborating this argument Shri Nanavati pointed out that since Clause (a) of Section 122 refers to a "proposal" to confiscate the goods as well as the proposal to impose a particular penalty, such a proposal necessarily involves a judicial determination of that authority which can undertake adjudication proceedings contemplated by Section 122. According to him, therefore, if it is found that the adjudication proceedings in this case could be conducted only by a Collector of Customs or a Deputy Collector of Customs, an officer subordinate to these two officers is not competent to issue any show cause notice under Section 124. In this connection he also drew our attention to Chapter II of the Act which speaks about the officers of the Customs. This Chapter consists of Sections 3 to 6. Section 3 classifies the customs officers into different classifications. Section 4 speaks about the appointment of the officers of customs, Section 5 speaks about the powers of these officers of customs while Section 6 speaks about the entrustment of the functions of the board and customs officers on certain other officers. He pointed out that all these sections go to show that the duties of different classes of customs officers have been specified in the Act and, therefore, an officer of a lower grade cannot perform the duty which is expected to be performed by the officers of higher grade. He therefore urged this court to hold that if adjudication proceedings under Section 122 could be conducted by Collector of customs or Deputy Collector of customs, the issuance of show cause notice under Section 124 cannot be made by any officer subordinate either to the Collector or to the Deputy Collector of customs.

12. On perusal of the scheme as regards seizure and adjudication when read together with the provisions contained in Section 124 of the Act, we do not find any substance in any of the arguments advanced by Shri Nanavati on behalf of the petitioner. As already noted by us above, the goods in question have been seized on the night of 27th August, 1968 under Section 110 of the Act, which speaks about the seizure of goods, documents and things. So far as the facts of this case are concerned, sub-sections (1) and (2) of Section 110 are relevant. They are in the following terms:

"(1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods;

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or other-

wise deal with the goods except with the previous permission of such officer.

(2) Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months."

This section speaks of "proper officer" which term is defined in Clause (34) of Section 2 of the Act as under:

"'Proper officer' in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Collector of Customs."

In this case it is not in dispute that the seizure of the disputed quantity of silver is made by a "proper officer". Now if we make a reference to the above quoted provisions of Section 110, it becomes evident that seizure under this section can be made by a "proper officer" only if he has a reason to believe that the goods are "liable to confiscation" under the Act. In other words, before proceeding to seize a particular article, the officer concerned must entertain a belief that the said article was liable to confiscation. The belief as regards the liability to confiscation should, therefore, precede the act of seizure. It follows, therefore that the officer who seizes an article under Section 110 of the Act is the first officer who can know and disclose the grounds on which the said article has become liable to confiscation. It need not be said that the officer acting under Section 110 may not be the same officer who is authorised to hold adjudication proceedings under Section 122 and when this is so, it is the seizing officer and not the adjudicating officer who possesses the first hand knowledge regarding the circumstances under which he believed that the seized article was liable to be confiscated. It should further be noted that the show cause notice contemplated by Section 124 follows the act of seizure under Section 110. This is evident from sub-section (2) of Section 110 which provides that if within 6 months of the seizure of the goods no show cause notice contemplated by clause (a) of Section 124 is given, the seized goods should be returned to the person from whose possession they were seized. Thus, it is apparent that Section 124 has direct relation with Section 110. This aspect of the matter provides a complete answer to Shri Nanavati's contention that it is only the officer competent to hold inquiry under Section 122 who can

know the grounds on which confiscation should be made. Fact of the matter is that in cases where seizure under Section 110 is made, the intimate knowledge about the grounds of confiscation would be more with the seizing officer rather than with the officer empowered to adjudicate under Section 122, for the simple reason that the seizing officer could have seized only after entertaining a belief that the article concerned was "liable to be confiscated".

13. Shri Nanavati's contention that the requirement of issuing a show cause notice contemplated by Section 124 of the Act is a part and parcel of the proceedings of adjudication contemplated by Section 122, is also not acceptable. The provision as regards show cause notice which is incorporated in Section 124 (a) is, as already stated above, in compliance with the rules of natural justice. These rules of natural justice require that the person against whom the proceedings of confiscation and imposition of penalty are proposed to be undertaken should know the exact grounds on which these proceedings are contemplated to be undertaken. These grounds would be best known to the officer who conducts the proceedings of seizure under Sec. 110 as it is that officer who proposes to confiscate the goods and who, therefore, ultimately seizes the goods under Section 110. Therefore, that officer would be in a better position to know the grounds on which the goods are seized on the footing that they are liable to confiscation. Under the circumstances, it would not be correct to state that proposal to confiscate the goods and to impose penalty should come only from an officer who is authorised to conduct the adjudication proceedings under Section 122 of the Act. Issuance of a show cause notice is a distinct step which is preliminary to the adjudication proceedings which are to follow. The adjudication proceedings are dependant upon the grounds mentioned in the show cause notice, but not vice versa. It is therefore not correct to say that the proceedings for a show cause notice form part and parcel of adjudication proceedings. The scheme of the Act as revealed from Secs. 110, 124 and 122 is that after a "proper officer" forms a reasonable belief that certain goods are liable to be confiscated, he would seize these goods under Section 110. within six months from this seizure a notice contemplated by Section 124 (a) should be given to the person from whose possession these goods are seized, calling upon him to show cause why the goods should not be confiscated. Such a notice under Section 124 (a) can be given by any officer who is competent to act. Ordinarily, the officer who has seized the goods after forming a belief that

they are liable to be confiscated would be best fitted to issue the required show cause notice and to give information as regards the grounds on which the confiscation is proposed to be made, but there is nothing in Section 124 to prevent any other competent officer from issuing such a notice after studying the facts of the case. It is significant to note that the legislature has advisedly refrained from providing in Section 124 as to who is competent to issue show cause notices under clause (a). The purpose of not making any specific provision on this point is that the issuance of a show cause notice being a formality which is quite distinct and separate from the actual adjudication proceedings under Section 122, such a formality can be undertaken by any officer who is conversant with the facts of the case, and also has authority to take steps under the provisions of the Act. Thus the show cause notice stating grounds of confiscation amounts practically to a charge-sheet submitted by the police relating to an accused who is sought to be tried before a Court of law. Adjudication proceedings which follow pursuant to the show cause notice under Section 124 (a) furnish the last step which may result in actual confiscation and penalty. From this analysis of the scheme there emerges nothing to show that the issuance of a show cause notice under Sec. 124 (a) is part and parcel of adjudication proceedings held under Section 122.

14. What Section 122 of the Act does is merely to make a suitable distribution of pecuniary jurisdiction to adjudicate as amongst different ranks of custom officers. Different officers authorised to act under this section may or may not be having first hand knowledge about the circumstances under which goods are seized under S. 110. They can therefore supply the grounds for confiscation in a show cause notice under S. 124 (a) only after studying materials placed before them. It would therefore be a mistake to hold that they are the only authorities who can issue show cause notices under Sec. 124 (a).

15. Shri Nanavati contended that if this view is taken then much confusion would follow because if the officer who is entitled to hold the adjudication proceedings under Section 122 of the Act is of the opinion that the goods in question should be confiscated on some other grounds, he would be bound by the grounds given by the officer who may be subordinate to him. We are not impressed, in the least by this contention of Shri Nanavati because though it is only the grounds which are conveyed to the person proceeded against, there is nothing in the Act to prohibit the officer conducting the adjudication proceedings to

supply fresh grounds to the person proceeded against and to give him an opportunity to show cause against those grounds. As already noted above, Section 124 does not restrict the power to issue a show cause notice to only a particular officer.

16. Before parting with this point it is necessary to note that clauses (b) and (c) of Section 124 contain other facets of the rules of natural justice. Clause (b) contemplates an opportunity of making a representation against the grounds of confiscation and Clause (c) contemplates a reasonable opportunity of being heard. Obviously, both these opportunities are expected to be availed of from the authority which is competent to hold adjudication proceedings under Section 122. It, therefore, follows that if a show cause notice under Clause (a) of Section 124 is issued by an officer who is not authorised to hold the adjudication proceedings, under Section 122, the said show cause notice should indicate before which authority the representation against the grounds of confiscation should be filed and the opportunity of being heard should be availed of. If such an indication is not available from the notice issued by an authority not competent to adjudicate under Section 122, the notice would be defective. But so far as the impugned notice in this case is concerned, it does not suffer from any such defect as it clearly directs the petitioner to appear before the Collector.

17. Under these circumstances, we are of the opinion that it is not necessary under Section 124 of the Act that the authority giving show cause notice under Cl. (a) of this Section should be the same which can undertake adjudication proceedings under Section 122. The function of issuing a show cause notice and the function of conducting adjudication proceedings under Section 122, are quite different and if Section 124 is intimately connected with any other section of the Act, it is Section 110 under which the goods are seized.

18. Since this is the only point which is pressed and argued in this petition and since rest of the points are not pressed at this stage, we are of the opinion that this petition should fail. The same is dismissed and rule is discharged with costs.

Petition dismissed.

AIR 1976 GUJARAT 140°

S. H. SHETH, J.

Chudasma Jasubha Manubha and another, Appellants v. Chudasma Raisinh Bapubha and others, Respondents.

Second Appeal No. 452 of 1972, D/-4-12-1975°°.

(A) Civil P. C. (1908), Order 41 Rule 27, Section 100 — Reception of additional evidence in second appeal — Permissibility — AIR 1956 Andhra 250 and (1974) 76 Bom LR 83 Dissented from.

The considerations which prevail in regard to the reception of additional evidence in a First Appeal are different from those which prevail in regard to its reception in a second appeal. In a Second Appeal, the court is required to examine whether the impugned decree is in conformity with law. The findings of fact recorded by the lower appellate court are final and binding on the Court. Additional evidence subsequently discovered by a party cannot be admitted in a Second Appeal. The expression "substantial cause" under Order 41, Rule 27 does not mean that a further opportunity should be given to the plaintiff to fill in the lacuna caused by their indifference and negligence. AIR 1956 Andhra 250 and (1974) 76 Bom LR 83 Dissented from; AIR 1954 Mad 1074 and AIR 1967 Guj 87; AIR 1972 Guj 70 and S. A. No. 756 of 1960, D/- 24-2-1965 (Guj). Followed. Case law discussed. (Para 11)

Cases	Referred:	Chronological	Paras
(1974) 76 Bom LR 83	= ILR (1975) Bom	9	11
AIR 1972 Guj 70	= ILR (1971) Guj	1165	11
AIR 1967 Guj 87	= 8 Guj LR 386		11
AIR 1965 SC 1008	= (1965) 1 SCR 542		11
(1965) Second Appeal No. 756 of 1960, D/- 24-2-1965 (Guj)			11
AIR 1963 SC 1526	= (1964) 2 SCR 35		11
AIR 1956 Andhra 250	= 1956 Andh WR	824	11
AIR 1954 Mad 1074	= 1954 Mad WN	677	11
AIR 1951 SC 193	= 1951 SCR 258		11
AIR 1923 PC 128	= 25 Bom LR 1259		11
(1907) 34 Ind App 115	= ILR 31 Bom 381	(PC)	11
(1904) ILR 28 Bom 4	= 5 Bom LR 615		11
(1872) 9 Bom HCR 89			11

°(Only portions approved for reporting by the High Court are reported here).

°°(Against order of J. C. Desai, Asst. J., Ahmedabad (Rural) at Narol in Civil Appeal No. 53 of 1971).

M. H. Chhatrapati, for Appellants; Mrs. Ketty A. Mehta, (for Nos. 1 to 4) and V. M. Solanki, (For No. 5), for Respondents.

JUDGMENT:— 1-10 x x x x x x x

11. Mr. Chhatrapati has filed on behalf of the plaintiffs an affidavit to which are annexed copies of certain documents. He prays for taking additional evidence on record. According to him that evidence which shows that what the defendants have stated in their evidence, is false. The question which has arisen is whether it is open to this Court in a Second Appeal to take additional evidence. On the question whether additional evidence can be taken or not in a Second Appeal there are two schools of thought. In P. V. Subba Raja v. S. S. Narayana Raja AIR 1954 Mad 1074 Mr. Justice Krishnaswami Nayudu after having reviewed a number of decisions has held that the circumstances under which a second appellate Court may determine an issue of fact are limited to the conditions arising under Section 103 which makes the position clear that so far as evidence is concerned, on which an issue of fact may be determined, the evidence on record must be sufficient to enable the High Court to decide the question of fact. According to him it necessarily implies that it is ordinarily not competent to the High Court in a Second Appeal to consider any other evidence excepting the evidence on record. Therefore, the second appellate Court cannot admit evidence and give its own decision on a question of fact. The provisions of Section 103 are sufficiently clear to exclude the operation of Order 41, Rule 27 and their applicability to appeals filed under Order 42, Civil Procedure Code. Every provision in Order 41 does not automatically apply to a proceeding in second appeal by virtue of Order 42, Rule 1 but only such provisions as may reasonably be applied having in view the provisions of Sections 100 and 103 and the limited scope of the jurisdiction of the second appellate Court in matters affecting questions of fact. According to him, therefore, the proper view to be taken is that it is not competent to admit additional evidence in a second appeal. The second school of thought is represented by the decision of Andhra Pradesh High Court in Venku Reddi v. Pichi Reddi, AIR 1956 Andhra 250. Mr. Justice Chandra Reddy has taken the view therein that there is nothing either in Section 103 or in Order 41, Rule 27, Civil Procedure Code, which excludes the applicability of the latter provision to second appeals. The terms of Rule 27 are general in application and in an appropriate case it is open to the

High Court in a second appeal to admit additional evidence. In *Ramchandra Pandurang Sathe v. Krishnaji Vithal Joshi*, (1904) ILR 28 Bom 4 it has been held by a Division Bench of the High Court of Bombay that if on coming to the High Court under second appeal it is discovered that there is evidence which ought to have been placed before the lower Courts, the proper practice to pursue is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower Appellate Court. This decision refers with approval to the earlier decision of the High Court of Bombay in *Nanabhai Vallabhdas v. Nathabhai Haribhai* (1872) 9 Bom HCR 89. In *Sumanlal Bhagwandas Kapadia v. Naginlal Bhagwandas Kapadia*, 8 Guj LR 386 = (AIR 1967 Guj 87) it has been held by this Court that there is no justification for the High Court to allow additional evidence in a second appeal for the purpose of filling in the lacuna in the evidence since the High Court in a Second Appeal is required only to examine, whether the impugned decree is in accordance with law or not. No additional evidence can be taken which would involve re-trial and reappraisal of evidence. If the case falls under Order 41, Rule 27 of the Civil Procedure Code then different considerations may arise. In *Ambabai Wd/o, Anandji Parashottamdas Ganatra v. Thakkar Gordhandas Dharamshi*, ILR (1971) 12 Guj 1165 = (AIR 1972 Guj 70) it has been held by this Court that it is not open to the High Court in a Second Appeal to consider the subsequent events and to allow additional evidence. It has been further held that since there is a specific provision made by the legislature in that behalf the provisions of Section 151 of the Code of Civil Procedure cannot be invoked. A similar question arose before Divan, J. (as he then was) in Second Appeal No. 756 of 1960 decided by him on 17th, 23rd and 24th February, 1965 (Guj). After having reviewed a number of decisions on the question, he has taken the view that additional evidence cannot be taken in a Second Appeal and that the decree of the lower appellate court can be attacked in a Second Appeal only on any of the grounds set out in section 100 of the Civil Procedure Code. Mr. Chhatrapati has invited my attention to certain other decisions also. In *Laxminarayan Deepchand Maheshwari v. Bhiku Punjabi Lewa* (1974) 76 Bom LR 83 the High Court at Bombay has taken the view that it is open to the High Court in a second appeal to admit additional evidence under Order 41, Rule 27 of the Civil Procedure Code, 1908 if the conditions laid down in that rule are satisfied. He has invited my

attention to the decision of Privy Council in *Indrajit v. Amar Singh* 25 Bom LR 1259 = (AIR 1923 PC 128). It has been held in that case that under Order 41, Rule 27 of the Civil Procedure Code, the jurisdiction of an appellate Court to admit additional evidence is not limited to cases where the Court itself discovers some lacuna or defect and requires evidence to enable it to pronounce its judgment. A suitor is entitled, for any substantial cause, to apply to the Court for the admission of further evidence and the Court has a discretion in the matter. The principle laid down by Privy Council in that decision is not applicable to Second Appeals because the facts of the case clearly show that the High Court at Bombay had refused to take additional evidence in a First Appeal. In a First Appeal the High Court decides on facts and is, therefore, entitled to review the evidence and to record its conclusion whether the finding recorded by the trial court is a finding which can be supported on evidence. Therefore, the question whether additional evidence can be admitted in a second appeal or not does not stand on par with the question whether additional evidence can be admitted in a First Appeal. In both cases different considerations prevail. The next decision to which my attention has been invited is in *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193. In that decision it has been held that a finding of fact, however erroneous, cannot be challenged in a second appeal. The principle laid down in that decision has no application to the facts of the case because the Supreme Court has observed that where the first appellate court admits additional evidence before examination of the evidence on record and consequently before reaching a decision that the evidence as it stands discloses a lacuna which the court requires to be filled in for pronouncing its judgment, the appellate court is not justified in admitting the additional evidence. That is not the case here. It has also been observed that if there is any lacuna or defect which becomes apparent to the Court of appeal then whether the additional evidence should be admitted or not is to be decided in the light of the fact whether the appellate court is able to pronounce the judgment on the materials before it without taking into consideration the additional evidence sought to be produced. That was also the case where additional evidence was sought to be produced in a First Appeal which is to be decided not only on law but on facts also. In *K. Venkatarajah v. A. Seetharama Reddy*, AIR 1963 SC 1526 the Supreme Court has observed that under Order 41 Rule 27 the appellate Court has power to allow additional evidence

not only if it requires such evidence to enable it to pronounce its judgment but also for any other substantial cause. The Supreme Court has further observed that the requirement by the Court of additional evidence means that it requires additional evidence to pronounce its judgment in the interests of justice in order that nothing may remain obscure and that it may pronounce its judgment in a more satisfactory manner. That was also a case where an attempt was made to produce additional evidence in a First Appeal before the High Court. It cannot govern the case where additional evidence is sought to be produced in a second appeal. The last decision to which Mr. Chhatrapati has invited my attention is in *Municipal Corporation of Greater Bombay v. Lala Pancham* AIR 1965 SC 1008. It has been held in that decision that under Order 41, Rule 27 the appellate Court has power to allow a document to be produced and a witness to be examined. However, it has been further observed that the requirement of the appellate Court must be limited to those cases where it finds it necessary to obtain such evidence for enabling it to pronounce its judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce its judgment. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing its judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. In that case the plaintiffs had instituted a suit in the City Civil Court at Bombay and First Appeal from the decision of that Court was taken to the High Court of Bombay. The question whether additional evidence should be allowed to be produced in a First appeal is different from the question whether it should be allowed to be produced in a second appeal. In *Kessowji Issur v. Great Indian Peninsula Railway Company* (1907) 34 Ind App 115, the Privy Council has laid down that the High Court had no jurisdiction under Section 568 to admit fresh evidence. Its power thereunder is limited to supplying any inherent lacuna or defect which appears on examining the evidence as it stands and does not relate to the discovery of new matter outside the Court. That decision is based upon section 568 of the earlier Civil Procedure Code. However, it is necessary to note that the question of admitting fresh evidence arose in that case before the High Court of Bombay in an appeal from a original decree passed by the learned Single Judge of that court. A review of several decisions to which Mr. Chhatra-

pati has invited my attention makes two propositions very clear. The first proposition is that the considerations which prevail in regard to the reception of additional evidence in a First Appeal are different from those which prevail in regard to its reception in a second appeal. In a Second Appeal, the Court is required to examine whether the impugned decree is in conformity with law. The findings of fact recorded by the lower appellate court are final and binding on the Court. The second proposition which emerges from the aforesaid decision is that additional evidence subsequently discovered by a party cannot be admitted in a Second Appeal. That is the view which this Court has taken in three decisions to which I have referred. That is the view which was taken by the High Court of Bombay in *Ramchandra Pandurang Sathe v. Krishnaji Vithal Joshi* (1904) ILR 28 Bom 4 (Supra). In light of this settled view on the question it is clear that the additional evidence which Mr. Chhatrapati seeks to produce in this second appeal cannot be taken. x x x The expression "substantial cause" under Order 41 Rule 27 does not in my opinion mean that a further opportunity should be given to the plaintiffs to fill in the lacuna caused by their indifference and negligence. The first contention which Mr. Chhatrapati has raised is, therefore, without any substance and is rejected.

12-13. x x x x x.

Appeal dismissed.

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B. J. DIVAN, C. J. AND T. U. MEHTA, J.
Narandas Bapalal Dandwala Appellant v.
The Land Acquisition Officer Respondent.
Letters Patent Appeal No. 212 of 1972,
D/- 20-12-1974*.

(A) Land Acquisition Act (1894), Section 23 — Compensation — Provision in lease deed for apportionment of compensation between lessor and lessee — Determination of amount payable to lessee F. A. No. 203 of 1965, D/- 30-11-1971 (Guj) Reversed.

The lease deed provided that if the land was acquired, out of the amount of compensation that may be payable, the lessor was to get the amount at the rate of Rs. 5/- per square yard and the balance of the compensation amount was to be paid to the lessee. The land, which admeasured

*(Against Judgment of A. A. Dave J. in F. A. No. 203 of 1965 D/- 30-11-1971 (Guj).)

AT/BT/A267/76/JHS

5717.25 sq. yards, was acquired. The Land Acquisition Officer did not grant any solatium and the total amount of compensation payable in respect of the land was Rupees 30,015.06 ps. No solatium having been allowed and the value of the land for the purpose of award having been fixed at Rs. 5.25 per square yard, the claimant lessee applied for a reference under Section 18 claiming the amount of the surplus from the total compensation amount that might be left after the lessor was paid at the rate of Rs. 5/- per square yard. The Court hearing the reference came to the conclusion that the claimant was entitled only to 15 per cent solatium on the total value of the land calculated at 25 ps. per square yard for the total area of the land. He directed that the claimant should be paid Rs. 274.40 ps. The claimant's appeal against this judgment and order was dismissed by the single Judge. In a Letters Patent appeal filed by the claimant, held, that the total amount of compensation payable consists of two constituents: (1) the market value of the land; and (2) 15 per cent solatium on the market value of the land. It is the aggregate of these two constituents which is paid in every case as compensation amount to the owner of land. It was therefore, clear that if 15 per cent solatium is to be included in the total amount of compensation, the total amount of compensation would come to Rs. 34,517.31 ps. Out of this amount, under the terms of the lease deed, the lessor would be entitled to get Rs. 28,586.25 ps. only, that being the amount arrived at by multiplying the total area measured in square yards by Rs. 5 per square Yard and the claimant would be entitled to the balance viz. Rupees 5921.06 ps. It was not correct to hold that the interest of the claimant in the compensation amount was restricted only to 25 ps. per sq. yard. F.A.No. 203 of 1965 D/- 30-11-1971 (Guj) Reversed. (Para 3)

J. C. Sheth, for Appellant; G. M. Vidyarthi, Asstt. Govt. Pleader, for Respondent No. 1.

B. J. DIVAN, C. J.:— The appellant in this appeal is the original claimant and the respondent is the Land Acquisition Officer, Ahmedabad. Along with other lands, land of Survey No. 116/3 admeasuring 1 Acre $7\frac{1}{4}$ Gunthas was acquired for certain public purposes. The claimant who is the appellant before us was the assignee of the lessee's interest in the land and the lessor was the successor-in-interest of one Shri Shivrajgiriji. The lease was granted for a period of 999 years. Under the terms of the lease, and

particularly by paragraph 8 it was agreed between the parties that if the land was acquired, out of the amount of compensation that may be payable, the lessor was to get the amount at the rate of Rs. 5/- per square yard and the balance of the compensation amount was to be paid to the lessee. It is not in dispute that the claimant, the appellant before us, as the assignee of the original lessee would be entitled to receive whatever compensation amount comes to his share in view of the terms of the lease deed. The Land Acquisition Officer did not grant any solatium and the total amount of compensation payable in respect of S. No. 116/3 was Rupees 30,015.06 ps. No solatium having been allowed and the value of the land for the purpose of award having been fixed at Rs. 5.25 per square yard, the claimant applied for a reference under Section 18 of the Land Acquisition Act claiming the amount of the surplus from the total compensation amount that might be left after the lessor was paid at the rate of Rs. 5/- per square yard for this land of S. No. 116/3. The Reference was heard by the learned Judge in the City Civil Court and he came to the conclusion that the claimant was entitled only to 15 per cent solatium on the total value of the land calculated at 25 ps. per square yard for the total area of the land. He directed that the claimant should be paid Rs. 274.40 ps. with 4 per cent interest from 18th December 1953 till realisation and proportionate costs. Against this judgment and order of the learned Judge in the City Civil Court, the claimant filed an appeal to this Court, being First Appeal No. 203 of 1965. Our learned brother A. A. Dave, J., sitting singly disposed of the First appeal on November 30, 1971. He agreed with the conclusion reached by the learned Judge in the City Civil Court and dismissed the appeal. The present Letters Patent Appeal has been filed against this decision of the learned Single Judge.

2. It was urged by the learned Assistant Government Pleader that the claimant was not proved to be the assignee of the lessee as the deed of assignment in favour of the claimant was not on the record. However, it is not open to us at this stage to go into this aspect of the question because, both the learned Judge in the City Civil Court and A. A. Dave J., sitting singly have proceeded on the footing that the claimant was entitled to receive whatever was payable to the lessee in his capacity as the assignee of the lessee. We have declined to go into this question about the title of the claimant who claims to be the assignee of the lessee.

3. As regards the main question of apportionment of the total amount of compensation, everything turns upon the wording of the lease deed in paragraph 8. Exhibit 10/1 is the lease deed for 999 years and under paragraph 8 of that lease deed it is mentioned that out of the compensation amount that may be received in respect of the lands, the lessor would be entitled to get amount at the rate of Rs. 5 per square yard and if there is any surplus of compensation amount after the lessor is paid at the rate of Rs. 5/-, the surplus is to be paid to the lessee. It may be pointed out that before the learned Judge in the City Civil Court, there was no challenge on behalf of the claimant to the award of the Land Acquisition Officer to the effect that the value of the land was Rs. 5.25 ps. per square yard. We will proceed on that footing. It is clear that the total area of 1 Acre $7\frac{1}{4}$ Gunthas comes to 5717.25 square yards. It is equally clear that the total value of land, admeasuring 1 Acre $7\frac{1}{4}$ Gunthas at the rate of Rs. 5.25 per square yard is Rs. 30,015-06, ps. Under Section 23 of the Land Acquisition Act, 1894, matters to be considered in determining compensation are set out. Under Sub-section (1) of Section 23, in determining the amount of compensation to be awarded for land acquired under the Act, the Court has to take into consideration the various factors mentioned in clauses (1) to (7) of Section 23 (1). Under sub-section (2), in addition to the market value of the land as provided in sub-section (1), the Court has to award in every case, a sum of 15 per cent of such market value in consideration of the compulsory nature of the acquisition. Looking to the scheme of Section 23, it is obvious that the total amount of compensation payable in land acquisition proceedings consists of two constituents: (1) the market value of the land; and (2) 15 per cent solatium; this solatium being 15 per cent of the market value of the land. It is the aggregate of these two constituents which is paid in every case as compensation amount to the owner or owners of land which is acquired under the provisions of the Land Acquisition Act. It is, therefore, clear that if 15 per cent solatium is to be included in the total amount of compensation, the total amount of compensation comes to Rupees 34,517-31 ps. Out of this amount of Rupees 34,000 and odd, which is the total compensation amount, under the terms of paragraph 8 of the lease deed, the lessor would be entitled to get Rs. 28,586-25 ps. only, that being the amount arrived at by multiplying the total area measured in square yards by Rs. 5 per square yard. It is clear on a perusal of the terms of the lease deed that the parties,

namely, the lessor and the lessee had arrived at an agreement inter se that in the event of the land under lease being acquired, the lessor was to be paid out of the compensation amount that might be paid at the rate of Rs. 5 per square yard and the balance of the compensation amount was to be paid to the lessee. It cannot be said that the interest of the lessee in the compensation amount was restricted in the light of the facts of this case only to 25 ps. per square yard. His interest extended to the total amount of compensation less the amount that may be arrived at by multiplying the total area admeasured in square yards by five. It is this balance to which the claimant was entitled and deducting the amount of Rs. 28,586-25 ps. from Rupees 34,517-31 ps. which is the total amount of solatium, the balance comes to Rs. 5,931-06 ps. It is this amount to which the claimant is entitled and in view of the clear terms of the lease deed, this amount must be paid to him and nothing else or no lesser amount can ever be paid to him. So far as the facts of this case are concerned, both the learned Judge in the City Civil Court and A. A. Dave, J., have proceeded on the footing that the solatium at the rate of 15 per cent should be paid to the claimant after calculating the amount payable to him by arriving at a figure of the total area of square yards multiplied by Re. 0.25. That approach is clearly erroneous in view of the clear terms of the lease deed and what we have set out above is the only correct approach in the light of the terms of the lease deed.

4. Under these circumstances we allow this appeal and set aside the judgment and order of the learned Judge in the City Civil Court as well as the judgment and order of A. A. Dave, J. We direct that the claimant should be paid the amount of Rs. 5,931-06 less such amount as he has already received and he shall be paid interest at 4 per cent per annum from 18th December 1958 on the amount of Rs. 5,931-06 ps. and interest will be calculated on the lessor amount from the date that he was paid a part of the amount as compensation. The interest will run at $4\frac{1}{2}$ per cent per annum from 15th August 1965. The respondent will pay the proportionate costs of the claimant all throughout.

Appeal allowed.

affairs personally. Therefore, there does not appear to be any question of dominating her will, it is only the person with whom the contract is entered into who should be in a dominating position to influence the person with whom the bargain is struck. Therefore, the question of undue influence in the instant case has got no relevancy at all.

26. The further submission was that of misrepresentation, which is defined under Section 18 of the Contract Act as meaning a positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him; and/or causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement. There is no scintilla of evidence except the allegations made in the pleadings with regard to misrepresentation, etc. The registration deed was written, as evidenced by P. W. 3, at the house of Shri R. N. Malhotra Advocate in the presence of Kr. Jowala Singh. This document was signed by Smt. Madna Vati to whom it was read over and then she herself presented the same before the Registrar. She has admitted her signatures. Therefore, it was for her to have proved that it was obtained by misrepresentation. But, nothing has been elicited out in cross-examination from either P. W. 1 or P. W. 3 whereby it may be inferred that this document was obtained under misrepresentation. Defendant No. 1 has stated only this much that Hima Ram, her brother, Kr. Jowala Singh, and Ram Dass showed her the registered deed, Exhibit D-A and she was told to put her signatures otherwise her property would stand auctioned and it was, according to her, under that pressure that she was made to sign. But, as already stated she did not report this matter anywhere that she had been forced to put her signatures by her brother, Ram Dass and Hima Ram. Towards the fag-end of her statement she has stated that she does not know who is Thakur Ram Dass and where he resides, which is not a trustworthy statement. Therefore, in the presence of this contradictory statement of the defendant herself it is manifest that no misrepresentation of any kind was made so as to obtain this deed from her under a false pretext.

27. It had been contended that since there were dealings between the father of the plaintiff and Kr. Jowala Singh, as evidenced by DW 4/A, the misrepresentation could be inferred. Exhibit D4/A purports to be a copy of the title of the suit filed by one Lala Karam Chand against Kr. Jowala Singh. The suit is instituted on 27-3-1950 and is decided on 13-7-1951. It appears that there is a list of reliance in which a document as original agreement deed dated 4-4-1950 on behalf of Kr. Jowala Singh in favour of Thakur Ram Dass for proof is mentioned. That may be correct. But, it cannot be inferred, as the learned counsel for the appellant wants us to do, that because of this the transaction between defendant No. 1 and the plaintiff was shady, inasmuch as Kr. Jowala Singh was indebted to the plaintiff's father and that he had any other dealings with him. When this Kr. Jowala Singh was not at all managing the affairs of the defendant it is difficult to accept that this lady who is sufficiently intelligent could have fallen a victim to the nefarious devices, if any, of her brother. It is not shown if by this device Kr. Jowala Singh had been able to liquidate any of his liabilities.

28. One of the circumstances in the case which has been pointed out by the learned counsel for the plaintiff-respondent is that there is an admission about the mortgage made in favour of the plaintiff in document, Exhibit PW2/A, which purports to be a mortgage in favour of Thandu Ram. In this mortgage deed she has stated the necessity for the creation of this subsequent mortgage and she has stated therein that she had received Rs. 13,400/- from the plaintiff on the basis of the mortgage deed executed on 5-10-1950 and registered on 10-10-1950. She has clearly mentioned that she had not been able to pay the same till that date. Therefore, she felt the necessity to make a further mortgage in favour of Thandu Ram so as to raise a loan of Rs. 6000/-. Regarding this admission the submission of the defendant-appellant is that it cannot be used against her unless the same had been put to her. But, the learned counsel appears to be quite forgetful of the fact that Smt. Madna Vati herself admitted the execution of this mortgage deed in favour of Thandu Ram in her written statement. Therefore, even if she did not get the full consideration from Thandu Ram that does not mean that this admission even though not put to her in cross-examination, is false. It was for her to explain when she was in the witness box as to how she made this admission. Therefore, in these circumstances, I am of the view, that this admission is a very strong piece of evidence against her.

with regard to the receipt of the consideration as also about the execution of the mortgage deed without any undue influence and misrepresentation and that she fully understood what she was about to do and what she had done.

29. It had also been contended by the learned counsel for the appellant that after the execution of the document the plaintiff and his father took no steps to implement the document. Under Section 34 of the Punjab Land Revenue Act it was incumbent upon the plaintiff to report his acquisition of the rights of mortgage to the patwari of the estate, so that the patwari could make an entry in his register of mutations respecting the acquisition of the mortgage. Therefore, according to the learned counsel this was also one of the factors which militated against the validity of the transaction and the necessary presumption would be that there was no mortgage as there was nothing to indicate in the revenue records to that effect. The entries in the revenue record do not indicate any such mortgage and this transaction as such is non est. But, it may be stated that this submission of the appellant is not correct that a presumption is to be drawn against the plaintiff-respondent. Section 34 only enjoins that acquisition shall be reported and Section 39 makes it penal for failure to report any acquisition within three months, but that does not mean that the transaction did not take place at all. Mutation as a matter of fact does not confer any title on a person in whose favour it is so attested.

30. The further contention is that there was no necessity for Smt. Madna Vati to raise a loan and mortgage the property and that she was a widow and at that time a widow was not competent to alienate property except for legal necessity. A bare perusal of the document, Exhibit PA would reveal that she was to pay Rs. 4000/- to Ram Dass and Rs. 2000/- was needed for the repairs of the buildings and houses situate at proper Junga and Badhai. She was suffering from the trouble of Gall bladder for a long time and had to bear the expenses for medical treatment every now and then. She had incurred a debt of Rs. 3000/- which had been paid to the creditors, viz. Pt. Hima Ram Sharma and Pt. Lekh Raj resident of Bhajji. She was still ill and in need of Rs. 4,400/- for further treatment, other domestic necessities and pilgrimage expenses and expenses on documents, etc. Therefore, it is futile on the part of the learned counsel for the appellant to contend that she had no legal necessity. The recital in the deed itself established the legal necessity for which the widow was quite competent to alienate the property. But that

apart after 1956 she had become the absolute owner of these properties and now there is no question whether there was any legal necessity or not.

31. Another point that had been argued by the learned counsel for the appellant is with regard to the nature of the transaction. According to him the transaction was Benami inasmuch as the real mortgagee was Ram Dass, who supplied the money. But, I need not go into the details of this question whether the transaction is Benami because it is quite manifest from the statement of Ram Dass as also the plaintiff himself that the plaintiff had his own money. The father had been making gifts on various occasions to his son and daughters. The father had got so many resources that in fact apart from his pay as an Accountant in the Mercantile Bank he had agricultural property, an orchard, grew vegetables and potatoes, and had a dairy farm. Therefore, it cannot be disputed that he could make gifts to his children when he had so many sources of income. It is also proved that this money which was advanced belonged to the plaintiff himself. If this money was not deposited in the bank that does not mean that the plaintiff had no money to advance and that the money in fact was advanced by Ram Dass. Therefore, there is no question of any Benami transaction.

32. Then there is the question of limitation. The learned Senior Sub Judge held that it was an anomalous mortgage and that it was Article 135 of the Limitation Act of 1908 under which the limitation was 12 years from the date when the mortgagee became entitled to possession. But, the submission made by the learned counsel for the appellant is that it is Article 116 of the Limitation Act of 1908 which would govern the case. Under this Article the limitation provided is 6 years from the date when the contract is broken or upon the failure to pay the money due on the mortgage. In the instant case the agreement was executed on 27-9-1950 and the suit was instituted on 26-9-62. Now the question that arises for consideration is whether it is Article 116 or Article 135, which will govern the case. It may be straightway stated that Article 116 is not at all applicable because it is an Article which provides a period of six years for compensation for the breach of a contract in writing registered and the present one is not a suit for compensation of a breach of contract in writing, rather it is a suit for the recovery of money by sale of the mortgaged property for failure of the appellant to pay the money. Mortgage deed, Exhibit PA shows that it was a simple mortgage and the possession remain-

ed with the mortgagor. She was required to pay the money by the end of May 1951, failing which it was provided that the mortgagee was given the right to obtain the possession of the entire mortgaged land from the mortgagor immediately. Therefore, it is not a usufructuary mortgage but an anomalous mortgage and under Article 135 time begins to run when the mortgagor's right to possession determines, which clearly means that on default in payment of the mortgage money within the date fixed in the deed, the mortgagee would be entitled to possession, the period of limitation for a suit by the mortgagee for possession runs from the date of default, because the mortgagor's right to possession ceases from that date. In my opinion the learned Senior Sub Judge was perfectly right in applying Article 135 under which there is 12 years' period which is to be computed from the date of the default on the part of the mortgagor to pay the mortgage money and he ceased to have the right to be in possession. Learned counsel for the appellant had relied on Nisar Ahmad Khan v. Raja Mohan Manucha (AIR 1940 PC 204) to show that it was Article 116 which was applicable and under which the period of limitation was 6 years as it was a suit for money. The present is a case for the recovery of the mortgage money by sale of the property, therefore, this authority is not at all applicable. These were the only points raised and they have all failed. Therefore, the appeal of Smt. Madna Vati against the plaintiff fails.

33. Now I come to the cross-objections filed on behalf of the plaintiff-respondent. The plaintiff had taken two points in his cross-objections, firstly, that the court had wrongly disallowed costs of the suit amounting to Rs. 1979-25 as given in the decree against the contesting defendant, and, secondly, the court had wrongly disallowed Rs. 2,600/- as claimed by him by way of interest. The powers of the court under Section 35 of the Civil P. C. are very wide and that may be exercised according to the discretion of the court as the section says that the court has the power to determine by whom or out of what property and to what extent such costs are to be paid. But, this discretion has got to be exercised judicially and not arbitrarily. The ordinary rule is that costs follow the event of the verdict. It is apparent from the pleadings that Smt. Madna Vati did not comply with the terms of the agreement. She had agreed to pay the amount by the end of May 1951, failing which she was to deliver the possession of the land under mortgage to the plaintiff but she failed to fulfil both the conditions and then there was no other alternative left for the plaintiff but to file the suit. She had been

opposing the case on one pretext or the other. She had put up the defence that she had not received any consideration under the mortgage nor had got the deed registered or that her signatures were obtained by her brother under a misrepresentation and undue influence at her house and that she never knew Ram Dass and had seen him only on that date in the court. Therefore, in these circumstances the conduct of defendant No. 1 clearly indicates that it was she who compelled the plaintiff to file this suit. Hence the costs must follow the event of the verdict. The court has in my opinion arbitrarily acted in disallowing the costs.

34. The second point is about interest. The plaintiff was also justified in claiming interest when his money was not repaid nor the possession was delivered. He was deprived of the income of the land, which could be adjusted towards interest on the mortgage money. Therefore, on that account the submission of the plaintiff-respondent in this behalf is also quite justified and which I am inclined to accept this disposes of the cross-objections of the plaintiff.

35. Now I come to the R. F. A. 7 of 1966 filed by Smt. Reshmu. She had taken the grounds that decision on issue No. 21 against her is against law and facts; the court had erred in passing a decree for possession of the land comprised in Khasra Nos. 55, 56, 66, 59, 71, 72, 75 and 77 measuring 9 bighas 9 biswas; and that the court had also erred in holding that she had not made any application for acquisition of proprietary rights. Smt. Reshmu had made an application under Order 41 Rule 27 Civil P. C. for permission to adduce additional evidence. The application was allowed by the Judicial Commissioner vide his order, dated 27th October 1966 and she was permitted to file the copy of the order of the Compensation officer additional evidence. The order of the Compensation Officer at page 137 of the paper-book shows that late Shanker Dass husband of Smt. Reshmu had made an application purporting to be one under Section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act for the acquisition of the right, title and interest of the land-owner, viz. Smt. Madna Vati in the land, khasra Nos. 55, 56, 66, 69, 71, 72, 75 and 77 measuring 9 bighas 9 biswas situate in village Bharai. This application, it appears, was made in the year 1960 or thereabout and was decided by the Compensation Officer, Mahasu, on 31st August 1964, granting proprietary rights to Smt. Reshmu on payment of Rs. 453-86 paise. Therefore, in the presence of this order it becomes crystal clear

that late Shanker Dass was the tenant of the land and Smt. Reshmu succeeded to the tenancy rights after his death. From the copy of the jamabandi for the year 1956-57 it is established that the tenancy was created before 1956 in respect of this land. Even if the tenancy was created after the mortgage was effected Smt. Madna Vati was not precluded from creating tenancy of the mortgaged land. Under Section 65-A of the T. P. Act a mortgagor has the power to make leases of the land and which shall be binding on the mortgagee unless there is a condition in the mortgage deed to the contrary. The mortgage deed, Exhibit PA, does not contain any such condition, therefore, in my opinion, the tenancy shall be binding on the mortgagee. Now she has already acquired the proprietary rights in this land. As regards Khasra No. 74 there is no evidence on the record to establish that this was sold by Smt. Madna Vati to Smt. Reshmu. Consequently, this Khasra No. 74 including the house thereon shall be held by her subject to the rights of the plaintiff as a mortgagee.

36. In so far as the claim of Shri Virendra Singh is concerned he, admittedly, had purchased the land from Smt. Madna Vati. From the statement of Panu Ram, the guardian of Virendra Singh it is established that he purchased 8 bighas of land for Rupees 1000/- from Smt. Madna Vati, defendant No. 1, and she told him that she had not sold or mortgaged this land to any one and that he confirmed this fact from the revenue papers but did not find that the land was transferred and this is correct that no mutation of the mortgage in favour of Ram Dass was made. Therefore, Shri Virendra Singh must be held to be a bona fide purchaser without notice and as such the sale cannot now be challenged by the plaintiff nor the property can be held subject to the rights of the plaintiff. So, in so far as the rights of Smt. Reshmu and Virendra Singh with regard to the land are concerned they can seek their remedy by taking recourse to a civil suit because at present this Court is only concerned with whether the property in question is subject to the rights of the plaintiff under the mortgage. In these circumstances, I hold that barring the land comprised in Khasra Nos. 55, 56, 66, 69, 71, 72, 75 and 77 the plaintiff shall be entitled to recover his money by sale of the other land in case Smt. Madna Vati is not in a position to pay the mortgage money personally. The plaintiff is also allowed interest and costs, as stated above.

37. The result, therefore, is that the appeal of Smt. Madna Vati fails with costs to the respondent-plaintiff. The appeal of

Smt. Reshmu is allowed with no order as to costs. In so far as the rights of Shri Virendra Singh and Smt. Reshmu are concerned they cannot be decided in this appeal. The cross-objections with regard to the costs and interest filed by the plaintiff also succeed, as already stated above.

PATHAK C. J.:— I agree.

Order accordingly.

AIR 1976 HIMACHAL PRADESH 52 **FULL BENCH**

R. S. PATHAK C. J., D. B. LAL AND
C. R. THAKUR JJ.

State of Himachal Pradesh, Petitioner v. Ishwar Chand, Respondent.

Supreme Court Appln. (Cr.) No. 10 of 1975, D/- 12-11-1975.

(A) Constitution of India, Article 134 (1) — 'Judgment, final order or sentence' — Meaning of — Single Judge referring bail application for decision of Full Bench — Full Bench however expressing its opinion on certain points of law arising therein and sending case back to single Judge for decision in light of its opinion — Opinion given by Full Bench cannot be described as 'Judgment, final order or sentence' — Certificate for leave to appeal to Supreme Court under Section 134 (1) cannot be granted. AIR 1965 SC 1818 and AIR 1964 SC 1897, Rel. on.

(Paras 6, 8 and 10)

Cases Referred: Chronological Paras
AIR 1965 SC 1818 = (1966) 1 SCR 190 8
AIR 1964 SC 1897 = (1965) 1 Cri LJ 94 7
AIR 1949 FC 1 = 49 Cri LJ 625 7

Advocate General, for Petitioner; K. D. Sud, for Respondent.

R. S. PATHAK, C. J.:— This is a petition for a certificate under Article 134 of the Constitution to enable the State of Himachal Pradesh to appeal to the Supreme Court on certain points of law arising in a bail application.

2. The respondent Ishwar Chand is a member of a partnership firm, Mahabir Trading Company, carrying on business in foodgrains at Solan. On a surprise check made on July 8, 1975 the police discovered that the godowns of the firm contained stocks of rice and salt in contravention of the Himachal Pradesh Commodities Price Marking and Display Order. A case was registered under the Defence and Internal Security of India Rules, 1971 and a report was submitted to the Chief Judicial Magistrate that it was pro-

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posed to arrest the respondent. The respondent applied for anticipatory bail before the Chief Judicial Magistrate, and on the application being rejected he applied to this Court for bail.

3. In a number of other cases, also allegedly involving a contravention of the said price Marking and Display Order, applications for anticipatory bail under Section 438 of the Code of Criminal Procedure or applications for bail under Section 439 of the Code were made. The applications came on for hearing before one of us (D. B. Lal, J.) and being of opinion that the points raised substantial questions of law he referred the applications to a larger Bench. The cases came on for hearing before a Full Bench. Having regard to the wide variety of facts calling for consideration in the several applications it was proposed to express an opinion on the major questions of law only and to send the cases back with the opinion of the Full Bench to the learned single Judge for disposal. On August 22, 1975 the Full Bench pronounced the following opinion on the points before it:—

(1) The Himachal Pradesh Commodities Price Marking and Display Order, 1975 or any part thereof is not ultra vires on the grounds taken by the petitioners.

(2) Rule 184 of the Defence and Internal Security of India Rules, 1971 does not come into play. Accordingly, the question whether mens rea is a concomitant of the offences of which the petitioners have been accused and the question whether Rule 184 is ultra vires on the grounds taken by the petitioners need not be considered.

(3) The High Court has powers under Section 438 and Section 439 of the Criminal Procedure Code 1973 to grant bail to the petitioners.

The reasons for that opinion were rendered later, on September 12, 1975. When the respondent's application for bail was heard by D. B. Lal, J. he made an order allowing it and directing the release of the respondent on bail.

4. A perusal of the petition before us discloses that the State desires a certificate against the "judgment dated September 5, 1975 of the Hon'ble Full Bench of this Hon'ble Court accepting the petition of the respondent for release on bail." The Full Bench did not allow the respondent's petition for release on bail, nor was any order made on September 5, 1975 by the Full Bench. To remove the confusion emanating from this recital in the petition the learned Advocate General, appearing for the State of Himachal Pradesh, clarified

that the petition was filed in respect of the opinion expressed by the Full Bench on August 22, 1975 and with reference to the reasons rendered on September 12, 1975. We must, therefore, consider whether the State is entitled to a certificate to enable it to appeal to the Supreme Court against that opinion.

5. A preliminary objection has been raised by Shri K. D. Sud, learned counsel for the respondent. He contends that no certificate can be granted under Article 134 (1) of the Constitution inasmuch as the opinion pronounced by this Court is not a "judgment, final order or sentence" in a criminal proceeding of this Court. In reply, the learned Advocate General urges that the matter before the Full Bench was a "proceeding" in itself and the opinion expressed by the Full Bench disposed of that proceeding and was, therefore, to be considered as a "judgment, final order or sentence". On careful consideration, I think that the preliminary objection must be sustained.

6. The learned Single Judge referred the bail application itself to the Full Bench for decision. The Full Bench expressed its opinion merely on certain points of law arising in the bail application. It did not dispose of the case, but returned it to the learned Single Judge for disposal in the light of the opinion expressed by it. The points of law on which the Full Bench expressed its opinion were only some of the points arising in the case. There were other questions affecting the merits of the case which remained to be considered by the learned Single Judge, and in his judgment he was to determine whether bail should be granted or refused. It is apparent that the proceeding before the Full Bench was in no sense different from the proceeding initiated originally before the learned Single Judge and later disposed of by him. It was the bail application itself. All that the Full Bench did was to express its opinion on certain points of law arising in the case and send the case back for decision to the learned Single Judge. The contention of the learned Advocate General that the matter before the Full Bench was a distinct proceeding in itself is rejected.

7. Now, Article 134 (1) of the Constitution envisages an appeal from a "judgment, final order or sentence". The opinion of the Full Bench is obviously not a "sentence". Nor, to my mind, is it a "judgment" or "final order". In *S. Kuppuswami Rao v. The King*, AIR 1949 FC 1 the Federal Court construed the expression "judgment" and "final order" in Section 205 (1) of the

Government of India Act, 1935. Section 205 (1) provided:

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law....."

After examining the cases decided by the courts in England and the courts in our country, the Federal Court laid down that the expression "judgment" indicated a judicial decision given on the merits of a dispute brought before the court. It observed that in criminal cases it was the decision terminated by an order of conviction or acquittal of the accused and did not include a preliminary or interlocutory order. Nor was it the statement given by the court of the grounds for that decision. It was the decision itself, and a decision on the merits of the dispute. The expression "final order" in relation to criminal cases was confined by the Federal Court to orders which finally determined the points in dispute and brought the case to an end. It must be an order disposing of a point which, decided either way, would terminate the matter before the court finally. An order was not a final order, even if it decided an important or even a vital issue in the case, when it allowed the matter to remain alive and left it to be tried in the ordinary way. In *State of U. P. v. Col. Sujjan Singh* AIR 1964 SC 1897 the Supreme Court considered the scope of Article 134 (1) of the Constitution and held that the expression "final order" contained therein referred to an order which of its own force bound or affected the rights of the parties.

8. In the present case, the Full Bench merely expressed an opinion on certain points of law arising in the bail application. The nature of the opinion was advisory only. It was intended to advise the learned Single Judge of what the law is on certain points arising in the case. It is well settled that when an opinion is pronounced on a question of law, the opinion cannot be described as a "judgment" or "final order". *Narayan Row v. Ishwarlal Bhagwandas* AIR 1965 SC 1818.

9. The learned Advocate General cited a number of cases to show that the expression "proceeding" included a distinct part of a case or a step in a case, but in the view taken by me this aspect of the matter does not arise.

10. Upon the aforesaid considerations, I am of the view that the opinion pronounced by the Full Bench cannot be described as a "judgment, final order or sentence" within the meaning of Article 134 (1) of the Constitution. The present petition for a certificate is misconceived and incompetent.

11. The petition is rejected. The respondent is entitled to his costs.

D. B. LAL J.:— I agree.

C. R. THAKUR J.:— I agree.

Petition rejected.

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D. B. LAL AND C. R. THAKUR JJ.

Union of India, Petitioner v. M/s. Himachal Shoddy Mills Ltd., Respondent.

Supreme Court Appeal No. 23 of 1975, D/- 3-3-1976.

(A) Constitution of India, Article 133 (1) — "judgment", "decree" or "final order" — Interlocutory order giving a tentative finding essential for granting interim relief of stay to writ petitioner leaving matters in controversy to be decided at the final stage of writ petition — Order can, neither be considered "judgment" nor "decree" nor final order and as such no certificate can be granted — Although interlocutory order may be judgment for purposes of letters patent appeal it is not so within Article 133 (1). AIR 1958 SC 253 and AIR 1961 SC 794 and AIR 1970 SC 1168 and AIR 1975 SC 123 and AIR 1973 Him Pra 47 Foll. (Paras 2 to 4)

Cases Referred:	Chronological	Paras
AIR 1975 SC 123 = (1975) 1 SCC 55	2	
AIR 1973 Him Pra 47 = ILR (1972) Him Pra 10	3	
AIR 1970 SC 1168 = (1969) 2 SCR 699	2	
AIR 1969 Ker 38	3	
AIR 1968 Mad 1 = (1967) 2 Mad LJ 1 (FB)	3	
AIR 1968 Andh Pra 9 = (1962) 2 Andh WR 119	3	
AIR 1961 SC 794 = (1961) 3 SCR 754	2	
AIR 1958 SC 253 = 1958 SCR 1007	2	
AIR 1957 Cal 727 = 61 Cal WN 559	3	
AIR 1955 Bom 266 = 57 Bom LR 228	3	
AIR 1955 Mad 121 = 1955 Cri LJ 505	3	
AIR 1953 Bom 117 = 54 Bom LR 844	3	

B. Sita Ram, Advocate General, for Petitioner; Hardyal Hardy, B. Dutta and Inder Singh, for Respondent.

D. B. LAL, J.:— This is an application on behalf of the respondents wherein they have sought for a certificate of fitness for appeal to Supreme Court under Article 133 (1) of the Constitution. Brief facts of the case from which the present application emerges may now be stated. Messrs. Himachal Shoddy Mills Limited filed a writ petition against the Union of India, the Textile Commissioner, and the State Trading Corporation, wherein they called upon the respondents not to withhold the allocation of

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unserviced raw material to which the petitioners were entitled. It is to be recalled that by an order made by the respondents the allocation of unserviced raw material was suspended to the petitioners, with the consequence that the mill was likely to be closed. The main contention of the petitioners was that the statutory provision was not observed while suspending the raw material and that a principle of natural justice was involved because neither a show cause notice was given nor the petitioners were heard otherwise before the suspension order was made. Along with the writ petition a prayer was made for interim order so that the respondents release the unserviced raw material which already stood allocated in the name of the petitioners. An *ex parte* order was made staying the operation of the order suspending the allocation of raw material. This order was subsequently confirmed by a detailed judgment of my brother Thakur, J. on June 16, 1975. One of the contentions of the respondents was that the Court had no jurisdiction because the offices of the respondents fall outside its territorial limits and hence no relief could be granted to the petitioners. In reply, the petitioners submitted that the cause of action arose within the territorial jurisdiction of the Court and also sought amendment for elucidation and elaboration of the plea regarding jurisdiction. These amendments were allowed by the learned Judge and, despite the objections of the learned Advocate-General that an amendment conferring jurisdiction could not be allowed, it was held that the amendments sought for were merely by way of elaboration or elucidation of the plea and that the Court basically and initially possessed jurisdiction and the plea only required to be clarified and so the amendments were necessary. However, the learned Judge held that the question regarding jurisdiction will again be open at the stage of the decision of the main petition. After this order of the learned Judge confirming the previous *ex parte* stay order, a fresh need arose for allocation of raw material, and another application CMP. No. 1303 of 1975 was filed by the petitioners for an additional relief as according to them the abeyance order although stayed was being rendered ineffective by the respondents because they had cut short the raw material for no rhyme or reason, with the result that the mills were likely to be closed and the workers were likely to suffer unemployment. It was, however, contended by the respondents that the petitioners have misutilized the raw material. This Court made another interim order on December 20, 1975 on CMP. No. 1303 of 1975 holding that a *prima facie* case existed

in favour of the petitioners, that the balance of convenience was in their favour and that irreparable injury was likely to cause if some order is not made releasing unserviced raw material to the petitioners. Regarding the amendments allowed by the learned Judge, it was observed that the same were correctly allowed by way of elucidation of the plea regarding jurisdiction. At any rate, the order allowing amendments was not disturbed by any subsequent proceeding. It is a different matter that the respondents have been given opportunity to agitate the plea regarding jurisdiction while the main writ petition comes up for decision. It is evident the question of jurisdiction embraces two separate facets: (1) Whether the amendment conferring jurisdiction could be allowed although according to petitioners this was never done but the initial jurisdiction was there and the plea was only elucidated and elaborated at a subsequent stage, and (2) whether once the amendments were allowed the plea of jurisdiction was at all amenable to the respondents. For this, the learned Advocate-General categorically stated that in case the amendments are not set aside but retained, the facts alleged will definitely confer jurisdiction upon the Court. These two questions, in my opinion, in view of the order of my learned brother Thakur, J., dated June 16, 1975 will still be open to the respondents. After all a *prima facie* finding as to title has been given in favour of the petitioners. They have yet to prove their case both on question of law and even on question of fact. The oft repeated considerations which prevail upon the Court to grant interim relief, namely *prima facie* case, balance of convenience and irreparable loss, have been considered and interim relief has been granted to the petitioners although according to respondents the interim relief is sufficiently material for the purpose of the case. At the same time it is already ordered by the Court that what ever unserviced raw material has been allocated the same shall stand adjusted in future allocations provided the petitioners are found eligible for the same. In fact the Court found that so much quantity of unserviced raw material was already allocated by the respondents to the petitioners and it was merely held back on grounds considered tentatively insufficient by the Court. In case the sufficiency of the grounds is established while deciding the main writ petition, the petitioners would naturally not be entitled to the unserviced raw material and the same will have to be adjusted in their subsequent allocations. It is stated that the petitioners are to be debarred from doing business or that their mill is to be closed under the

orders of the respondents. But for that, some proceedings under law are required to be taken up. It is evident the respondents have not yet initiated those proceedings.

2. — Therefore, the argument of the learned Advocate-General that practically the relief has been granted to the petitioners is neither here nor there. Some interim relief, in the opinion of the Court, was required to be given and the same has been granted. The main relief will, of course, be given in case the writ petition is allowed in favour of the petitioners. The main ground of the learned Advocate-General on the basis of which he has sought for a certificate of fitness is the question regarding jurisdiction. I have already observed above that the question regarding jurisdiction in both aspects mentioned above is still open to the respondents which they can agitate at the time of the hearing of the main writ petition. Only a tentative finding has been given in favour of the petitioners which was essential to grant them the interim relief. That apart, in my opinion, the order being interlocutory and the Court having not decided the dispute or having not finally determined the points in controversy, the order can neither be considered 'judgment' nor 'decree' nor 'final order' within the meaning of Article 133 (1). For this, there is ample authority in support of the view. In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* (1958 SCR 1007) = (AIR 1958 SC 253) the question regarding vires of an Act was involved and an interlocutory finding was given. The Supreme Court held that the certificate under Article 133 was incompetent as it could not be granted in respect of an interlocutory finding. This authority is an answer to the argument of the learned Advocate-General that the question regarding jurisdiction touches at the root of the case and hence is of primary importance. According to the learned counsel, a certificate of fitness be granted because a very primary question arising in the case is involved and calls for a decision by the Supreme Court. As I have said above, the question regarding vires of an Act was nonetheless of primary importance, still the Supreme Court did not grant a certificate of fitness as the order was interlocutory. In *Jethanand and Sons v. State of Uttar Pradesh* (AIR 1961 SC 794) the Supreme Court refused to grant a certificate of fitness because the appeal was being preferred against the order, refusing to set aside award and of remand of the case for de novo trial. It was held that the certificate of fitness cannot be granted against such an order which could neither be considered judgment nor decree nor final order within the meaning of Article 133. In *Tara-*

pore and Co., Madras v. V/o. Tractors Export, Moscow (AIR 1970 SC 1168) again the Supreme Court reiterated its previous view, and held that the judgment in the context of Article 133 (1) means final adjudication by Court of rights of parties. Interlocutory judgments even if they decide an issue or issues, do not finally determine rights and liabilities between parties and hence they are not judgments although the issue which they decide may be cardinal in the case. It was held that interlocutory orders passed without finally determining the rights and obligations of the parties are not covered under Article 133 (1) and hence no certificate of fitness can be granted. Finally, in *Ajantha Transports (P). Ltd., Coimbatore v. M/s. T. V. K. Transports, Pulampatti, Coimbatore District, etc.* (1975) 1 SCC 55 = (AIR 1975 SC 123) yet again the Supreme Court took the same view and held that in a case where no final order is passed and only an interlocutory order is granted a certificate of fitness cannot be granted under Article 133.

3. In reply, the learned Advocate-General relied on several cases of which the reports are *Jai Hind Iron Mart v. Tulsiram Bhagwandas* (AIR 1953 Bom 117), *Mansata Film Distributors, Calcutta v. Sorab Merwanji Modi* (AIR 1955 Bom 266), *S. Govind Swaminathan, In re*, (AIR 1955 Mad 121), *Shorab Merwanji Modi v. Mansata Film Distributors* (AIR 1957 Cal 727), *Kuppa Viswapathi v. Kuppa Venkata Krishna Sastry* (AIR 1963 Andh Pra 9), *L. C. T. L. P. L. Palaniappa Chettiar v. M. R. Krishnamurthi Chetty* (AIR 1968 Mad 1) (FB) and *State of Kerala v. Annam* (AIR 1969 Ker 38). All these cases referred to Letters Patent appeals. As noticed in *L. C. T. L. P. L. Palaniappa Chettiar* (supra), there is a clear distinction between intra-court appeals and appeals preferred to Supreme Court. Letters Patent appeals are intra-court appeals from one Judge to another Bench of Judges of the same court. In this category of cases, even interlocutory orders which do not finally determine the dispute are held to be 'judgment' if appealed under Letters Patent. Their Lordships have observed that the considerations which determine the appealability from the High Court to the Federal Court or the Supreme Court cannot apply to an appeal from one Judge of the High Court to a Bench under Clause 15 (Madras Letters Patent). The latter is an internal or domestic matter where an appeal will lie even where there is no final and ultimate disposal of the suit as required for an appeal to the Federal Court or the Supreme Court. A similar view was expressed in *Kuppa Viswapathi* (supra). Their Lordships

observed that in order to constitute a 'judgment' within the ambit of clause 15 (Andhra Pradesh Letters Patent), it is not essential that the decision should wholly put an end to the litigation, and it need not possess the attributes of a final order, as contemplated by Section 109 C. P. C. or Article 133 of the Constitution. If a decision effectively disposes of a suit or proceeding, it is a 'judgment' within the purview of clause 15. So, in the very cases relied upon by the learned Advocate-General the distinction has been noted and for a certificate under Article 133 a judgment, decree or final order is required, which can only be when nothing is left out in the case to be determined. An interlocutory order decidedly does not settle the controversy on all questions in dispute and leaves the case pending between the parties. In the instant case as well the interim relief has been granted to the petitioners but the lis is still pending. The points in controversy have yet to be determined and the question regarding jurisdiction is also left open. As such there is ample authority in support of the view that no certificate can legally be granted against such an order made by the Court. This appears to be the view even of this Court as held by a Division Bench in *H. S. Bedi v. Smt. Dhanni Devi* (ILR (1972) H. P. 10) = (AIR 1973 Him Pra 47). It was held by a Division Bench that a judgment or order as contemplated under Article 133 (1) is the one which completely adjudicates the rights in dispute between the parties and if after the judgment or order the dispute still remains to be tried and the rights of the parties remain to be determined, the judgment or order is not final for the purpose of Article 133.

4. In this view of the matter, the order made by this Court in respect of which the present application is directed can neither be considered judgment, nor decree nor final order, and hence a certificate of fitness under Article 133 (1) cannot be granted. The application is, therefore, rejected.

C. R. THAKUR J.:— I agree.

Petition rejected.

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C. R. THAKUR, J.

Rania, Petitioner v. Smt. Kamla Devi and another, Respondents.

Civil Revn. No. 59 of 1974, D/- 19-12-1975.

BT/DT/A347/76/JHS

(A) Civil P. C. (1908), Section 152 —
— Amendment of decree — Mistake originating in pleadings.

A court can under Section 152 amend a clerical error in a decree although the error may have occurred on account of a mistake of the parties themselves in their pleadings and the mistake in the decree was on account of its being copied from the plaint. Thus where the plaint in some places wrongly mentioned Khata No. 58 but in some places the correct Khata No. i. e. 38 was also mentioned, the Court ordered the correction to be made in the decree. AIR 1954 Pat 108 and AIR 1957 All 133 and AIR 1959 Ker 386 Followed. (Paras 4, 5, 6)

Cases Referred: Chronological Paras
AIR 1959 Ker 386 = 1959 Ker LJ 111 4
AIR 1957 All 133 = 1956 All LJ 691 4
AIR 1954 Pat 108 = 1953 BLJR 529 4

ORDER:— Rania petitioner had filed a suit for possession by pre-emption of the land as detailed in the head-note of the plaint. A decree was passed accordingly in his favour by the Senior Sub Judge, Kangra at Dharamsala, on 29th April 1972. The operative part of the decree reads as under:

"I therefore, grant a decree for possession by way of pre-emption of 11 kanals of land entered in Khata No. 58, Khasra No. 49 in favour of the plaintiff and against the defendant. The sale price of the suit land measuring 46 Kanals 10 marlas is Rs. 15,500/- and accordingly the sale price of the decretal land measuring 11 Kanals comes out to be Rs. 3666.66 paise. The plaintiff has deposited Rs. 3100/- as pre-emption money and the remaining amount of Rs. 566.66 paise is directed to be deposited within one month of the passing of the present decree failing which the suit of the plaintiff shall be deemed to have been dismissed. The plaintiff shall get the proportionate costs of the suit".

2. The decree-holder filed an application purporting to be one under Sections 151 and 152 of the Code of Civil Procedure for correction of the judgment and decree, wherein Khata No. 38 has been wrongly inserted as khata No. 58 and that this was an inadvertent clerical mistake which could be rectified. This petition was dismissed by the Senior Sub Judge by his order, dated 25-9-1974 holding that:

"In para 2 of the plaint it is significant to note that the plaintiff himself has mentioned the land measuring 11 kanals comprising of khata No. 58 and khasra No. 49 in respect of which the decree was passed by my learned predecessor. In view of the description of the land given by the applicant himself in para No. 2 of the plaint, it cannot be

said that there is any mistake in the Judgment or decree-sheet".

3. I have perused the plaint and I find that in the head-note it is clearly mentioned: "Suit for possession by pre-emption of land entered in Khata No. 38 min, khasra Nos. 8, 11, 21, 23, 36, 37, 49, 22 land measuring 38 Kanals 10 marlas". In para 1 of the plaint also it is stated as. "That the land entered in Khata No. 38 min, Khasra Nos. 8, 11, 21, 23, 36, 37, 49, 22 land measuring 38 kanals 10 marlas". However, in para 2 of the plaint there is no doubt that it is written as "Khata No. 58,". But this appears to be purely a clerical or a typographical mistake when in the head-note of the plaint as also in para No. 1 of the same it has specifically been mentioned as "Khata No. 38 min". In the copy of the khasra girdwari which has been exhibited as P. 2 it is clearly written as Khewat No. 38. The copy of Jamabandi Exhibit P. 3 also indicates that it is Khata Khatauni No. 38 min. The sale deed, Exhibit D. 1, also shows that it is Khata No. 38 min, which was sold. Therefore, this documentary evidence leaves no manner of doubt to hold that in fact it was Khata No. 38 min in which the land was comprised and which was the subject matter of the suit for pre-emption and it appears that by typographical mistake in para 2 of the plaint it has been mentioned as 58. Therefore, in these circumstances, I think the court had to allow this amendment which was purely of a clerical nature which had appeared in the pleading.

4. According to Mt. Anupa Kuer v. Yogendra Jha (AIR 1954 Pat 108) where the plaint omitted to state from which direction the plaintiff claimed recovery of possession over the suit plots, it was held that the decree, which, having been drawn in accordance with plaint, also omitted to give such direction should be amended since there was no ambiguity as to the subject-matter of the suit but there was only a mistake as to the description of the property. Similarly in Shahzad Khan v. Pt. Sheo Kumar (AIR 1957 All 133) also it has been held that a court can under Section 152 amend a clerical error in a decree although the error may have occurred on account of a mistake of the parties themselves in their pleadings and this mistake in the decree was on account of its being copied from the plaint. In such cases it is not necessary to amend the plaint itself. Similarly in N. Subramonia Iyer v. Joseph George (AIR 1959 Ker 386) also it had been observed that the question how far a court can under Section 152 amend clerical error in a decree although the error may have first

occurred in the parties' pleadings and may have been merely copied from them in the decree has been the subject of some diversity of judicial opinion. The language of Section 152 does not exclude such mistake and there is no reason for restricting the scope of the Section to correction of errors made by the court itself. Indeed mistakes having their origin anterior to the suit and repeated in the decree have themselves been corrected by exercise of jurisdiction under this section.

5. Therefore, what follows is that the Court has to do a substantial justice and for that the Court is competent to correct any mistake, clerical or arithmetical, which has crept in the decree or in the plaint or the written statement itself, so as to give effect to the decree. In the instant case the sale was of Khata No. 38 min and the head-note of the plaint as also para 1 of the plaint also correctly mention the same although in para 2 a typographical mistake has occurred. The learned Senior Sub Judge therefore was wrong in rejecting the application of the plaintiff-decree-holder merely on the ground that he had himself so mentioned in para 2 forgetting that not only in the head-note rather in para 1 of the plaint also he had given the correct description and the documentary evidence also speaks to the same effect. The sale deed which was the subject-matter of the suit also mentions Khata No. 38. Therefore, in order to do substantial justice and to give effect to the decree it was the duty of the Senior Sub Judge to have corrected this typographical error in the decree.

6. In these circumstances, I, therefore allow this petition and reverse the order of the learned Senior Sub Judge and order that amendment shall accordingly be made in the decree so as to insert and read Khata No. 38 min for 58 min. However, I pass no orders as to costs.

Petition allowed.

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R. S. PATHAK C. J.

Sunder Singh Raghubans, Petitioner v. Embassy of India, in Nepal and another, Respondents.

C. W. P. No. 28 of 1974, D/- 15-12-1975.

(A) Civil P. C. (1908), Section 20 — Jurisdiction — Offer by telegram by Indian Embassy in Nepal to A a resident of Hima-

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chal Pradesh — A accepting offer by telegram — Part of cause of action in suit relating to the contract arises in Himachal Pradesh within jurisdiction of High Court of Himachal Pradesh.

X was a resident of Himachal Pradesh. The Indian Embassy in Nepal offered to X, by telegram, an employment for 6 months in the Embassy. It was accepted by X by telegram. Held: that the contract of service was made where the offer was accepted, and that the High Court of Himachal Pradesh had jurisdiction to deal with a dispute as to the terms of the service. 1973 (1) SLR 968 (MP), Dist. (Paras 2 and 3)

But where after the initial appointment X was appointed to different posts in Nepal, not under his original appointment order, but as fresh appointments, the dispute as to the terms of such appointments would be beyond the jurisdiction of Himachal Pradesh High Court. (Para 3)

(B) Constitution of India, Article 309 — Rules under — Two cadres of service in Indian Embassy in Nepal (1) "India based" (2) Service under local recruitment — Meaning of "India based" service.

Held: from the terms of service appended at the foot of the Government of India Letter No. 4674/AG/PS4(a) 365/S/D/Pension/Services it is clear that the expression "India based" employee refers to a person recruited from India as distinguished from a person recruited locally in Nepal. When at the time the person was recruited initially, he was residing in India, he would, on recruitment, be an "India based" employee. (Para 4)

The entire tenor of the Government of India's letters points to one conclusion, and that is that persons residing in India when they agreed to serve in the Indian Embassy at Nepal cannot be considered as recruited locally and must be regarded as "India based" employees. It is their residence in India, and not that they held Government employment in India, which makes them "India based". (Para 4)

Cases Referred: Chronological Paras (1973) 1 Serv LR 968 = 1972 MPLJ 1053 2

Miss Kamlesh Sharma, for Petitioner; H. K. Paul, for Respondents.

ORDER:— The petitioner has his permanent place of residence in the village of Arla, situate in the district of Solan in this State. He retired from the Army in 1956 and settled down as a farmer in his village. On October 28, 1958 he received a telegram from the Indian Embassy in Nepal informing him that if he desired to accept the post of a Lower Division Clerk in the Military branch

for Pokhara camp for a period of six months he should "confirm acceptance" by telegram. On October 29, 1958 the petitioner sent a telegram conveying his acceptance of the offer. This was followed by a letter dated October 30, 1958. The petitioner joined the post in Nepal. According to Annexure P-3 to the writ petition, he held the post of Lower Division Clerk from November 8, 1958 to May 3, 1959. It seems that he was thereafter appointed to the post of Upper Division Clerk from May 4, 1959 to April 30, 1960. From May 1, 1960 to September 22, 1960 he held the post of Lower Division Clerk again. Subsequently he was appointed to the post of Upper Division Clerk from September 23, 1960 where he continued until November 8, 1960. Thereafter he held the post of Assistant for various periods. In between he held the post of Sub Treasury Officer for temporary periods.

He was finally appointed to the post of Sub Treasury Officer from August 9, 1961 which post he holds to the present day. Now, the employees of the Indian Embassy were divided into two classes, those recruited locally and those treated as "India based" employees. The latter enjoyed more favourable terms of pay and allowances. The petitioner, it seems was allowed pay and other conditions of service on the basis that he was recruited locally. His claim that he should be treated as an "India based" employee of the Indian Embassy in Nepal has been rejected. The petitioner urges that he is an "India based" employee because when he was recruited he was residing in India. Accordingly, he has filed the present writ petition for relief:

2. At the outset, an objection has been raised by Shri H. K. Paul, holding the brief for the learned Advocate General, that the writ petition is not maintainable. He urges that this Court has no jurisdiction inasmuch as the cause of action accrued entirely within Nepal. In my opinion, the objection is sound in so far as the petitioner's case relates to the appointments following his initial appointment. The telegram dated October 28, 1958 issued by the Indian Embassy offered a post of Lower Division Clerk for a period of six months. That offer was accepted by the petitioner by a telegram dated October 29, 1958. So far as that contract is concerned, it was completed by the telegram of acceptance. Reliance is placed by learned counsel for the respondents on Ramswaroop Agarwal v. Polson Ltd., (1973) 1 Serv LR 968 (Madh Pra). In that case, the facts were entirely different. The terms of the offer clearly indicated that it could be accepted only by the plaintiff joining the post, and the Madhya Pradesh High Court held

that inasmuch as he joined the post at Anand (Gujarat), his letter intimating acceptance and sent from Nagpur, within the State of Madhya Pradesh, could not give rise to any cause of action.

3. I am of opinion that so far as the petitioner's initial appointment is concerned, the cause of action arose in part at Solan within the jurisdiction of this Hon'ble Court. But subsequently, as detailed in Annexure P-3, the petitioner was appointed to different posts at different times. They were all fresh appointments and not part of the original engagement. It will be noted that on October 6, 1959 the Government of India sanctioned certain posts, including those of Lower Division Clerks, Upper Division Clerks and Sub Treasury Officers for Pokhara for a further period. This was followed by a similar order sanctioning the posts with effect from October 1, 1960 for the period beyond that. The petitioner was never appointed as member of a service in which all the posts held from time to time by him were encadred, so that even when he was moved from one post to another it could be said to be under his original appointment to the service. On the contrary, he was appointed successively to specific posts. Each appointment was a fresh appointment. All the appointments made after the initial one were made in Nepal, and therefore, fell outside the jurisdiction of this Court.

4. On the merits, the question is whether the petitioner can be considered as an "India based" employee. The petitioner contends that he is entitled to that status because he was residing in India at the time when the initial offer was made by the Indian Embassy in Nepal. The respondents say that a person is an "India based" employee only if he holds a post in India at the time when the offer is made to him for appointment in the Indian Embassy at Nepal. Now, as I have held, this court has jurisdiction to consider the claim of the petitioner only in respect of the period of his initial appointment. That is the period upto May 3, 1959. It does appear from the terms of service appended at the foot of the Government of India letter No. 4674/AG/PS4(a) 365/S/D/Pension/Services that the expression "India based" employee refers to a person recruited from India as distinguished from a person recruited locally in Nepal. When the person was recruited initially, he was residing in India. On recruitment, he was an "India based" employee. For the period upto May 3, 1959, in respect of which alone this Court has jurisdiction, he is entitled to the pay and allowances admissible to an "India based" employee.

Now, there is no material which indicates what were the pay and allowances for that period. The Government of India's letter dated October 6, 1959 referred to above and similar letters issued subsequently relate to the period thereafter. If this Court had the jurisdiction to entertain the petitioner's claim for that subsequent period. I would have had no hesitation in upholding the petitioner's claim for that period. In my opinion, the entire tenor of the Government of India's letters points to one conclusion, and that is that persons residing in India when they agreed to serve in the Indian Embassy at Nepal cannot be considered as recruited locally and must be regarded as "India based" employees. It is their residence in India, and not that they held Government employment in India, which makes them "India based". Even after the initial appointment, when the petitioner was appointed to successive posts, he cannot be said to have taken up residence in Nepal and therefore liable to be treated as a local recruit. But for his employment in the Indian Embassy he would have been residing in India. He cannot be said to have abandoned his residence in India at any point of time.

5. But, as I have said, this Court must be confined to the claim for the period ending May 3, 1959. The initial appointment of the petitioner was to the post of Lower Division Clerk and for a period of six months only. There is nothing to show that the period was extended. The post itself appears to have been sanctioned for a temporary period only. In the absence of any material showing that an "India based" employee had any different terms of service regarding pay and allowances for the period ending May 3, 1959 than what the petitioner has been paid, no relief can be granted to the petitioner.

6. As regards the period from October 6, 1959, when the Government of India letter was issued specifically providing for the terms of service of 'India based' employees, I would have been inclined to grant relief to the petitioner if I had found that this Court had jurisdiction. While denying him relief because of want of jurisdiction, I think it appropriate to observe that the administrative authorities may consider whether the petitioner should not be granted relief by them out of court without compelling him to judicial proceedings in an appropriate court of law.

7. The writ petition fails and is dismissed. There is no order as to costs.

Petition dismissed.

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R. S. PATHAK, C. J. AND D. B. LAL, J.

State of H. P. and another, Appellants v. Ajit Kumar Respondent.

Letters Patent Appeal No. 24 of 1974, D/- 19-12-1975.

(A) Constitution of India, Article 226 — Appeal — Interim stay order granted by single Judge in writ proceeding — Appeal to Division Bench does not lie. (Letters Patent (Lah), Cl. 10) — (Delhi High Court Act (1966), Section 10) — (Civil P. C. (1908), Order 47, Rule 1).

No appeal lies to a Division Bench of the High Court either under Clause 10 of the Letters Patent or Sec. 10 of the Delhi High Court Act against an interim stay order granted by a Single Judge in a writ proceeding. Neither Section 141, Civil P. C. nor Rule 19 of the Delhi High Court (Original Side) Rules 1967 can be pressed into service for spelling out such a right of appeal. The appeal cannot also be treated as a review petition for if the appellant intended to apply for review that petition should have been made to the Single Judge who passed the order. Case law discussed. (Paras 4, 5, 6, 8, 14, 15, 16, 17)

Cases Referred: Chronological Paras

AIR 1975 Punj and Har 1 = 76 Pun LR 451 (FB) 9
 AIR 1974 SC 1719 = (1975) 1 SCR 550 6, 14 (1974) FA O No. 32 of 1974 (Him Pra) 14, 16
 AIR 1972 Delhi 102 = 74 Pun LR (D) 129 (FB) 4, 6
 1972 Lab IC 787 = ILR (1972) Him Pra 301 7
 1970 All LJ 1379 = ILR (1971) 1 All 694 5
 AIR 1969 Delhi 85 = 1969 Delhi LT 15 (FB) 7
 1968 All LJ 210 = ILR (1967) 2 All 882 5
 1968 Delhi LT 82 6
 AIR 1967 All 334 = 1967 All LJ 232 5
 AIR 1967 Cal 275 = ILR (1966) 1 Cal 14 5
 AIR 1963 SC 946 = (1963) 1 SCR 1 6
 AIR 1961 All 561 4
 AIR 1960 All 692 = 1960 All LJ 387 (FB) 6
 AIR 1954 Mad 1057 = (1954) 2 Mad LJ 525 (FB) 6
 AIR 1953 SC 198 = 1953 SCR 1159 6, 14
 AIR 1952 Nag 357 = 1953 Nag LJ 58 (FB) 6
 AIR 1935 Rang 267 = ILR 13 Rang 457 (FB) 6
 (1912) ILR 35 Mad 1 = 21 Mad LJ 1 6
 (1888) ILR 11 Mad 28 = 14 Ind App 160 (PC) 6
 (1872) 8 Beng LR 433 = 17 Suth WR 364 6

Advocate General, for Appellants; S. Malhotra, for Respondent.

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D. B. LAL, J.:— Shri Ajit Kumar filed Civil Writ Petition No. 111 of 1974, wherein he sought for the quashing of the impugned orders, Annexures 'G' and 'J' to the petition whereby he was reverted from the post of Deputy General Manager (Works) in the Transport Department. His case was, that he was appointed Deputy General Manager (Works) in the vacancy caused by the transfer of one Shri I. C. Mahajan to the Government of India. According to petitioner, his appointment was on probation for a period of two years and as such could not be held ad hoc. The appointment was also made on the recommendation of the Public Service Commission. Subsequently Shri I. C. Mahajan returned from the Government of India and as a result to that Shri Ajit Kumar was reverted by notification Annexure 'G' dated November 7, 1973. Subsequently he was appointed officiating Deputy General Manager in the Himachal Pradesh Agro Industries Corporation but from that post also he was reverted vide Annexure 'J' in April 1974. The petitioner sought to impugn these two reversion orders.

2. The learned single Judge before whom the writ petition was set down for hearing was asked to make an order staying the operation of the two annexures 'G' and 'J' so that the reversion of the petitioner is not made from the post of the Deputy General Manager (Works). The learned single Judge at first granted interim stay of the reversion orders and thereafter made the interim stay absolute. Against that order the present Letters Patent Appeal has been filed before this Division Bench.

3. A preliminary objection has been taken by the learned counsel for the respondent Ajit Kumar that no appeal lies before the Division Bench under clause 10 of the Letters Patent as the decision of the learned single Judge cannot be construed a 'judgment' within the meaning of that clause.

4. The learned Advocate General representing the appellant sought for the aid of Section 10 of the Delhi High Court Act, 1966 inasmuch as he attempted to discover a right of appeal within that provision. In sub-section (1) of Section 10 the language used is "exercises ordinary original civil jurisdiction conferred by sub-section (2) of Section 5" which is obviously not the case in the present situation. The learned single Judge has not exercised ordinary original civil jurisdiction conferred by sub-section (2) of Section 5 of the Delhi High Court Act, 1966. A reading of sub-section (2) of Section 5 makes it clear that the ordinary original civil jurisdiction has to relate to a suit the value of which exceeds Rs. 50,000/-. The learned single Judge has rather entertained a

civil writ petition which is by way of extraordinary civil jurisdiction exercised by him. It is certainly not the jurisdiction exercised within the meaning of sub-section (2) of Section 5 of that Act. Therefore, section 10 (1) is not *per se* applicable. That apart, the said provision only prescribes a forum and not a right of appeal. In *University of Delhi v. Hafiz Mohd.* (AIR 1972 Delhi 102) a Full Bench of that Court was considering Section 10 (1) and held that the said section provides for forum of appeal. Their Lordships were considering Rule 19 of the Delhi High Court (Original Side) Rules, 1967 and Order 43 Rule 1 of the Code of Civil Procedure and observed that these provisions indicate the orders which were appealable. Therefore, Section 10 (1) was contradistinguished from Rule 19 and Order 43 Rule 1 and it was held that the section provided only for forum and not for right of appeal. It cannot be disputed that right of appeal is a substantive right which can only be inferred from a provision relating thereto. As far back as in *Minakshi Naidu and Subramanya Sastri* ((1888) ILR 11 Mad 26) the Privy Council held that it is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority. The view was reiterated in *Gaja v. Mohd. Farukh* (AIR 1961 All 561) and it was held that an appeal is a substantive right and not a mere matter of procedure and unless it is conferred by a statutory provision a right of appeal cannot be stated to exist. Therefore, the learned Advocate General cannot take assistance of Section 10 (1) by assuming that a right of appeal is conferred by that provision. This is in addition to the objection that Section 10 (1) in terms does not apply to a right of appeal against an order passed by a single Judge while exercising writ jurisdiction.

5. The appellant referred to Section 141 of the Code of Civil Procedure and Rule 19, Chapter I of the Delhi High Court (Original Side) Rules, 1967. Both these provisions applied the procedure of the Code in regard to all proceedings in any Court of civil jurisdiction. Rule 19 made particular reference to the proceedings on original side in Delhi High Court. An argument was founded that an order in the nature of interim injunction granted by the learned single Judge was an order appealable under Order 43 Rule 1 of the Code of Civil Procedure and since the provision of the Code is applicable in writ jurisdiction a right of appeal shall accrue against that order. A reading of Section 141 makes it clear that only provisions as to procedure apply to all proceedings in any Court of civil jurisdiction. There may not be any dispute to hold that

while exercising writ jurisdiction the Court engages in a proceeding of civil jurisdiction. In that connection reference can be made to *Krishnalal Sadhu v. State of West Bengal* (AIR 1967 Cal 275); *Asst. District Panchayat Officer Rae Bareilly v. Jai Narain Pradhan* (AIR 1967 All 334); *Mall Singh v. Smt. Laksha Kumari Khaitan* (1968 All LJ 210) and *Lalman Gupta v. State of U. P., Lucknow* (1970 All LJ 1879). But the argument still remains that only provisions regarding procedure as contained in the Code shall apply to a proceeding under writ jurisdiction. A right of appeal being a substantive right cannot be held to be a matter of procedure. For a similar reason Rule 19 of the Delhi High Court (Original Side) Rules, 1967 will not apply although it talks of the provisions of the Code of Civil Procedure but then it refers to all proceedings on the original side. In other words Rule 19 is meant for jurisdiction to be exercised under Section 5 (2) of the Delhi High Court Act, 1966. The learned single Judge in the instant case never exercised that category of jurisdiction. This being the position Rule 19 of the Delhi High Court (Original Side) Rules, 1967 will not be of any help to the appellant.

6. The learned Advocate General then called for his assistance clause 10 of the Letters Patent but for that he has to show that the order of the learned single Judge is a 'judgment'. In the *University of Delhi* (AIR 1972 Delhi 102) (FB) (supra) the Full Bench of Delhi High Court was faced to interpret the expression "judgment" although with reference to Section 10 (1) of the Delhi High Court Act, 1966. Their Lordships showed inability and in ultimate analysis held that the facts and circumstances in each case shall determine as to whether the order made by the Court is a 'judgment' within the meaning of Section 10 (1). The controversy is raging right from (1872) 8 Beng LR 433 (*Justices of the Peace for Calcutta v. Oriental Gas Co.*). Their Lordships referred to (1912) ILR 35 Mad 1, AIR 1935 Rang 267 (FB), AIR 1952 Nag 357 (FB), AIR 1954 Mad 1057 (FB), AIR 1953 SC 198 and finally AIR 1963 SC 946. According to their Lordships right up to 1966 when the Delhi High Court Act was passed there was no authoritative pronouncement or precise definition of the term 'judgment' in the Letters Patent. In *Standard Glass Beads Factory v. Shri Dhar*, (AIR 1960 All 692) a Full Bench of that Court was considering the meaning of 'judgment' in clause 10 of the Letters Patent. In that case a learned single Judge of the High Court dismissed an appeal against an order of a subordinate court granting an interim injunction. It was held that the order finally determined the right of a party to a specific temporary relief.

As such it was held to be a 'judgment'. Their Lordships divided 'judgment' in three categories 'final judgment', 'preliminary judgment' and an 'interlocutory judgment'. It was held that the order was at any rate, interlocutory judgment and as such appealable under clause 10 of the Letters Patent. But since then in *Shanti Kumar v. Home Insurance Co. of New York* (AIR 1974 SC 1719) the Supreme Court considered the meaning of 'judgment' under clause 15 of the Bombay Letters Patent and laid down certain tests which in my opinion need be applied in the present case. In finding out whether the order is a 'judgment' within clause 15, observed their Lordships, it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. Their Lordships further held that the right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability. In the present case there has neither been a decision of the action on merit nor determination of some right or liability. The case for interim relief in favour of Ajit Kumar has been ascertained, *prima facie*, and that would not be determination of merit of the action. Although he has been granted a temporary relief, yet determination of some right or liability *qua* Ajit Kumar or the State has not taken place. Therefore, applying the tests laid down by the Supreme Court the order appealed against cannot be considered 'judgment' within clause 10 of the Letters Patent. There can be no dispute that Section 10 (2) of the Delhi High Court Act, 1966 affords ample protection to clause 10 of the Lahore High Court which became applicable to Delhi High Court and is now applicable to Himachal Pradesh High Court. If authority is needed, reference can be made to *Ashok Kumar v. Administrator Himachal Pradesh* (1968 Delhi LT 82). Therefore, Cl. 10 of the Letters Patent is the only relevant provision under which an appeal could be filed. The order of the learned single Judge does not amount to 'judgment' within the meaning of that clause. As such the appeal is not maintainable.

7. In fact the present dispute is a covered matter so far as this Court is concerned. A Division Bench of this Court has held in *Dharam Vir Puri v. State of H. P.* (ILR (1972) Him Pra 301) that no appeal lies from an order of a learned single Judge vacating the interim order maintaining the status quo which in other words is nothing but an order refusing temporary injunction. A Full Bench decision of Delhi High Court *Begum Aftab Zamani v. Lal Chand Khanna* (1969 Delhi LT 15) = (AIR 1969 Delhi 85) (FB) was

referred to and it was held that the order never amounted to 'judgment' within the meaning of clause 10. In my opinion, therefore, the decision in *Dharam Vir Puri* (supra) applies and so far as this Court is concerned it has been decided that no appeal lies against the impugned order.

8. The learned Advocate General also contended that the petition for appeal can be considered a review under Order 47 Rule 1. But the difficulty is that a review petition is required to be filed in a prescribed manner and the provisions of the High Court Rules and Orders have not been followed and besides all that, the review petition is maintainable before the very same Judge who has made the order. Therefore, the petition of appeal cannot be converted into a petition of review and no relief can be granted to the State on that ground.

9. It was also contended by the respondent that the required copies of the documents were not filed along with the appeal and as such Rule 3 of Part C Chapter 2-C, Volume V of the Rules and Orders of the Punjab High Court was not complied with. On the basis of *Bikram Dass v. Financial Commissioner, Revenue, Punjab, Chandigarh* (AIR 1975 Punjab and Har 1 (FB)) it was contended that the appeal is not maintainable as a mandatory provision has been disregarded. But in that very decision it was held that the delay can be condoned under Section 5 of the Limitation Act. The learned Advocate General has filed an application under Section 5 of the Limitation Act and on the basis of the averments made the delay, if any, in filing the appeal can be condoned. Moreover, it is not even necessary to decide as to whether the afore-mentioned rule is mandatory or as to whether the appeal will be incompetent as the required documents were not filed along with it. As the appeal is being dismissed on another ground, it may not be necessary to decide this point of dispute.

10. It was also contended on behalf of the respondent that necessary parties were not made parties in the appeal and as such the appeal has to fail on that ground. It is, however, not pointed out as to which party was left out and could be considered necessary for entertaining the appeal. As such this plea is not substantiated.

11. In view of what I have stated above, the present appeal is not maintainable and the same is rejected. No order is made as to costs.

R. S. PATHAK, C. J.:— 12. I have perused the judgment of D. B. Lal, J. while agreeing with him that the present appeal is not maintainable I am unable, with respect to

subscribe to all the reasons on which he has based his judgment. I shall set out the reasons which have prevailed with me.

13. The question whether this appeal is maintainable can be disposed of shortly.

14. The learned Advocate General says that the appeal lies under Section 10 (1) of the Delhi High Court Act. Section 10 (1) does not apply because it contemplates an appeal from the judgment of a single Judge exercising the ordinary original civil jurisdiction conferred by Section 5 (2) of the Act. In *Asa Singh Kochhar v. Darshan Singh Kochhar* (FAO No. 32 of 1974 (Him Pra)) I have taken the view that while Section 10 (1) provides a right of appeal as well as the forum of appeal, the appeal must be from a "judgment" in the sense of that expression in Clause 10 of the Letters Patent, that is to say it must be a decree disposing of a suit or an order which has the effect of determining any rights in controversy between the parties. *Asrumati Debi v. Kumar Rupendra Deb*, (AIR 1953 SC 198) and *Shanti Kumar v. Home Insurance Co.* (New York AIR 1974 SC 1719). The interim order made by the learned Single Judge against which the present appeal has been preferred does not dispose of the suit and cannot be said to determine any rights in controversy between the parties. By such an order the Court merely provided for a temporary equilibrium between the parties pending the determination of the respondent's rights in controversy in the writ petition. Besides, Section 10 (1) of the Delhi High Court Act can be availed of, as its language indicates only where a single Judge has exercised the jurisdiction conferred by Section 5 (2). That jurisdiction is a jurisdiction enacted by statute. It is not the constitutional jurisdiction conferred by Article 226 of the Constitution which has been invoked by the respondent.

15. In the alternative, reliance was placed by the learned Advocate General on clause 10 of the Letters Patent, but inasmuch as the expression "judgment" in that clause means what it does as mentioned above, no assistance can be derived by him from that provision.

16. The learned Advocate General then rests this appeal on Section 141 of the Code of Civil Procedure and also relies on Rule 19 of Chapter I of the Delhi High Court (Original Side) Rules, 1967. I may reiterate what I have already said in *Asa Singh Kochhar* (supra) (FAO No. 32 of 1974 (Him Pra)) that neither Section 141 of the Code nor Rule 19 of the aforesaid Rules relate to anything more than the practice and procedure of the court. They cannot be employed for spelling out a substantive right of appeal.

17. It is also not possible to accept the contention of the learned Advocate General that the present appeal should be treated as a review application. The principles applicable to the exercise of that jurisdiction are well settled. If the appellant intended to apply for review of the interim order, that application should have been made to the learned single Judge who passed that order.

18. I am clearly of the opinion that the present appeal is incompetent.

19. The appeal is rejected, but in the circumstances, there is no order as to costs.

Appeal dismissed.

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R. S. PATHAK C. J.

Dhyan Singh Petitioner v. Director of Consolidation, H. P. Simla and others, Respondents.

C. W. P. No. 8 of 1974 D/- 28-10-1975.

(A) Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act (1971), Section 54 — Petition for reservation of Khasra for Abadi — Petitioner absent at the hearing — Proper course is to dismiss the petition for absence of petitioner — Disposal on merits is illegal. AIR 1970 Bom 132 Rel. on. (Para 3)

(B) Interpretation of Statutes — Absence of procedure for conduct of judicial or quasi judicial proceedings — Authority entitled to adopt a reasonable procedure — Once a procedure is adopted all necessary incidents thereof will be attracted — Procedure adopted requiring hearing of applicant — Applicant can claim hearing as of right. AIR 1957 Mys 12 and AIR 1968 Mys 251 Dist. ((1) Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act (1971), Sec. 54). ((2) Constitution of India, Article 226 — Natural Justice). (Para 4)

(C) Civil P. C. (1908), Order 9, Rule 9 — Restoration — Application under Himachal Pradesh (Consolidation and Prevention of Fragmentation) Act — Authority empowered to dismiss revision in default — Right to apply for restoration implied ex debito justitiae — (Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act (1971), Section 54).

Even if there be no provision in the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act for an application for restoration of revision petition dismissed in default, if there is power in the Director to dismiss a revision petition in de-

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be adjudicated upon. I am fortified in my view by a very recent pronouncement of their Lordships of the Supreme Court in *State of Orissa v. Khageshwar Dass* AIR 1975 SC 1906, wherein their Lordships have very elaborately explained the implications of Article 359 of the Constitution of India and the Presidential Order issued thereunder by observing:

"The judgment of the High Court was handed down on the 30th November, 1972, long before the issuance of the notification dated 28th June, 1975, by the President of India under Article 359 (1) of the Constitution. The rule was declared ultra vires on the ground of violation of Articles 14 and 16. The State of Orissa was the appellant before us. It was, therefore, agreed on all hands that this appeal was not proceeding pending in this court for the enforcement of the right under Article 14 of the Constitution of India and was, therefore not suspended. The enforcement of the right was made by the delivery of the High Court judgment and State merely wanted in this appeal a decision of enforcement." (emphasis mine)

In the light of the above reasoning, it would appear that the case of the defendants in the present case can easily be equated with the case of the respondent in the above given example and following the law laid down in *Khageshwar Dass* case (Supra) I would hold that the argument raised by the defendant is devoid of any merit and the proceedings in the suit do not require to be stayed as the plaintiff's case is that the Act is not ultra vires the Constitution as opposed to the defendants' plea.

45. Even otherwise, if the effect of the Presidential order was to stay all the proceedings in which any plea based on Articles 14, 21, or 22 of the Constitution of India was raised, irrespective of the fact whether the plea was for the enforcement of the specified fundamental right or not and its consideration was or was not necessary for effective adjudication of the dispute, flood gates of frivolous pleas based on Articles 14, 21 or 22 of the Constitution would be open to persons who are interested in delaying the disposal of the proceedings pending against them. Unscrupulous defendant or respondent in any claim would put up the plea of the Act under which the plaintiff appellant or the petitioner seeks relief to be ultra vires of a specified fundamental right and thereby frustrate the proceedings and delay adjudication. Under the Presidential order only such proceedings which seek the

"enforcement of the rights....." (pending or fresh) have been barred and which have to remain suspended during the period when the Presidential order is in force. The court shall have to examine the plea put forward before deciding whether the proceedings have to remain suspended or not. While considering the question as to what proceedings have to remain suspended the courts will have to see whether or not those proceedings involve the "enforcement of the right....." If the court finds that the proceedings do not involve the "enforcement of right....." those proceedings have not to be stayed. If the court comes to the conclusion that the proceedings are in fact for the enforcement of the fundamental right, it shall suspend those proceedings which may be revived only after the Presidential Order either expires or is revoked. If on the other hand the court finds that directly the proceedings do not involve the enforcement of the fundamental rights but the proceedings involve the consideration of violation of the specified articles of the Constitution, then it shall at the same time determine whether the claim can be effectively adjudicated upon without examining the plea based on the contravention of the specified articles of the Constitution. If the court comes to the conclusion that the claim of the parties can be effectively adjudicated upon without going into that plea, the court shall not suspend those proceedings, otherwise it shall.

46. I have already held above that the controversy between the parties can be effectively adjudicated upon without taking into consideration the plea put forward by the defendant about the constitutional validity of the Rent Act, since that is only one of the defence pleas, the proceedings in the suit under consideration do not therefore, come within the mischief of the Presidential Order and do not require to be stayed. The learned Single Judge can adjudicate the claim of the plaintiff in the light of the various other pleas raised by the defendants without taking into consideration the plea about the constitutional validity of the Rent Act, since, during the period the Presidential order is in force, the defendant has got no locus standi either to initiate or continue a challenge based on the contravention of Article 14 of the Constitution. Such a plea about the Constitutional validity will have to be ruled out of consideration being incompetent.

47. After giving my careful consideration to the facts and circumstances

of the case in the light of the above discussion, I am of the opinion, that the proceedings in the present suit do not require to be kept in a state of suspension during the period when the Presidential Order is in force and the plea raised by the defendant about the constitutionality of the Rent Act, based as it is on the violation of Article 14, will have to be rejected as incompetent and the suit would proceed without taking into consideration the plea raised by the defendants. No difficulty would be occasioned since that plea is only one of the pleas raised by the defendants and a judgment can be delivered on the basis of the other pleas raised by the defendants. The application, in my opinion, merits dismissal and I would dismiss the same but without any order as to costs.

PER FULL COURT

48. In accordance with the opinion of the majority, the application for stay is dismissed. The case will now go back to the learned Single Judge for holding further proceedings on a date to be fixed by the Deputy Registrar.

Order accordingly.

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DR. A. S. ANAND, J.

(On difference of opinion between MIAN JALAL-UD-DIN AND MUFTI, JJ.)

B. K. Thapper and another, Petitioners v. Vijay Kumar and another, Respondents.

Petition No. 20 of 1975, D/- 15-1-1976.*

(A) Constitution of India, Arts. 132, 133 — Ejectment suit — Question raised as to constitutionality of provision of Rent Control Act and effect of its decision on the suit — Presidential order under Article 359 during suit — Application by defendants for suspension of proceedings — Application refused, holding that suit could be decided minus issue as to constitutionality of impugned provision — Leave to appeal to Supreme Court from that decision — Decision held not appealable under Art. 132 or 133 — Decision did not involve question as to interpretation of any provision of Constitution.

*(Petition under Arts. 132 and 133 of Constitution of India for leave to appeal in the Supreme Court against Full Bench Judgment of this Court reported in AIR 1976 J & K 51 (FB).)

CT/CT/A745/76/VBB

In a suit for ejectment brought by the respondents against the petitioners before a Single Judge the issue arose: Whether Section 1 (3) (iii) of Jammu and Kashmir Houses, and Shops Rent Control Act of 1966 was ultra vires of the Constitution and if so, what was its effect on the suit. During the pendency of the suit the President issued an order under Article 359 (1) of the Constitution suspending the operation of Arts. 14, 21 and 22 of the Constitution. As a result of this an application was moved before the Single Judge by the defendant (petitioner), for suspension of the proceedings. The Judge was of the opinion that the point raised was an important question of law of general importance. He, therefore, referred the question to the Full Bench. The Full Bench expressed the opinion that pending proceedings could not be suspended and the suit could be decided minus the issue raised relating to the constitutionality of the impugned provision of law. Against this judgment of the Full Court, leave to appeal to the Supreme Court was sought by the defendant (petitioner).

Held by Dr. A. S. Anand, J. (agreeing with Mufti J. and dissenting from Mian-Jalal-Ud-Din, J.) that the decision of the F. B. in question was not appealable to the Supreme Court either under Art. 132 or under Art. 133. (Paras 28, 30)

The Full Bench was only called upon to interpret the effect of the Presidential Order issued under Art. 359 (1) of the Constitution and of no specific provision of the Constitution of India as such. It cannot therefore be said that the "case" involved any substantial question of law as to the interpretation of the Constitution. The so-called substantial question of law relating to the interpretation of Art. 359 of the Constitution would be an entirely new question which was raised for the first time at the hearing of the petition for a certificate. Such an application could not be entertained. Even otherwise interpretation of Art. 359 of the Constitution has been finally settled by the Supreme Court of India in numerous pronouncements. A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by the Supreme Court. Even the interpretation of the Presidential order which was the sole question before the Full Bench had been authoritatively settled by the Supreme Court. No certificate could therefore, be granted to the petitioners-defendants under Art. 132 of the Constitution of India. (Para 29)

1976 B. K. Thapper v. Vijay Kumar (M. Jalal-ud-din J.) [Prs. 1-4] J. & K. 67

Cases Referred : Chronological Paras

AIR 1976 J & K 30 = 1975 J & K LR 121	21
AIR 1975 SC 1906 = 1975 Lab IC 1446 (1975) Decision of Supreme Court D/- 15-4-1975	29 21
AIR 1975 Delhi 77 = ILR (1973) 2 Delhi 673 (FB)	5
AIR 1970 SC 1168 = (1969) 2 SCR 699	5, 8, 16
AIR 1968 SC 733 = 1968 Cri LJ 876	16
AIR 1968 SC 765 = 1968 Cri LJ 972 = 1968 Lab IC 872	29
AIR 1966 SC 740 = 1966 Cri LJ 608	29
AIR 1964 SC 381 = (1964) 1 Cri LJ 269	29
AIR 1960 SC 356 = (1960) 2 SCR 346	29
AIR 1950 Mad 284 = (1949) 2 Mad LJ 694	21
AIR 1949 All 632 = 50 Cri LJ 958	29
I. D. Grover, for Petitioners; S. P. Gupta, for Respondents.	

MIAN JALAL-UD-DIN, J.:— This is an application under Articles 132 & 133 of the Constitution of India for leave to appeal to the Supreme Court against the judgment of this Court dt. 29.12.75.*

2. In a suit for ejectment brought by the respondents against the petitioners the following agreed issue was framed by the learned Single Judge:

"Whether the provisions of Section 1 (3) (iii) of Jammu and Kashmir Houses and Shops Rent Control Act of 1966 are ultra vires of the Constitution; if so, what is its effect on the present suit?"

3. During the pendency of the suit the President issued an order under Article 359 (1) of the Constitution suspending the operation of Arts. 14, 21 and 22 of Constitution. According to the said order all the pending proceedings in which right for the enforcement of any of the Articles specified therein is claimed have to remain suspended during the operation of the order. As a result of this an application was moved before the learned Single Judge by the defendants for suspension of the proceedings. The learned Judge was of the opinion that the point raised was an important question of law of general importance which has far-reaching implications in the sense that the decision bearing on the application would affect a large number of pending cases, he, therefore, referred the following question to the Full Bench:

"What is the effect of the Presidential Order issued under Article 359 (1) on pending proceedings particularly suits, writ petitions and appeals involving pleas

based on any Article mentioned in the order as ground of claim or defence, alone or in conjunction with other grounds?"

The Full Bench by majority judgment pronounced on the question that pending proceedings could not be suspended and the suit could be decided minus the issue raised relating to the constitutionality of the impugned provision of law. The minority judgment dissented from the majority view and held that the Presidential Order affected the pending proceedings and the true effect of the Order is that all pending proceedings in which any of the rights specified in the order is claimed either by way of attack or defence have to be stayed till the enforcement of the order. Against this judgment delivered by the Full Court leave to appeal to the Supreme Court is being sought by the defendant.

4. Mr. I. D. Grover appearing for the defendants has submitted that the question decided by the Full Bench has far-reaching implications and is going to affect a large number of pending cases and it also raises an important and substantial question of law of general importance as to the interpretation of the Constitution. He has further submitted that the learned Single Judge who made reference to the Full Court was himself of the opinion that the matter raised before him was of general importance which had bearing on a large number of cases. He has urged that the Presidential order or for the matter of that Article 14 of the Constitution makes no difference whether the right is sought to be enforced by way of claim or by way of defence. It is a right available to a citizen in appropriate proceedings. Even in the majority judgment, it is argued, there is divergence of view expressed on construction of the Order of the President. According to one view right under Article 14 could not be enforced at all during the operation of the order either by way of claim or defence and that the plea raised must be held as incompetent and suit tried minus the plea raised. The view has been enunciated on the principle that a party be he plaintiff or defendant loses locus standi to raise the plea in all proceedings be they fresh or pending. According to the other view the order affects only such pending proceedings in which right under Art. 14 is sought to be enforced only by way of claim and not by way of defence can be suspended. In other words pending proceeding in which right is sought to be enforced by way of claim will remain stayed but, if

*Reported in AIR 1976 J & K 51 (FB).

the right is claimed by way of defence that right will not survive and the plea raised in defence must be dismissed as incompetent. It is, therefore, all the more necessary that the matter should go to the Supreme Court for an authoritative pronouncement on the question. Leave, it is requested may, therefore, be granted.

5. Shri S. P. Gupta the learned counsel for the plaintiff has, on the other hand, vehemently opposed this application. He has raised two fold arguments; (1) that the order of the Full Bench is neither a 'judgment' nor a 'final order' within the meaning of Articles 132 and 133 of the Constitution of India and therefore, leave cannot be granted. According to the learned counsel the order is only an interlocutory order, a mere expression of opinion of the court on a question referred to it for decision. The order does not finally adjudicate upon the rights of the parties in the case. No issue has been decided in which rights of the parties have been finally determined. The suit has to go back to the learned Single Judge for trial. Reliance is placed on AIR 1970 SC 1168, AIR 1975 Delhi 77 (FB), and AIR 1965 All 457.

6. The learned counsel has further urged that the order passed by the Full Bench does not in any way raise a question of general importance and it has got no bearing on the interpretation of Constitution. Therefore, the requirements of the above mentioned Articles are not satisfied. The court may for these reasons decline to grant leave to the defendants to file appeal in the Supreme Court.

7. I have given my anxious consideration to the matter raised before us.

8. It is true that their Lordships of the Supreme Court in AIR 1970 SC 1168 (supra) have construed the expression 'final order' occurring in Article 133 (1) to mean a final decision on the rights of the parties in dispute in a suit or proceeding, and if the rights of the parties in dispute in a suit or proceeding remain to be tried, after the order, the order has been held not to be a final order. Therefore, an order which does not finally decide the rights of the parties in dispute has been held not to be a final order. The Delhi High Court has also enunciated the same view following the observations made by their Lordships of the Supreme Court. But the view has been laid down in the aforesaid judgment in respect of an application made under Article 133 (1) and not under Article 132. The petitioners in the present case claim leave to appeal both under Articles 132 and 133 of the

Constitution of India. Their application may not be competent under Article 133 but in so far as Article 132 is concerned it has wider scope as it explains the expression 'final order' to include an order deciding an issue which if decided in favour of the appellant, would be sufficient for the final disposal of the case. The explanation has been added only for the purpose of this Article. It is, therefore, clear that this has enlarged the scope of the Article in so far as its application to the final order is concerned.

9. In my view the order passed by the Full Bench has virtually decided the issue of the constitutionality of the impugned provision of law which is germane to the case. The order of the Full Bench has practically shut out the material defence of the defendants relating to the vires of Section 1 (3) (iii) of the Rent Control Act. If the Full Bench had decided the question in favour of the petitioners that the plea of the defendants could not be dismissed as incompetent and the right to claim enforcement of Article 14 survived and could be revived after the revocation of the Presidential Order, then the position would be different for in that event if the defendants successfully established the constitutionality of the impugned law, the issue would be decided in their favour and in that case the defendants could successfully claim protection of the Rent Control Act by virtue of their being statutory tenants and this would be sufficient for the final disposal of the case. The effect of the decision of the Full Bench, on the other hand, is that it has to all intents and purposes practically decided the material issue germane to the case itself.

10. In my view the said order therefore, comes within the purview of the explanation appended to Article 132 of the Constitution.

11. Again, there can be no denying the fact that the question decided by the Full Bench is of substantial importance as also of general importance. This has bearing on a large number of pending cases. The judgment has decided an important issue relating to the interpretation and the applicability of Art. 14 of the Constitution.

12. Again, the matter needs to be decided by the Supreme Court because there is divergence of view expressed in the two majority judgments in respect of the application of Article 14 and the Presidential Order with reference to pending cases as pointed out by the learned coun-

sel for the defendants. There is no unanimity in the view that all the pending proceedings in which right under Article 14 is claimed must continue regardless of the fact whether the right is grounded by way of claim or defence. There is thus no positive guideline laid down unanimously in the judgment for the courts to follow. The matter having been heard by the Full Bench on reference no further appeal can lie to this Court and the party aggrieved also can have no right of appeal in the court. Therefore, for an effective decision and for an authoritative pronouncement by the Supreme Court on a question of general importance, leave must be granted to the petitioners.

13. For the foregoing reasons I would, therefore, allow the application and grant the defendants leave to file appeal in the Supreme Court within the prescribed time.

14. As regards, the prayer for stay of the proceedings the question is left to the learned Single Judge for his consideration. He will pass appropriate orders thereon according to his discretion.

MUFTI, J.:— 15. This petition must be dismissed on the short ground that the decision of the Full Bench dt. 29.12.75* is not appealable to the Supreme Court under Article 132 or under Article 133 of the Constitution of India.

16. The law is well settled that each one of the expressions 'judgment', 'decree' and 'final order' occurring in Article 133 (1) of the Constitution bear the same connotation viz. that there is a final adjudication of the rights of the parties in relation to the whole suit or proceeding. (See AIR 1968 SC 733; AIR 1970 SC 1168).

17. The decision of this court dated 29-12-75* finally disposes of the proceeding for the stay of the trial of the suit. The proceeding followed the promulgation of the Presidential order dated 27.6.75 under Article 359 (1) of the Constitution on the application of the defendants who claimed that, in accordance with the said order, the trial of the suit was liable to be stayed and sought a direction to that effect. The plaintiffs resisted the application. The question naturally arose whether the trial of the suit was liable to be stayed under the Presidential order. By its decision dated 29.12.75* this court, by a majority, dismissed the application holding that the Presidential order did not warrant the stay of the trial of the

suit. Thus the decision finally disposes of the question of stay of the trial of the suit and not the suit itself. The suit is still alive and has got to be tried and disposed of on merits. The decision merely decides a point which incidentally arose in the suit. It does not determine the rights, and obligations of the parties in relation to the matters in dispute in the suit. That being so, the decision cannot be deemed to be a 'judgment, decree or final order' for purposes of Article 133 (1) of the Constitution, as also held by my learned brother Mian Jalal-ud-Din J.

18. On a parity of reasoning the decision of this court cannot also be held to fall within the purview of the expression "judgment, decree or final order" occurring in Article 132 unless it is covered by the explanation appended at the end of this Article in these words:

"For purposes of this Article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case."

19. Dwelling on this aspect of the matter the learned counsel for the defendants argued that the majority judgment had virtually decided issue No. 6 against the defendants which, if decided in their favour, would be sufficient for the final disposal of the suit, and, so viewed, the decision squarely fell within the purview of Article 132 of the Constitution. My learned brother, Mian Jalal-ud-Din has upheld the argument and held that an appeal would lie to the Supreme Court from the decision in question under Article 132 of the Constitution. With utmost respect I venture to say that this view is not correct.

20. The effect of the decision no doubt is that challenge to Section 1 (3) (iii) of the Jammu and Kashmir Houses and Shops Rent Control Act must be dismissed as incompetent and that way the court may have virtually decided the question of vires of that section against the defendants but, so doing, the court has merely disposed of first part of issue No. 6 which reads:

"Whether the provisions of Sec. 1 (3) (iii) of the Jammu and Kashmir Houses and Shops Rent Control Act are ultra vires of the Constitution?"

The second part of this issue providing:

"If so, what is its effect on the present suit" still remains and so also the other issues raised in the suit which have got to be tried decided on their merits before the suit can be finally disposed of by this court.

*Reported in AIR 1976 J & K 51 (FB).

21. It will not be correct to assume, as the argument of the learned counsel suggests, that if the impugned provision was held to be bad, then, what follows is that the defendants would successfully claim protection of Jammu and Kashmir Houses and Shops Rent Control Act, particularly so, having regard to the following observations made by me in my order dated 10th January, 1975 = (AIR 1976 J & K 30) regarding appointment of a Receiver, an order which was confirmed in appeal by the Supreme Court by its order dated 15.4.1975.

"Leave that alone, there is a more strong impediment in accepting the case of the defendants based on statutory tenancy. That impediment lies in Sec. 2 (5) of the Houses and Shops Rent Control Act, 1966. That Section reads:

"Shop" means a building or a part of a building suitable for occupation as such and includes a piece of land, with or without structure let for the purpose of being used principally for business or trade;" By virtue of Notification No. 193 of 1961 dated 24-5-1961 issued under the second proviso to S. 1 (3) of Jammu and Kashmir Houses and Shops Rent Control Act, 2009, the Government was pleased to direct that the said Act shall apply to the buildings let for the purpose of any trade or business or use for any industrial or commercial purpose in any area in which the said Act was in force and any such building shall be construed as a 'shop' within the meaning of the said Act. That Act was repealed by the J & K Houses and Shops Rent Control Ordinance, 1966 which however continued the notifications issued under the previous Act by virtue of Section 34 (2) thereof as if such notifications were issued under the Ordinance. A similar provision appeared in the Act replacing the Ordinance styled as the J & K Houses and Shops Rent Control Act, 1966. The notification must therefore, be read as one issued under the existing Act namely J & K Houses and Shops Rent Control Act, 1966. In accordance with the said notification any building let for commercial purposes must be construed as a 'shop' within the meaning of the said Act.

In the present case what was demised to the defendants is described in clause 1 of the lease deed dated 12th December, 1966 which says:

"The lessors granted and the lessees as joint tenants accepted a lease of the property known as Hari Talkies, situated at Raghunath Bazar Jammu, consisting

of a Cinema Hall with its premises consisting of structures, fixtures and chobara in fit and perfect condition in accordance with the Cinematograph Act and Municipal Bye-Laws for the purpose of a licence, along with the Cine Machine, electric fittings, fans and furniture in perfect order the list of which is attached as Annexure A for the sole purpose of running the cinema business for the years from 1st October, 1964 at a monthly rent of Rs. 4100/- (Rs. four thousand and one hundred only) payable in advance on the tenth of each month at the Dharmarth chest, Jammu or at such place as the lessor may instruct in this behalf."

Thus the lease was a composite lease of cinema premises and the talkie equipment including machinery, fittings and furniture and not a lease of a mere building or building with land and structures or the like covered by the definition of 'shop' in the said Act. On a parity of reasoning it was held in *S. Raja Chetty v. Jagannathadas Govindas*, (AIR 1950 Madras 284) that the lease of land and building together with fixtures, talkie equipment machinery and other articles is not the lease of mere building or the building with mere furniture of the sort covered by the definition of the 'building' under S. 2 of the Madras Buildings (Lease and Rent Control) Act, 1946. In that case there was a provision in the deed which split up the monthly rent and hire of Rs. 3200/- into Rs. 1600 being rent for the ground and superstructure, Rs. 800/- being hire of furniture and Rs. 800/- being hire of talkie equipment machinery and fixtures, but the court held it was extremely artificial and not to effect a division of lease, into two separate contracts, namely one of the rent of the building and the other of hire of the furniture so as to make the provisions of the Act applicable. Here the position is even worse. No separate provision has been made for hire and rent. The amount payable by the lessee represents a gross amount in lieu of both rent and hire. It was stated that the machinery and equipment were purchased by the defendant when they took the lease for the first time in 1954 and the property therein could not be treated to have passed to the lessor when he demised it along with the premises in the year 1964. There is no evidence on the file so far to justify the conclusion that the machinery and equipment were purchased by the defendants or in any case that property therein had not passed to the lessor when he demised it in the year

1964. That evidence may come in the course of trial. But presently no case can be found in favour of defendants on that plea."

22. Accordingly if by virtue of the decision in question this court has found that challenge to Section 1 (3) (iii) is incompetent, it cannot be said that the court has decided issue No. 6 in its entirety or even that it has decided a part of an issue which, if decided in favour of the defendants would finally dispose of the suit.

23. Again it must be remembered that the question involved in the suit is whether the defendants-lessees surrendered the possession at the expiry of the period of the lease and, alternatively, whether they are liable to be ejected and not merely whether they are liable to be ejected. So, even if it were assumed that this court has decided issue No. 6 in its entirety against the defendants, it cannot be said that the court has decided an issue which, if decided in favour of the defendants, would finally dispose of the suit.

24. Viewed from any angle, therefore, the decision in question cannot be held to fall within the purview of the explanation to Article 132 and I hold so. In that view the decision cannot be deemed to be 'judgment, decree or final order' for purposes of Article 132.

25. Apart from this there is another formidable obstacle in the way of the defendants under Article 132. It is this. The case does not directly involve interpretation of any provisions of the Constitution. The question before the Full Bench was: what was the effect of the Presidential order on the pending actions? So viewed, the question directly involved was the interpretation of the Presidential Order. That may have incidentally raised question as regards the interpretation of some provision of the Constitution but that is not enough for purposes of Article 132 which, I think, requires that the case should directly involve the interpretation of some particular provision of the Constitution.

26. In these circumstances I am of the opinion that the decision in question is not appealable to the Supreme Court either under Art. 132 or under Art. 133. Accordingly the question of giving any certificate under these Articles does not arise. No doubt, the decision pertains to an important question of law of general importance but that requirement, by itself, is not sufficient to entitle a party to get certificate for leave to appeal, as I

thought it to be, when, simultaneously with the filing of the petition for leave to appeal to the Supreme Court, the matter was briefly argued before us.

27. The result is that the petition is dismissed but there will be no order as to costs.

(In view of difference of opinion between Mian Jalal-ud-Din and Mufti Baha-ud-Din Farooqi JJ., the matter was placed before Dr. Anand J. who delivered the following Judgment).

Dr. ANAND, J.:— 28. I have had the advantage of going through the orders prepared by my learned brothers Mian Jalal-ud-Din J. and Mufti Baha-ud-Din Farooqi J. I respectfully agree with the reasonings and conclusions arrived at by my learned brother Mufti Baha-ud-Din Farooqi J. and respectfully accord my dissent from the reasonings and the conclusions arrived at by my learned brother Mian Jalal-ud-Din J. However, I would like to add a few words of my own.

29. Under Article 132 of the Constitution of India an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution. Thus, one of basic requirements which must be satisfied before the High Court can issue the certificate is that the 'case' involves a substantial question of law as to the interpretation of the Constitution. In the application of the petitioners-defendants, for the stay of the proceedings which had come up before the Full Bench, no question with regard to the interpretation of any provision of the Constitution was taken up nor was any such question canvassed at the time of the hearing of that application by the Full Bench. The Full Bench did not dwell on the interpretation of any provision of the Constitution other than what was necessary for interpreting the Presidential Order. The Full Bench was only called upon to interpret the effect of the Presidential Order issued under Art. 359 (1) of the Constitution and of no specific provision of the Constitution of India as such. In my opinion under these circumstances when the question of interpretation of the Constitution was not involved in the application of the defendants which was disposed of by the Full Bench, it cannot be said that the "case" involves any substan-

tial question of law as to the interpretation of the Constitution. In the application of the petitioners for the grant of certificate under Article 132 of the Constitution it has been pleaded that the case involves interpretation of Article 359 of the Constitution. I do not think that any interpretation of Article 359 of the Constitution of India is involved in the present case. Moreover, the interpretation of Article 359 of the Constitution of India which is sought to be raised before the Supreme Court was never raised in the stay application which was disposed of by the Full Bench. The so-called substantial question of law relating to the interpretation of Article 359 of the Constitution of India would, therefore, be an entirely new question which is raised for the first time at the hearing of the petition for a certificate of fitness to file an appeal in the Supreme Court. Such an application cannot be entertained. Reference in this connection may be made with advantage to AIR 1949 All. 632, wherein on a parity of reasoning such a certificate was refused under Section 205 of the Government of India Act, 1935, which section in all its essentials is akin to Article 132 (1) of the Constitution of India. Even otherwise interpretation of Article 359 of the Constitution of India has been finally settled by the Supreme Court of India in numerous pronouncements. (See AIR 1964 SC 381, AIR 1966 SC 740, AIR 1968 SC 765 etc). A substantial question of law, therefore, cannot arise where that law has been finally and authoritatively decided by the Supreme Court (Reference may be made to AIR 1960 SC 356 in this connection). Even the interpretation of the Presidential order which was the sole question before the Full Bench has been authoritatively settled by the Supreme Court in AIR 1975 SC 1906 to which I have made a reference in my judgment in the Full Bench. No certificate can, therefore, be granted to the petitioners-defendants under Article 132 of the Constitution of India.

30. In view of the above discussion I agree with my learned brother Mufti Baha-ud-Din Farooqi J. that the decision of the Full Bench in question is not appealable to the Supreme Court either under Article 132 or under Article 133 of the Constitution of India and I would accordingly refuse the grant of the certificate to the petitioners-defendants. The petition, therefore, deserves to be dismissed but without any order as to costs and I hereby do so.

BY FULL COURT

31. In view of the Majority Judgment certificate to file appeal to the Supreme Court cannot be granted. The petition is, therefore, dismissed. There will be, however, no order as to costs.

Petition dismissed.

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JASWANT SINGH, C. J.

Abdul Ghani Daga, Applicant v. Mahant Ram Saran and others, Respondents.

Civil Revn. No. 82 of 1974, D/- 12-8-1975.

(A) Civil P. C. (1908), O. 39 R. 2 and S. 151 — Decree for possession against tenant — Tenant's relative suing for permanent injunction against execution of decree — Decree not illegal or void — No exceptional circumstances requiring prevention of abuse of process of Court shown — Temporary injunction refused. (Specific Relief Act (1877), Ss. 53 & 56) — (Specific Relief Act (1963), Ss. 37, 38 and 41).

Where execution of a decree for possession was sought to be enjoined by a close relative of unauthorised sub-tenant filing an independent suit therefor, held, that the decree for possession not being prima facie illegal or void and since exercise of the legal rights to execute a decree would not amount to "injury" within the meaning of R. 2 of O. 39 C. P. C. interim injunction restraining execution of the decree could not be granted. AIR 1961 J & K 29; AIR 1956 Madh. B. 75; AIR 1957 Madh. B. 95; AIR 1949 Mad 104; AIR 1973 Mad 258; 1964 MP L. J. (SN) 14 and AIR 1963 Madh Pra 209 Followed. (Paras 18 & 22)

Section 56 of the Specific Relief Act too would not support the grant of interim injunction because by virtue of Section 53 of that Act, Section 56 relates to perpetual injunctions and grant of temporary injunctions were left to be governed by O. 39 of C. P. C. AIR 1923 Lah 144 (2) and Madh LJ 1954 H.C.R. 42 and AIR 1925 Cal 233 Followed. (Para 19)

Section 151 C.P.C. resorted to only in exceptional circumstances to meet the ends of justice and prevent abuse of the process of court too, held, could not be availed of since no such factors were shown to exist in the case. AIR 1955 Andhra 4, AIR 1950 Mad 219; AIR 1962

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S. C. 527 and AIR 1975 Madh Pra 85 Followed. (Paras 25 & 28)

(B) Specific Relief Act (1877), S. 56 (b) — Proceeding pending in a court of co-ordinate or concurrent jurisdiction — Injunction to stay proceeding held could not be issued. (Specific Relief Act (1963), Section 41 (b).)

Court of City Judge, Srinagar and that of the Sub-Judge (CJM) Srinagar being courts of concurrent jurisdiction, the former Court could not, by reason of Section 56 (b) of the Specific Relief Act, 1877, issue an injunction to the latter staying a proceeding pending disposal before it. AIR 1951 Pepsu 78 Followed.

(Paras 20 & 21)

(C) Civil P. C. (1908), S. 11 — Res judicata — Principles not applicable to findings in interim orders — Yet a second application, the relief and the grounds of which are similar to those in the prior unsuccessful application, held could not lie. AIR 1964 SC 993 Followed.

(Para 29)

Cases Referred : Chronological Paras

AIR 1975 Madh Pra 85 = 1975 Jab LJ 140	14, 24
AIR 1973 Mad 258 = (1973) 1 Mad LJ 128	12, 18
1972 Jab LJ (SN) 104	16
1967 MPLJ (SN) 111	15
AIR 1964 SC 993 = (1964) 5 SCR 946	29
1964 MPLJ (SN) 14	13
AIR 1963 Madh Pra 209 = 1963 Jab LJ 65	27
1963 MPLJ (SN) 24	15
AIR 1962 SC 527 = 1962 Supp (1) SCR 450	23
AIR 1961 J & K 29	12, 18
AIR 1957 Madh B 95 = 1956 Madh BLJ 442	12, 18
AIR 1956 Madh B 75 = Madh BLJ 1955 HCR 1875	12, 18
1956 MPLJ (SN) 14	17
AIR 1955 Andhra 4 = 1954-2 Mad LJ (Andh) 154	23
Madh BLJ 1954 HCR 42	19
AIR 1951 Pepsu 78 = 3 Pepsu LR 214	20
AIR 1950 Mad 219 = 1949-2 Mad LJ 645	23
AIR 1949 Mad 104 = (1948) 2 Mad LJ 188	12, 18
AIR 1925 Cal 233 = 81 Ind Cas 2	19
AIR 1923 Lah 144 (2) = 73 Ind Cas 909	19

S. L. Kaul, for Applicant; M. R. Sunder Lal, for Respondents.

ORDER:— This application which seeks revision of an order dated November 14, 1974, of the City Judge Srinagar, refusing to stay the execution of the

decree dated April 5, 1975, passed by the Sub Judge (CJM) Srinagar, arises in the following circumstances:

2. Mahant Ram Saran Das, respondent No. 1 herein, and a few others, trustees of the Asthanpan Sri Chander Chinar, Kothi Bagh, Residency Road, Srinagar, brought a suit on March 19, 1959, in the court of the Sub-Judge (CJM), Srinagar, for ejectment of Abdul Ghani Farash, respondent No. 2 herein, and Abdul Gaffar Khan son of Ahmed Khan resident of Ikhray Pura, Lalmandi Srinagar, and of Mohd. Sidiq Soofi betel vendor, Residency Road, Srinagar from an area measuring 915 sq. ft. situate in Kothi Bagh, Residency Road, Srinagar, and for recovery of Rupees 105/- on account of rent and Rs. 110/- by way of damages for use and occupation of the said property and for a declaration to the effect that the Malba lying thereon belongs to the Asthanapan and the defendants had no right to interfere with the same as also for an injunction restraining the defendants from raising any new construction on the suit property.

3. The case of the said plaintiffs was that the defendants namely Abdul Ghani Farash (respondent No. 2 herein) and Abdul Ghaffar Khan took on lease the aforesaid area belonging to the Asthanapan vide lease deed dated Poh 10, 2009 (Samvat), with effect from Magh 1, 2009 (Samvat) on a rental of Rs. 50/- per mensem, that the lease was to enure up to the end of Poh 2015 (Samvat), i.e., January 13, 1959, that Abdul Ghani Farash and Abdul Gaffar Khan had by means of the aforesaid deed undertaken not to sub-let the area during the continuance of the lease and to restore the property on the expiry of the aforesaid period of lease in the same condition in which it was taken by them and to remove the structure, if any, raised by them on the aforesaid area during the aforesaid period of lease, that in violation of the terms of the lease deed, Abdul Ghani Farash and Abdul Ghaffar Khan sub-let a part of the demised area in favour of Mohd. Sidiq Soofi and since the defendants had not restored possession of the area after removing the Malba lying thereon and demolishing a part of the structure raised by them which still stood on the area and which according to the terms of the lease deed had become the property of the Asthanapan, hence the suit.

4. On August 1, 1967, Mohammad Sidiq Soofi made an application to the Sub Judge (CJM) acknowledging therein

that Abdul Ghani Farash had, out of the demised property, sub-let to him an area measuring 7 1/2 x 8' in the form of a shop and seeking permission to enter into a direct compromise with the plaintiffs in respect of the property in his possession, and further praying that his name be deleted from the array of the defendants. The suit was, after a protracted trial extending over ten years decree in favour of the trustees vide his judgment and decree by the Sub-Judge (C.J.M.) Srinagar, dated March 31, 1969. On appeal by Abdul Ghani Farash and Abdul Ghaffar Khan the learned District Judge, Srinagar, vide his judgment dated March 12, 1970, set aside the aforesaid judgment and decree of the Sub-Judge (CJM) on the technical ground that it had been rendered without hearing the arguments and remanded the case to the trial court for a fresh decision in accordance with law after disposing of the application for amendment of the plaint filed by the said plaintiffs. After remand negotiations commenced between the parties for compromise of the suit. Before the disposal, however, of the said suit Mohammad Sidiq Soofi died whereupon his legal representatives were brought on the record. On April 5, 1974, the Sub-judge (CJM) decreed the suit in favour of the said plaintiffs on the basis of the compromise dated March 27, 1974, arrived at between the said plaintiffs on the one part and Abdul Ghani Farash and Abdul Ghaffar Khan on the other. In the course of the judgment given by him on the basis of the aforesaid compromise the Sub-Judge observed that the decree would be ex parte against the legal representatives of Mohammed Sadiq Soofi.

5. On May 21, 1974, respondent No. 1 herein took out execution of the aforesaid compromise decree whereupon a warrant for delivery of the property covered by the decree was issued by the Sub-Judge (CJM). During the course of the execution of the warrant by the plaintiff, Habibullah Dagga, son of the petitioner herein, who was found in possession of the shop run under the name and style of 'Soofi Pan House' offered resistance, and openly declared that he would not allow execution of the warrant to take place as his father, who had no connection with the judgment debtors, had been in possession of the shop for the last 26 years whereupon the bailiff reported the matter to the executing court and sought its instructions as to whether Habib Ullah Dagga had to be

ejected from the property or not and also requested that the aid of the police be made available to him for execution of the warrant. Along with his report the Bailiff also forwarded to the Executing court the written objections dated July 26, 1974, handed over to him by the petitioner herein in which he, inter alia, averred that the property belonged to him and he was not bound by the aforesaid decree to which he was not a party and that he had already filed a suit for declaration of his title to the property covered by the aforesaid decree in the court of the City Judge who had also issued an order for maintenance of status quo in regard to the 'Soofi Pan House.'

6. On July 27, 1974, the petitioner filed an application before the Sub Judge (CJM) Srinagar objecting to the execution of the said decree on the same grounds as were raised by him in the written note handed by him to the Bailiff on July 26, 1974. After inviting objections from respondent No. 1 herein, the Sub Judge (CJM) dismissed this application on August 27, 1974, holding that the same was not maintainable and that the objector could only move an application under O. 21 R. 100 of the Civil P.C. after his dispossession. Aggrieved by this order the petitioner came up in revision to this court but remained unsuccessful as the revision application was dismissed by the erstwhile Chief Justice vide order dated October, 31, 1974, on the ground that the interim injunction had already been issued in the civil suit instituted by the petitioner in the court of the City Judge, Srinagar.

7. As already indicated the petitioner herein brought a suit in the court of the City Judge, Srinagar, against respondents herein on June 26, 1974, for a declaration to the effect that he was owner in possession of the property covered by the aforesaid decree passed by the Sub-Judge (CJM) which was ineffectual and not binding on him as it had been obtained by collusion between respondents Nos. 1 and 2 herein and he was not a party to the same and for an injunction restraining the respondents herein from interfering with his rights and from altering the condition of the property. Along with his petition of plaint, the petitioner also made an application for issue of temporary injunction restraining the respondents herein from interfering with his possession of the property whereupon the City Judge, Srinagar, by an ex parte order directed the respondents to main-

tain the status quo. Denying that the property belonged to the petitioner or was in his possession and that the property had also been leased out by him to respondents 3 and 4 after it was relinquished by Abdul Ghani Farash and Abdul Ghaffar Khan, respondent No. 1, herein filed objections on June 19, 1974, to the aforesaid ex parte order made by the City Judge Srinagar directing maintenance of the status quo. Thereupon the City Judge issued a commission for making a local inspection of the spot and reporting as to which of the parties was in possession of the property in question. With a view to ascertain the true position, the City Judge also inspected the spot himself and after hearing the learned counsel for the parties, made an order on July 9, 1974, vacating his earlier ex parte order directing maintenance of the status quo, observing therein that the petitioner's case that he was in possession of the entire suit property was not borne out from the record or from the spot inspection, that Abdul Ghani Farash and others had executed a relinquishment deed in favour of respondent No. 1 herein which showed that possession of the suit property had been handed over to Mahant Ram Saran, respondent No. 1 herein, who had in turn leased out the main shop, which was the subject matter of dispute, to Rajindra Kumar, respondent No. 4 herein who had effected substantial improvements therein, and that the counsel for respondent No. 1 had offered to give an undertaking that in case the petitioner eventually succeeded in his suit, his client would not at all claim the cost of the renovation and improvement of the building.

8. The petitioner did not remain content with this order and on November 1, 1974, made another application to the City Judge, Srinagar, reiterating his earlier stand and praying that the aforesaid decree passed by the Sub-Judge be stayed as he carried on business in 'Soofi Pan House' and in case he was dispossessed therefrom, he and his family would be put to a great hardship and loss. This application was also after hot contest dismissed by the City Judge vide his order dated November 14, 1974, observing that although the principles of res judicata could not be invoked by respondent No. 1., the second application made by the petitioner herein on the same facts as were put forth by him in his previous application for issue of temporary injunction was not maintainable, that the grant of the prayer of the petitioner would tan-

tamount to issue of injunction restraining the respondents from executing the decree obtained by them which did not constitute an injury within the meaning of O. 39 R. 1 of the Civil P. C. and no injunction could be issued to a court of co-ordinate jurisdiction in view of the provisions of Section 56 (b) of the Specific Relief Act. The learned City Judge further held that the order sought for could not be issued under S. 151 of the Civil P. C. as the petitioner had failed to make out a prima facie case, as the issue of the order would result in overriding and bypassing the express provisions of the law contained in Section 56 (b) of the Specific Relief Act and as the petitioner was not in possession of the entire property and respondent No. 4 had acquired possession of the main shop and respondent No. 1 had already given an undertaking that he would not in the event of the petitioner's success claim cost of the improvement or of renovation thereof. It is against this order that the present revision is directed.

9. I have heard the learned counsel for the parties. Mr. Sham Lal, learned counsel for the petitioner, has urged that the learned City Judge has erred in not passing the order sought for by his client which was warranted by the facts and circumstances of the case and the law bearing thereon.

10. The provisions regarding the issue of injunctions are contained in Section 94 (c) and Rr. 1 and 2 of O. 39 of the Code of Civil Procedure (hereinafter referred to as the Code), and Section 56 of the Specific Relief Act. Section 94 (c) of the Code authorizes a court to grant temporary injunctions in the manner prescribed by the Code itself to prevent the ends of justice being defeated. O. 39 of the Code prescribes the rules governing the issue of temporary injunctions to restrain individuals to proceed in a particular manner and not to restrain a court from continuing a proceeding pending before it. Rule 1 of O. 39, inter alia, empowers a court to issue a temporary injunction to a party to a suit with a view to prevent him from wasting, damaging or alienating the property in dispute. R. 2 of O. 39 authorizes a court to issue temporary injunctions to restrain the defendant from committing any kind of injury to the property which is the subject matter of dispute.

11. In the instant case there can be no question of the property in dispute be-

ing wasted, damaged or alienated by the respondents.

12. Let us see whether the delivery of immovable property to a decree holder in execution of a decree obtained by him can be said to amount to an injury within the meaning of sub-r. (1) of R. 2 of O. 39 of the Code. Some High Courts seem to be of the view that a court has jurisdiction to grant a temporary injunction only under O. 39 Rr. 1 and 2 and since the execution of a decree which is an exercise of a valid legal right cannot constitute commission of an injury within the meaning of sub-r. (1) of Rule 2 of O. 39 of the Code, no injunction can be granted to restrain a decree-holder from executing the decree, obtained by him. (See AIR 1961 J & K 29, AIR 1956 Madh B. 75, AIR 1957 Madh B. 95, AIR 1949 Mad. 104 and AIR 1973 Mad. 258).

13. In Abdul Rahim v. Safarmal, 1964 MP LJ (SN) 14 also it was held that no injunction can be granted under O. 39 Rules 1 and 2 to restrain a decree-holder from executing a decree in his favour so long as the decree stands.

14. A contrary view has recently been taken by the Madhya Pradesh High Court in Surendrasingh v. Lal Sheoraj, AIR 1975 Madh Pra 85 wherein it has been held that if an injury is construed in the sense of harm or damage to the right of a person or property, a decree which prima facie appears to be illegal or void can be construed as causing injury to him, and that a court is competent to issue an injunction under O. 39 R. 2 to a decree-holder restraining him from executing the decree, if the word 'injury' is liberally construed.

15. In some cases a distinction has been drawn between a case where an injunction is sought by a judgment-debtor and one where an injunction is sought by a third party. Acting on this distinction it was held in Mohd. Feroz Khan v. Mulla Mumtaz, 1963 MP LJ (SN) 24 that an injunction at the instance of a third party can be granted in order to maintain the status quo. This view was followed in 1967 M.P. L.J. (SN) 111 wherein it was held that where a person is not bound by an earlier decree or order of a court or Tribunal, injunction may be granted, but if a person is a party to the decree or order he should not be granted an injunction restraining the other party from executing it even though the earlier order may be a summary order.

16. Drawing another distinction, namely, a distinction between a decree of a regular civil court which on the face of it is final and conclusive and one which is subject to decision in a regular suit, it was held in Ram Singh v. Hardayal Singh, 1972 Jab. L.J. (SN) 104 that where a decree is of a revenue court or of a civil court in proceedings of a summary nature which is subject to the decision of a civil court in a regular suit, a temporary injunction may be granted if the other conditions justifying the grant of injunction are fulfilled.

17. Again in Ram Prashad v. Sh. Khurshid Jahan, 1956 MP LJ (SN) 14 a single Judge of the Madhya Pradesh High Court held that a temporary injunction can be granted against the decree-holder on the ground that the decree is not binding on the plaintiff, if a prima facie case is made out.

18. After a careful study of the aforesaid decisions, I am however inclined to follow the view expressed by Nair J. of this court in AIR 1961 J & K 29 (Supra) which receives ample support from the decisions reported in AIR 1956 Madh B. 75, AIR 1957 Madh B. 95, AIR 1949 Mad 104 and AIR 1973 Mad 258 (Supra), that the execution of a decree being in exercise of a legal right cannot constitute an injury within the meaning of sub-r. (1) of R. 2 of O. 39 of the Code.

19. Let me now examine the provisions of Section 56 of Specific Relief Act and see if a temporary injunction can be issued under it. It would be noted that this section occurs in the chapter relating to 'Perpetual injunctions' and has no application to temporary injunctions which are by the express words of S. 53 of the Act left to be governed and regulated by O. 39 of the Code. I am fortified in this view by three decisions reported in AIR 1923 Lah 144 (2), Madh B. LJ 1954 HCR 42 (43) and AIR 1925 Cal 233.

20. It has also to be borne in mind that Section 56 (a) lays down that no injunction can be granted to stay a judicial proceeding pending at the time of institution of a suit by which an injunction is sought unless such restraint is necessary to prevent multiplicity of proceedings. Section 56 (b) also does not authorize a court to issue an injunction to a court not subordinate to it, i.e., a court is prohibited from issuing an injunction to a court of co-ordinate jurisdiction. (See ILR 2 Cal 190 (216) (sic) and AIR 1951 Pepsu 78).

21. The facts and circumstances of the instant case did not render it necessary to restrain respondent No. 1 from executing the aforesaid decree. The court of the Sub Judge (CJM) Srinagar is also not in any way subordinate to the court of the City Judge, Srinagar. Both the courts are of concurrent jurisdiction.

22. Thus in view of the above noted authorities and the facts and circumstances of the case, I am clearly of the view that the order sought for by the petitioner could not be passed either under O. 39 of the Code or under S. 56 of the Specific Relief Act and the learned City Judge was right in expressing his inability to come to his relief.

23. Let me now advert to S. 151 of the Code on which strong reliance has been placed by the learned counsel for the petitioner. It seems to me that though injunction cannot be granted under O. 39 Rr. 1 and 2 of the Code or under S. 56 of the Specific Relief Act, it can in view of the decisions reported in AIR 1955 Andhra 4 and AIR 1950 Mad 219 which receive support from a decision of the Supreme Court reported in AIR 1962 SC 527 be granted under Section 151 of the Code in the ends of justice or to prevent an abuse of the process of the Court. It, however, appears from para 27 of the judgment of the Supreme Court reported in AIR 1962 SC 527 (Supra) that inherent powers can be exercised only in exceptional cases.

24. The principle is also well settled that before an order in exercise of inherent powers is passed, the court must be satisfied 1) that the applicant has a prima facie case in his favour, 2) that irreparable injury would be caused to the applicant if the order sought for by him is not granted during the pendency of the legal proceedings, or 3) that the balance of convenience lies in favour of the applicant. But it appears from a perusal of the decision in *Surinder Singh v. Lal Sheoraj*, AIR 1975 Madh Pra 85 (Supra) that since a party in whose favour a decree or order has been passed holds his prima facie title to the property or the right which was the subject matter of the decree or the order, very strong evidence would be necessary to rebut the presumption of prima facie title in favour of the decree-holder. The following observations made in that decision are very pertinent and must be borne in mind while granting the relief to an applicant:

"Decree-holder should not ordinarily be restrained from enjoying the fruits of

the decree obtained by him after a successful litigation. Merely, because a party chooses to file a suit challenging the decree or order on certain grounds, would not suffice to destroy the presumption in his favour and a very heavy burden would lie on the applicant to produce strong and cogent prima facie evidence to satisfy the court that the grounds on which the decree or order is challenged are fairly strong and that there is a reasonable possibility of the success of such suit."

25. No exceptional case for the grant of relief sought for by the petitioner is made out in the present case and as rightly observed by the learned City Judge, the petitioner has even failed to make out a prima facie case or to show that the balance of convenience lies in his favour.

26. It cannot also be said that the petitioner who is admittedly the father-in-law of Mohd. Sidiq Soofi was unaware of the previous litigation which lasted for ten long years and in the course of which the latter unequivocally admitted in the aforesaid application filed by him on August 1, 1967, that an area of 7 1/2' x 8' had been sub-let to him by the original lessees namely Abdul Ghani Farash and Abdul Ghaffar Khan.

27. As held in a decision of the Madhya Pradesh High Court in AIR 1963 Madh Pra 209, where a decree is passed by a court of competent jurisdiction in favour of a party, the principles of justice require that he should not be deprived of the fruits of the decree pending decision of the independent suit relating to the same property which could but was not filed till the termination of the former litigation.

28. It cannot also be ignored that no irreparable loss or injury is likely to be caused to the petitioner by the execution of the decree and even if an injury may be caused to him, it is not such as cannot be easily compensated by damages. I am, therefore, of the view that it was not necessary in the ends of justice or to prevent the abuse of the process of the court to pass an order sought for by the petitioner and the City Judge was perfectly right in refusing the prayer of the former.

29. In view of the decision of their Lordships of the Supreme Court reported in AIR 1964 SC 993, I find myself in complete agreement with the observations of the learned City Judge that although the

principle of *res judicata* may not be applicable to the findings contained in interim or interlocutory orders like stay, injunction or receiver, which are designed to preserve the status quo pending the litigation and to ensure that the parties may not be prejudiced by the delay which the proceedings before the court usually entail, a second application for obtaining substantially the same order or relief cannot lie when a previous application on identical facts has been refused.

30. The impugned order also does not seem to suffer from any defect of jurisdiction to justify interference with the same.

31. For the foregoing reasons, the revision application fails and is hereby dismissed.

Petition dismissed.

AIR 1976 JAMMU & KASHMIR 78 MUFTI, J.

Milapa Ram, Petitioner v. The State of Jammu and Kashmir and others, Respondents.

Writ Petn. No. 173 of 1973, D/- 27-1-1976.

(A) Constitution of India, Art. 226 — Certiorari — Who can apply — Issue of certificate of permanent residentship in the State of Jammu and Kashmir — Person entitled to appear and object to grant of such certificate can ask for certiorari even if he has not participated in proceedings for issue of certificate. (J & K Grant of Permanent Resident Certificate Procedure Act (1963), S. 6). (Para 4)

Cases Referred : Chronological Paras
AIR 1959 Mad 528 = (1959) 2 Mad LJ 136 6
(1921) 1 KB 248 = 90 LJ KB 413 5
(1901) 2 KB 157 = 70 LJ KB 636 5

Autar Singh, for Petitioner; A. D. Singh, for Respondents.

ORDER :— By his order dated February 21, 1956 the Tehsildar Jammu, respondent No. 3 herein, directed the issue of a certificate of permanent residentship in favour of Shri Sharma, respondent No. 4 herein. The petitioner agitated the matter in revision before the Government. The revision was disposed of by the Revenue Minister, respondent No. 2 herein, who, by his order dated December 17, 1957 remanded the matter for fresh en-

quiry to Tehsildar Jammu; upon fresh enquiry the Tehsildar Jammu, by his order dated 20-4-1960, again directed issue of permanent residentship certificate in favour of respondent No. 4. The petitioner again went in revision to the Government. By Government order No. VA-3 of 1973 dated 3.4.1973 the revision was again dismissed by the Revenue Minister acting on behalf of the Government. The petitioner has now filed this writ petition and challenged the order.

2. The principal plea raised in the petition is that the impugned order is violative of the principles of natural justice. Dwelling on this plea the petitioner has averred on affidavit that his counsel, S. Pritam Singh, Vakil, was informed that the date of hearing fixed in the revision was 31.3.1973 and when on that date the counsel went to argue the matter before the Revenue Minister, he was told by the concerned Secretary that the case had already been decided and the orders would be conveyed to the parties in due course. But actually, he adds, the impugned order was subsequently passed on 3.3.1973 behind the back of the petitioner. The respondents have vaguely stated in reply that the petitioner had wilfully absented himself on the date fixed in the case. That reply too has not been verified much less supported by any counter affidavit. Accordingly the allegations made by the petitioner on oath must be treated as uncontroverted. On these allegations it is clear that the impugned order was made behind the back of the petitioner who was neither served nor had otherwise any notice of the hearing fixed on 3.4.1973 when the order was made. I might even add that the case was taken up at random on the said date as, according to the impugned order, the other side too was absent. In that view the impugned order is clearly violative of the principles of natural justice.

3. Even so, argued Mr. Anil Dev Singh, appearing for the Revenue Minister, this court ought not to interfere by making the rule absolute for certiorari. Because, the grant of permanent residentship certificate to respondent No. 4, as he put it, does not invade any personal or particular right of the petitioner to entitle him to ask the court to exercise its discretion as to the granting of a writ of certiorari. In other words, his argument is that the petitioner has no personal or private interest in the subject matter to entitle the petitioner to apply for certiorari. In this Mr. Anil seems to assume that the petitioner has no interest of his

own beyond some inconvenience suffered by him in common with the members of the public if the law is not administered properly. The assumption is not correct. The petitioner has a particular interest in the subject matter and nothing can better explain it than the fact that every permanent resident of the State has unquestionably certain special rights and privileges available to him, for instance, the right to acquire immoveable property in the State, which are not available to the non-permanent resident and, so, if person is admitted to the category of the permanent residents of the State without title, it constitutes an invasion of those rights, threatened if not actual.

4. Assuming, however, that the petitioner has no particular interest in the subject matter in the sense explained above, he still has it in the sense that he was entitled to appear and object to the grant of certificate to respondent No. 3, as he actually did, and so he is fully competent to apply for a writ of certiorari. Lest there should be any misunderstanding, I want to make it clear that he could apply for certiorari even without having participated in the proceedings for the grant of the certificate, if he had the right to appear and object to the grant of certificate, as he really had. The grant of permanent resident certificates is governed by the Jammu and Kashmir Grant of Permanent Resident Certificates Procedure Act, 1963 and the Rules framed thereunder. Rule 4 of the Rules framed under the Act gives right to any person to object to the grant of the certificate by making a provision to the effect that the Tehsildar, Assistant Commissioner, and the competent Authority, as the case may be, "may, if he deems necessary, invite objections, if any, to the grant of certificate and hear the person or persons objecting". More sweeping is Section 6 of the Act itself which gives any person right to seek revision of any order passed on an application for grant of certificate, pending or disposed of, by a competent authority.

That section reads:

"The Government may at any time either on its own motion or on an application made to it in this behalf, call for the record of any case pending before or disposed of by a competent authority and may uphold or reverse the orders of the competent authority or may pass any other orders or give any directions as it may deem fit: Provided that no orders prejudicial to an interested person shall

be passed without giving such a person a reasonable opportunity to be heard.

2. If it appears to a competent authority that a substantial question of law or public interest is involved in any proceedings under this Act, it may report it to the Government and the Government may pass any orders or issue any directions that it may deem fit."

This Section even suggests that the revision petitioner need not have objected to the passing of the order at the trial stage to entitle him to apply under this section.

5. In *Rex v. Richmond Confirming Authority; Howitt, Ex parte* (1921) 1 K.B. 248 an application was made to the licensing Justices by Mr. Taylor, the Assistant Secretary of L. & Co. for a licence for the sale of intoxicating liquor in respect of premises occupied by L. & Co. as a restaurant. The application was opposed by Mr. Howitt, the licensee of other premises in the same borough, but was granted by the licensing justices. Before the confirmation of the grant Mr. Taylor died. At the meeting of the Confirming Authority an application was made to confirm the grant but to substitute in the licence the name of Mr. Booth, successor-in-office of Mr. Taylor as Secretary to L. & Co. This application was opposed by Mr. Howitt on the ground that the confirming Authority had no jurisdiction to grant it but the application was nevertheless granted. Mr. Howitt obtained a rule nisi for certiorari, L. & Co. in showing cause, took the point that even if it was held that the justices had acted in excess of jurisdiction, the court ought not to interfere by making the rule absolute because the fact that applicant was rival licensee did not entitle him to the writ as a person aggrieved. Dealing with the objection his Lordship, Reading C. J., observed:

"The applicant does not, in my opinion, stand in the same category as a member of the public who may be said to have only a general interest in seeing that the law is properly carried out. He had a particular interest in this subject matter, and nothing can better show this than the fact that he incurred the expense of instructing counsel to secure, if he could, the refusal of the confirmation, and to contend that the confirming authority had no jurisdiction. Bearing in mind that the applicant is a person who was entitled to appear and object as having this interest that he was carrying business as the licensee of premises in Richmond, I think the case comes within the decision of *Rex v.*

Groom, Ex parte Gobbold (1901) 2 K. B. 157). There the very point was taken that the rule for certiorari to quash an order of the licensing justices had been obtained by rivals in trade and that, as such, they were not persons aggrieved. On the other side it was contended that they were persons aggrieved as persons who had an interest in the matter of the application for the licence and therefore entitled to the writ of certiorari. Lord Alverstone C. J. indicated that if he could have decided the case merely on the grounds of sympathy there was not much merit in the application he would have held that the Court ought not to make the rule absolute, but he said this:

"As to the question whether the applicants for the rule are persons aggrieved, there can be no doubt that they have no real grievance arising from the omission to serve the notice in time. That, however, is not the sense in which persons applying for a certiorari are required to be persons aggrieved. It is sufficient if they have a real interest in the decision of the justices, and they have in this case. They took the point now raised before the justices at the adjourned general annual licensing meeting and when the confirming order was made, and it would be too strong to say that they had not a sufficient interest in the matter to enable them to apply for the rule."

6. Clearly the decision is an authority for the principle that any person who is entitled to appear and object to the making of any order by an authority is entitled to move for the issue of a writ of certiorari in the matter. Thus the decision supports the view expressed above. It was on this principle that in case *Issardas Somamal Lulla v. The Collector of Madras and Additional Custodian of Evacuee Property, Madras*, (AIR 1959 Mad 528) the Madras High Court issued a writ of certiorari at the instance of a person who, though assumed to have no right in the subject matter viz. import and export quota, was held entitled to apply for certiorari for quashing an order which he had objected to before the appropriate authority.

7. For these reasons the impugned order must be set aside; and the matter referred back to the Government for fresh decision in accordance with law. In that view it will not be necessary to go into the additional ground taken by the petitioner that the impugned order was perverse in the sense that it was based on no evidence as that aspect can be looked into

by the Government while rehearing the matter in revision.

8. In the result the petition is allowed; the impugned order is set aside; and, it is directed that the Government will rehear the revision and pass appropriate orders in accordance with law. The parties will bear their own costs.

Petition allowed.

AIR 1976 JAMMU & KASHMIR 80

MIAN JALAL-UD-DIN AND

DR. ADARSH SEIN ANAND, JJ.

Union of India, Petitioner v. P. S. Mahal, Respondent.

Civil Misc. Appeals Nos. 36 and 40 of 1975, D/- 12-1-1976.*

(A) Motor Vehicles Act (1939), Section 110A (3) — Petitioner's counsel in spite of his best efforts failing to find out existence of Claims Tribunal before he instituted suit — Consequent delay in presenting plaint before the Tribunal condoned. (Para 16)

(B) Motor Vehicles Act (1939), Section 110-B — Compensation — Injured working as Executive Engineer in C. P. W. D. — Accident rendering him incapable of driving vehicle due to foot drop and shortening of left lower limb — Amount of Rs. 19,200/- calculated at Rs. 200/- P. M. allowed as expenses likely to be incurred by him on a driver for eight years till his superannuation date. (Para 29)

(C) Motor Vehicles Act (1939), Section 110B — General damages — Injured aged 49 working as Executive Engineer — Injuries causing one inch shortening of the left lower limb, foot drop, wasting of muscles of both sides, weakening of hip and knee joints and rendering him unable to do field work — General damages raised from Rs. 30000 to Rs. 40000. (Paras 32, 33)

(D) Motor Vehicles Act (1939) Section 110CC — Interest — Interest held payable from date of claim and not from date of order. (Para 34)

Cases Referred : Chronological Paras
1974 J & K LR 44 = 1974 Kash LJ 282 16
AIR 1972 SC 749 = 1972 SCD 271 17
1971 ACC CJ 180 = 1971 All WR (HC) 875 16

*Against order of Motor Accidents Claims Tribunal D/- 7-1-1975.

CT/DT/A753/76/RSK

on that question, this Court pointed out that every Tribunal and quasi-judicial authority in this State, is bound to follow the rulings of this Court unless such rulings are reversed or overruled by the Supreme Court and that it is not permissible for such Tribunals and authority not to follow such rulings and to take a different view on any such question of law. The Government, while it functions as a quasi-judicial authority, in hearing and deciding appeals or revision, is no exception in regard to such obligation to follow the rulings of this Court.

17. Hence, the impugned order of the Government which disregards the rulings of this Court, must be held to suffer from an error apparent on the face of the record and consequently is liable to be quashed.

18. However, Mr. Kadidal Manjappa, learned counsel for respondent 4, submitted that when the Revenue authorities propose to grant a part of the Gomal land to any person or persons, it is not reasonably practicable for such authorities to give notice to all villagers who have the right of free pasturage in such Gomal land and to hear their objections and hence ascertainment of the views of the villagers in a Mahazar conducted by such authorities, should be regarded as sufficient.

19. We are unable to accept the above contention of Mr. Manjappa. Though it may not be practicable to give individual notices to all the villagers having the right of free pasturage in Gomal lands, the Revenue authorities can give public notice to the villagers by affixing a copy of such notice in the village chavadi, or by beat of tom tom or by publication in a newspaper having circulation in the village or in any other reasonable manner. Hearing of objections of such persons, to the proposed grant of land in the Gomal, need not necessarily be a personal or oral hearing.

20. A Mahazar cannot take the place of notice to persons in the village and consideration of their objections. In the absence of such notice, there is no certainty that all persons who desire to object to the proposed grant of land in the Gomal, will know that a Mahazar will be held and that they can express their objections at such Mahazar. In the absence of such notice, the possibility of stage managing a Mahazar so as to gather only such persons who support the applicant for grant of land in the Gomal and

to keep away from such Mahazar persons who are likely to oppose the application for grant of land, cannot be ruled out.

21. Mr. Manjappa next contended that the first petitioner had himself applied for grant of land in this very Gomal, that two other petitioners had signed the Mahazar in which it was stated that they had no objection to grant 20 acres of land for coffee cultivation and that these petitioners had, by their own conduct, disentitled themselves from invoking the discretionary jurisdiction of this Court under Art. 226 of the Constitution.

22. There is some force in the above contention of Mr. Manjappa. But there are two other petitioners who were neither applicants for land in the Gomal nor consenting parties to the impugned grant of land. There is no reason to deny them the reliefs claimed in the writ petition.

23. Lastly, Mr. Manjappa submitted that respondent 4 had, after taking possession of the land, cleared the jungle and had planted coffee seedlings and reared them incurring heavy expenditure and that if the grant of land to him should be set aside at this distance of time, he would be put to heavy loss.

24. Though we are not unmindful of the loss and the hardship to which respondent 4 may be put to if the grant of land in his favour should be set aside, we cannot, on that ground alone, deny relief to the petitioners who challenged the grant in his favour without undue delay. Individual hardship, if any, cannot stand in the way of maintenance of the rule of law. We can only make an observation that if the Deputy Commissioner determines, after enquiry, that there is surplus extent of land in the Gomal and decides to grant any portion of such excess extent of land, he may take into account the claim of respondent 4 that he has incurred expenditure for cultivation of coffee plants in 20 acres of land granted to him.

25. Mr. Manjappa next submitted that if we quash the grant of land, respondent 4 should be permitted to enter upon that land and to carry out only those agricultural operations that are absolutely necessary to protect the young coffee plants, till the Revenue authorities determine whether there is excess extent of land in the Gomal and in case there is such excess decide afresh whether any portion of such excess land should be granted to him. This is a matter entirely

for the Revenue authorities to decide. If respondent 4 makes such a request to them, we hope that it will receive their sympathetic consideration.

26. With these observations, we allow this appeal and in reversal of the order of the learned single Judge we quash the impugned orders of the Deputy Commissioner, the Divisional Commissioner and the Government. However, we make it clear that it will be open to the Deputy Commissioner to make a determination in accordance with law, whether there is any surplus extent of land in the Gomal of the village and to consider in accordance with law the application of respondent 4 for grant of land in the Gomal.

27. The petitioners-appellants shall get their costs from respondent 1 (the State of Karnataka) both in the appeal and in the writ petition. Advocate's fee Rs. 100 in each of the proceedings, the writ petition and the appeal.

Appeal allowed.

AIR 1976 KARNATAKA 162

K. JAGANNATHA SHETTY, J.

Krishnaji Pandurang Naik, Petitioner v. Govind Narasimha Umarji and others, Respondents.

Civil Revn. Petn. No. 1400 of 1974, D/- 16-3-1976.*

(A) Civil P. C. (1908), S. 47 — Explanation — Auction purchaser within scope of explanation — Who is.

Auction purchaser referred to in the explanation is an auction purchaser who has purchased the property in execution of the decree concerned with the property and not a person who has purchased the property in an independent sale, unconnected with the said decree. Thus persons who have purchased the land in parallel proceedings (public auction held by State Government for recovery of Takkavy loan from the judgment-debtor, in the instant case) unconnected with the consent award decree which has been obtained in proceedings under the Bombay Agricultural Debtors' Relief Act and which is being put in execution for possession, cannot be said to be the auction purchasers within the said explanation

*(Against order of 2nd Addl. Dist. J., Belgaum, in Appl. No. 7 of 1969, D/- 13-11-1973.)

and cannot also be considered to be representatives of the judgment-debtor in the award decree. S. 47 is no bar to a separate suit for possession. AIR 1968 Delhi 104 (107), Rel. on. (Para 5)

(B) Civil P. C. (1908), S. 47 — Separate suit, when not barred.

A decree-holder cannot seek possession in execution of the consent award decree, against third parties when they oppose execution on the ground of fraud and collusion between decree-holder and judgment-debtor. The remedy of the decree-holder is to file separate suit.

(Para 6)

Cases Referred: Chronological Paras

AIR 1968 Delhi 104 5

AIR 1963 SC 827 = (1963) Supp 1 SCR 322 3

Murlidhar Rao, for Petitioner; B. V. Krishnaswamy Rao (for No. 3) and N. Basavaraju H. C. G. P., (for No. 2), for Respondents.

ORDER:— Krishnaji Pandurang Naik the petitioner was the owner of lands bearing Survey Nos. 9 and 11 of Nandgad village. In 1946, he sold the lands to Govind Narasimha Umarji respondent 1 before me. After the sale, he instituted proceedings under the Bombay Agricultural Debtors' Relief Act claiming that the alienation made by him was not an out and out sale, but only a mortgage and he should be permitted to redeem the same. G. N. Umarji resisted the action. The Joint Civil Judge, Junior Division, Belgaum before whom the proceedings were initiated, held that the transaction complained of was not a mortgage. Against that decision, the petitioner preferred an appeal to the B.A.D.R. Court. In the said appeal, the petitioner and respondent 1 entered into a compromise. They agreed that the alienation regarding Survey No. 9 should be treated as mortgage and the one in respect of Survey No. 11 should be treated as sale. On 14-10-1960, the B.A.D.R. Court made an award accordingly.

G. N. Umarji was a local Talati. He had taken Takkavy loan from the Government on the security of Survey No. 9. He became a defaulter in payment of the loan. He had also misappropriated certain Government funds. To recover the said sum, the Government brought land Survey No. 9 to public auction. On 6-11-1957, in the absence of bidders, the Government purchased the land for a nominal price of Re. 1. On 10-3-1961, the said land was again auctioned in which Somanna

Gangaram Gunjekar—respondent 3 before me purchased it for Rs. 4,000. On 30-5-1961, the sale was confirmed in his favour.

2. The petitioner wanted to execute the award decree. So, he filed an execution petition in the Court of the Second Additional Munsiff, Belgaum to which he had impleaded the State Government and also the auction purchaser respondent 3. The petitioner contended that they are the representatives of the judgment-debtor G. N. Umarji and they should be directed to deliver possession of the property to him. But the Government and the auction purchaser contended that the decree was obtained by collusion and practising fraud, and was not binding on them. The learned Munsiff rejected the execution petition observing that the decree-holder, if he is so advised, might file a regular suit and such a suit was not barred under Section 47 of the Code of Civil Procedure. Aggrieved by that order, the petitioner preferred an appeal to the Second Additional District Judge, Belgaum. The learned Judge, among other findings, held that the State Government and the auction purchaser were not representatives of the judgment-debtor and the petitioner, therefore, could have his remedy by way of suit.

Hence this revision petition.

3. From the above facts, it is seen that the State Government and S. G. Gunjekar were not parties to the award proceedings. There was also no adjudication by a Court that Survey No. 9 was mortgaged to G. N. Umarji and not sold to him. The petitioner claims possession only on the basis of the consent award. On these facts, can we say that the view taken by the appellate Judge was incorrect? Can we say that the State Government and S. G. Gunjekar were representatives of the judgment-debtor? Should they be regarded as parties to the award proceedings? Section 47 of the Code of Civil Procedure provides an effective answer to these questions. It states that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit, and that where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

The Explanation thereunder provides that for the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit.

On the strength of this Explanation, it was urged for the petitioner that S. G. Gunjekar who was an auction purchaser should be held to be a party to the proceedings. It was also urged that the first sale made in favour of the State Government was void in view of the decision of the Supreme Court in *Ramrao Jankiram Kadam v. State of Bombay* (AIR 1963 SC 827). Counsel for the respondents, however, submitted that the ratio of that decision is not applicable to the facts of the present case since the Supreme Court was concerned in that case with a sale without any statutory rules regulating the auction, whereas the position in the present case was quite different. It is said that erstwhile State of Bombay had framed Land Revenue Rules for regulating such auction in which the State Government validly purchased the land for a nominal price of Re. 1 for want of bidders and that sale was not invalid.

4. The learned District Judge has not expressed any opinion on the validity of the sale in favour of the Government. He has left open that question for determination in an appropriate suit. I think it is a wise step, and so I leave it there.

5. The question which I should primarily consider is, whether S. G. Gunjekar should be held to be an auction purchaser within the scope of the Explanation to Section 47. It seems to me, that the auction purchaser referred to in the said Explanation is an auction purchaser who has purchased the property in execution of the decree concerned with the property, and not a person who has purchased the property in an independent sale, unconnected with the said decree. S. G. Gunjekar purchased the land in a parallel proceedings unconnected with the award decree. Similarly, the sale in favour of the State Government. Both, therefore, cannot be said to be the auction purchasers within the said explanation. They cannot also be considered to be representatives of G. N. Umarji, the judgment-debtor in the award decree. Section 47 is therefore no bar for instituting a separate suit. Such a suit is a must in this case, since the contention that the award decree was vitiated by fraud and

collusion cannot be investigated in the execution proceedings under Section 47. The view taken by the Court is therefore perfectly sound. My view finds support from the decision of the Delhi High Court in *Sham Mohan Lal v. Jai Gopal* (AIR 1968 Delhi 104 at p. 107).

6. Before I part with the case, I must refer to the last contention which was strongly put forward by counsel for the petitioner. He urged that the decree-holder should not be driven to the civil court and if necessary, the auction purchaser or the State must institute a suit challenging the award decree. The contention appears to be simple from my view. One who wants a relief of possession must go to the civil court. He cannot seek to execute the consent award decree against third parties when they oppose the execution on the ground of fraud and collusion between the decree-holder and judgment-debtor.

7. In the result, this revision petition fails and is dismissed, but without costs.

Petition dismissed.

AIR 1976 KARNATAKA 164

M. SADANANDASWAMY AND

D. NORONHA, JJ.

Bhairavasingh Malojirao Ghorpade, and another, Petitioners v. Shankar Rao Bindu Rao Padaki and others, Respondents.

Civil Revn. Petn. No. 1869 of 1973, D/- 26-3-1976.

(A) Civil P. C. (1908), Sections 86 and 87B — Suit against Ruler of former Indian State — Consent — Words 'May be sued' in Section 86, meaning of — President's ordinance de-recognising Rulers issued prior to institution of suit — Suit filed without obtaining consent under Section 86 — Supreme Court striking down the Ordinance — Consent 'to sue' obtained after that decision — Constitution (26th Amendment) Act 1971 also coming into force during pendency of suit — Effect of — Maintainability of suit.

A suit for possession of immovable properties was filed on 5-12-1970 against the defendant No. 1, the former Ruler of Mudhol State, without obtaining the consent of the Central Government under Section 86. The President of India had issued an ordinance de-recognising the Rulers prior to the date of the institution of the suit. The Supreme Court by its decision dated 15-12-1970 struck

down the said Ordinance. The plaintiff filed an application to the Central Government on 29-7-1971 and obtained its sanction on 10-10-1971. The Certificate stated that the Central Government consents to a suit being instituted against the Raja of Mudhol.... The Constitution 26th (Amendment) Act 1971 also came into effect on 29-12-1971.

Held, as there was no necessity to obtain the certificate of consent on 5-12-1970, the suit must be construed as having been validly instituted. The fact that the order of the President was declared illegal and not to have been made at all by the Supreme Court, could not have the effect of rendering the institution of the suit invalid since the suit was instituted on a date earlier to the date of the decision. Since the suit was validly instituted on 5-12-1970, it could not be said to have abated on 15-12-1970 in the absence of any provision of law which provides for such abatement. It might be that the suit was rendered incompetent after 15-12-1970 due to the absence of the consent under Section 87-B and the Court could either reject the plaint or dismiss the suit. But neither of those actions was taken by the court. The suit therefore must be deemed to have been pending in the lower court even after 15-12-1970 since it was not disposed of under any of the provisions of the Code of Civil Procedure. (Case law discussed). (Para 9)

The words 'may be sued' in Section 86 (1) include the continuation of a suit already filed. The consent to a "suit being instituted" is equivalent to a consent stating that a former Ruler "may be sued" under Sec. 86 (1) and therefore the consent to a suit being instituted includes consent to the continuation of the suit. Hence, the certificate must be understood to mean that consent has been given to the continuation of the suit which was pending in the lower court on the date the certificate was granted. AIR 1962 SC 73, Foll. (Para 10)

The institution of the suit on 5-12-1970 was valid even though no consent had been obtained on that date. By virtue of the Constitution (26th Amendment) Act under which the privileges of the former Indian Rulers were abolished, it became no longer necessary to obtain the consent of the Central Government under Section 87-B. Hence, after 29-12-1971, it could not be said that the suit instituted by the plaintiff was incompetent for want of consent of the Central Government. Since the suit was pending on the date of the Constitution (26th Amendment) Act coming into force the plaintiff was entitled to continue the suit against defendant 1 after 29-12-1971. (Paras 11, 12)

(B) Specific Relief Act (1963), Sec. 6 — Suit for possession of immovable property filed on 5-12-1970 against Ruler of former Indian State without obtaining consent under Section 86, C. P. C. — Suit filed within six months of dispossession — Suit was valid on the date of filing — Consent became necessary after certain decision of Supreme Court on 15-12-1970 — Suit continued to be pending on 29-7-1971 when plaintiff applied for consent and even after 10-10-1971 when Certificate of consent was actually granted as well as on the date when Constitution (26th Amendment) Act 1971 came into force — Suit held, could not be said to be barred by limitation.

It can be said that the suit could not be continued without the certificate under Section 87-B after the decision of the Supreme Court, i. e., after 15-12-1970. It was open to the Court to come to the conclusion that the suit, became incompetent in the absence of the necessary certificate under Section 87-B after 15-12-1970. But since the suit continued to be pending even on 29-7-1971, the date when the plaintiff applied for the grant of a certificate under Section 87-B, as well as thereafter even after 10-10-1971 when the certificate was actually granted, it cannot be said that the suit became barred by limitation. (Para 16)

The suit was pending even on the date the Constitution (26th Amendment) Act, 1971 came into force when the privileges of the Rulers ceased to exist. Hence, though it was necessary for the plaintiff to obtain the certificate for the continuation of the suit after the decision of the Supreme Court, no such certificate became necessary for the continuation of the suit after 29-12-1971. Hence, it could not be said that the suit was barred by limitation. (Para 17)

Cases Referred: Chronological Paras
 AIR 1971 SC 530 = (1971) 3 SCR 9 4, 7, 8
 AIR 1967 Orissa 160 = ILR (1967) Cut 521 12
 AIR 1964 Andh Pra 172 12
 AIR 1962 SC 73 = (1962) 1 SCR 702 10
 AIR 1958 Bom 30 = 59 Bom LR 655 14
 AIR 1957 SC 540 = 1957 SCR 488 10
 AIR 1956 Mad 15 = 1955-2 Mad LJ 426 16
 AIR 1943 FC 24 = (1943) 5 FCR 39 10
 AIR 1941 FC 16 = 1940 FCR 110 10
 AIR 1936 PC 49 = 63 Ind App 47 10
 AIR 1934 Bom 91 = 36 Bom LR 84 15
 AIR 1914 Cal 806 = ILR 41 Cal 1125 (SB) 8
 (1897) ILR 21 Bom 351 13
 (1893) ILR 17 Bom 169 15
 (1881) 9 Ind App 8 = ILR 8 Cal 422 (PC) 16

(1877) 4 Ind App 127 = ILR 3 Cal 47 (PC) 8

U. L. Narayana Rao, for Petitioners; S. L. Benadikar, for Respondent No. 1.

SADANANDASWAMY, J.:— This revision petition has been referred to a Division Bench by Bhimiah, J. The revision petition is presented against the order dated 6-8-1973 passed on I. A. VI by the Civil Judge, Bagalkot, in O. S. 38/70. The petitioners are defendants 1 and 3 in the suit. I. A. VI is an application filed by defendant-1 on 6-7-1971 under Section 87-B read with Sections 85 and 86 of the Code of Civil Procedure, requesting the Court to dismiss the plaintiff's suit in limine as being not maintainable. The application was dismissed by the Civil Judge.

2. The first respondent brought the suit on 5-12-1970 under Section 6 of the Specific Relief Act, 1963 for possession of the suit immoveable properties. Defendant-1 was the former Ruler of Mudhol State. Defendant-2 (Respondent-2) is his mother, Defendant-3 is the General Power of Attorney-holder from defendants 1 and 2. Respondents 3 to 12 (defendants 4 to 13) are the relatives of defendants 1 and 2 in whose favour certain transfers in respect of the suit properties have been effected. The case of the plaintiff is that all the suit properties which consist of lands in Shirol village, Mudhol taluk, belonged to defendants 1 and 2, defendants 1 and 2 agreed during the month of January 1960 to sell the suit properties to the plaintiff for Rupees six lakhs, the plaintiff paid a sum of Rupees one lakh as advance and paid another sum of Rupees one lakh during 1969, he was put in possession of the properties, there was an agreement between the plaintiff and defendants 1 and 2 for payment of the balance of the consideration in five equal annual instalments and that in spite of the same plaintiff has been dispossessed of the suit properties by defendants 1 to 3 and their men on 18-8-1970. It is the further case of the plaintiff that defendants 1 and 2 have effected transfers of some of the suit properties in favour of defendants 4 to 13, but that those transfers are all bogus and are intended to save the properties from the claim of the plaintiff.

3. In the affidavit accompanying I. A. VI the third defendant has sworn to the fact that defendant-1 was a Ruler of the former Mudhol State before its merger with the Indian Union, that defendant-1 thereafter agreed to merge the State with the Indian Union, that the Central Government has, by Notification dated 1-4-51, specified Mudhol

State as a former Indian State for the purpose of Section 87-B of the Code of Civil Procedure, that defendant-1 is recognised by the President of the Indian Union as the Ruler of the former State of Mudhol, that the plaintiff has not obtained the consent of the Central Government to file the suit under Section 87-B of the Code of Civil Procedure and that therefore the suit is not maintainable.

4. In the objection statement filed on 2-3-1971, the plaintiff stated that the suit was filed when the privileges of the Rulers of the former Indian States had been extinguished by the Ordinance issued by the President of India, that the decision of the Supreme Court striking down the Ordinance (AIR 1971 SC 530) was rendered subsequent to the institution of the suit but that he has approached the Central Government for the necessary sanction.

5. The application I. A. VI was rejected by the Civil Judge on 5-1-1973 as not maintainable and premature. Defendants 1 to 3 preferred Civil Revision Petition No. 173/73 to this Court. The revision petition was allowed, the order of the lower court was set aside and the Civil Judge was directed to dispose of the application on its merits. Further arguments were heard by the lower court on 26-7-1973.

6. The plaintiff filed an application to the Central Government on 29-7-1971 and obtained its sanction under Section 87-B of the Code of Civil Procedure under the Certificate dated 10-10-1971. The certificate states that under the provisions of sub-section (1) of Section 86 read with Section 87-B of the Code of Civil Procedure the Central Government consents to a suit being instituted by the plaintiff in the Court of competent jurisdiction against the first defendant in respect of the matters specified in the application dated 29-7-1971, a copy of which is annexed to the certificate. Subsequently the Constitution (26th Amendment) Act, 1971 deprived the Rulers of former Indian States of their special privileges. Hence, according to the plaintiff the suit would be maintainable against defendant-1 even without the consent of the Central Government under Section 87-B of the Code of Civil Procedure.

7. The relevant dates for the purpose of the decision of this case are these:— The plaintiff is alleged to have been disposed on 18-8-1970. The order of the President of India de-recognising defendant-1 as Ruler was issued on 6-9-1970 and notified in the Gazette of India of 19th September 1970. The plaintiff filed the suit on 5-12-1970. The judgment of the Supreme Court

in AIR 1971 SC 530 (Madhav Rao Scindia v. Union of India) holding that the order of the President was illegal was pronounced on 15-12-1970. The plaintiff applied for the consent of the Central Government under Section 87-B of the Code of Civil Procedure on 29-7-1971. The certificate was granted by the Central Government on 10-10-1971. The Constitution (26th Amendment) Act, 1971 came into effect on 29-12-1971. I. A. VI was filed on 7-6-1971.

8. The order of the Court in AIR 1971 SC 530 (Madhav Rao Scindia v. Union of India) reads as follows:—

“In accordance with the opinion of the majority the petitions are allowed and writs will issue declaring that the orders made by the President on September 6, 1970 challenged here, were illegal and on that account inoperative and the petitioners will be entitled to all their pre-existing rights and privileges including the right to privy purses, as if the orders have not been made.”

It is therefore contended by Mr. U. L. Narayana Rao, appearing for the petitioners, that the order of the President de-recognising defendant-1 must be deemed to have been not in existence at all even from the date it was promulgated and that consent of the Central Government was necessary for the institution of the suit even on 5-12-70. In ILR 41 Cal 1125 = (AIR 1914 Cal 806) (SB) (Gopeshwar Pal v. Jiban Chandra Chandra) a Special Bench of the Calcutta High Court held that where the application of the provisions of an Amending Act makes it impossible to exercise a vested right of suit, the Act should be construed as not being applicable to such cases, and it was observed as follows:—

“Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction “that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act. It is not (in our opinion) even a fair reading of Section 184 and the third Schedule of the Bengal Tenancy Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions; where in accordance with its provisions a suit

could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application." In (1877) 4 Ind App 127 (PC) (Delhi and London Bank v. Orchard) it was observed as follows:—

"It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay and by the Chief Court in the Punjab, is correct, a judgment creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed, or a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature."

In the present case, the President of India had issued an Ordinance de-recognising defendant-1 prior to the date of the institution of the suit. Hence, even if the plaintiff had applied for a certificate under Section 87-B of the Code of Civil Procedure, it would not have been granted. The decision of the Supreme Court was rendered on 15-12-1970 striking down the President's Ordinance. The plaintiff could not anticipate that the Ordinance issued by the President would be declared illegal when he instituted the suit. Hence, to require the plaintiff to have obtained the certificate before the institution of the suit on 5-12-1970 would be asking the plaintiff to do the impossible. Hence, in the interests of justice the institution of the suit on 5-12-1970 must be held to be valid. It is no doubt true that according to the decision of the Supreme Court, the Ordinance issued by the President must be regarded as not having been in existence at all in the eye of law. But their Lordships were concerned in that case with the rights and privileges of the former Rulers. The decision of

the Supreme Court cannot be construed as having the effect of invalidating the institution of the suit which had already been instituted prior to the date of the decision.

9. It is next contended by Mr. Narayana Rao that even if it is to be assumed that the plaintiff need not have applied for consent of the Central Government on 5-12-1970 he was bound to apply for it after the decision of the Supreme Court on 15-12-1970 that he should have withdrawn the suit, applied for the grant of the certificate by the Central Government and to have filed the suit after obtaining the certificate. It is also urged that the suit abated on 15-12-1970 when the order of the President was declared to be illegal and the order must be deemed to have been not made at all according to the decision of the Supreme Court. It is therefore his contention that the suit could not be continued after 15-12-1970, that the court could not keep it pending till consent was obtained and that the suit did not get revived by the certificate subsequently obtained on 10-10-1971. But as there was no necessity to obtain the certificate of consent on 5-12-1970, the suit must be construed as having been validly instituted. The fact that the order of the President was declared illegal and not to have been made at all by the Supreme Court, cannot have the effect of rendering the institution of the suit invalid since the suit was instituted on a date earlier to the date of the decision. Since the suit was validly instituted on 5-12-1970, it cannot be said to have abated on 15-12-1970 in the absence of any provision of law which provides for such abatement. It may be that the suit was rendered incompetent after 15-12-1970 due to the absence of the consent under Section 87-B of the Code of Civil Procedure and the Court could either reject the plaint or dismiss the suit. But neither of these actions was taken by the court. The suit therefore must be deemed to have been pending in the lower court even after 15-12-1970 since it was not disposed of under any of the provisions of the Code of Civil Procedure.

10. The next contention of Mr. Narayana Rao is that the consent obtained by the plaintiff is not for the continuation of the suit but only to sue defendant-1 and that therefore there is no compliance with the requirements of Section 87-B of the Code of Civil Procedure. The plaintiff applied to the Central Government for permission to continue the suit after stating in the application the circumstances under which the suit had been filed by him already. The certificate issued to the plaintiff reads as follows:—

"Government of India,
Ministry of Home Affairs,
New Delhi-1,
the 10th October, 1971.

CERTIFICATE

This is to certify that under the provisions of sub-section (1) of Section 86, read with Section 87-B of the Code of Civil Procedure 1908 — (Act V of 1908) the Central Government consents to a suit being instituted by Sri Shankar Rao Bindurao Padaki in the court of competent jurisdiction against His Highness Raja Shrimant Bhairvasingh Malajirao Ghorpade, Raja of Mudhol in respect of the matters specified in the application dated 29th July 1971, a copy of which is hereto annexed.

**BY ORDER AND IN THE NAME OF
THE PRESIDENT**

Sd/-

(Govinda Narain)

Secretary to the Government of India"

Since the certificate states that the Central Government consents to a suit being instituted against defendant-1 and does not state that the Central Government consents to the continuation of the suit already instituted by the plaintiff, it is contended by Mr. Narayana Rao that it is not a valid consent for the continuation of the present suit. He has relied on the decision in AIR 1962 SC 73 (Mohanlal v. Sawai Man Singhji) in support of his contention that the consent of the Central Government is necessary under Sections 86 and 87-B of the Code of Civil Procedure for the continuation of the suit even if it is to be assumed that the present suit could be instituted on 5-12-1970 without such prior consent. In that case, the suit had been filed prior to the enactment of Section 87-B by Section 12 of the Code of Civil Procedure Amendment Act of 1951. The plaintiff applied to the Central Government for its consent but it was refused. It was contended on behalf of the plaintiff in that case that since the suit was filed before the enactment of Section 87-B the substantive right of the plaintiff to continue the suit could not be taken away in the absence of express language or plea of intendment and that only initiation of a suit and not the continuation of a suit already filed before the section was enacted is covered by the words "No Ruler of a foreign State may be sued in any Court. . . ." in Section 86 (1) of the Code of Civil Procedure. While rejecting the said contention it was observed as follows:—

"In our opinion these arguments cannot be accepted. The word 'sued' means not

only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word 'sued' covers the entire proceeding in an action, and the person proceeded against is sued throughout the duration of the action. It follows that consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. In view of the amplitude of the word 'sued', it is not necessary to consider generally to what extent pending cases are affected by subsequent legislation or refer to the principles laid down in *United Provinces v. Atiq Begum* 1940 FCR 110 = (AIR 1941 FC 16) *Venugopala Reddiar v. Krishnaswamy Reddiar*, (1943) 5 FCR 39 = (AIR 1943 FC 24) or *Garikapati Veeraya v. N. Subbiah Chowdhury*, 1957 SCR 488 = (AIR 1957 SC 540). If the language of Section 86 read with Section 87-B were applicable only to the initiation of a civil suit, these cases might have been helpful; but since the words "may sue" include not only the initiation of a suit but its continuation also, it is manifest that neither the suit could be filed nor maintained except with the consent of the Central Government. In *Atiq Begum's case*, 1940 FCR 110 = (AIR 1941 FC 16), *Varadachariar, J.*, referred to the two principles applicable to cases where the question of retrospectivity, of law has to be considered. They are that vested rights should not be presumed to be affected, and that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. But the learned Judge pointed out that the language of the enactment might be sufficient to rebut the first, and cited the case of the Privy Council in *K. C. Mukerjee v. Mst. Ram Ratan Kuer*, ILR 15 Pat 268 = (AIR 1936 PC 49). Here the matter can be resolved on the language of the enactment. The language employed is of sufficient width and certainty to include even pending actions, and the contrary rule applies, namely, that unless pending actions are saved from the operation of the new law, they must be taken to be affected. The word 'sued', as we have shown, denotes not only the start but also the continuation of a civil action, and the prohibition, therefore, affects not only a suit instituted after the enactment of Section 87-B but one which, though instituted before its enactment, is pending. In our judgment, the present suit was incompetent against the first defendant, the ex-Ruler of Jaipur."

The words 'may be sued' in Section 86 (1) of the Code of Civil Procedure have been held

to include the continuation of a suit already filed. The Certificate in the present case shows that consent 'to a suit being instituted' has been given by the Central Government. It is not disputed that if consent had been given prior to the institution of the suit no fresh consent would have been necessary for the continuation of the suit. The consent to a "suit being instituted" is equivalent to a consent stating that a former Ruler "may be sued" under Section 86 (1) and therefore the consent given in the present case includes consent to the continuation of the suit as held by the Supreme Court. Hence, the certificate must be understood to mean that consent has been given to the continuation of the present suit which was pending in the lower court on the date the certificate was granted.

11. On behalf of the Respondent-plaintiff it is urged by Mr. Benadikar that the consent of the Central Government, though granted subsequent to the institution of the suit, relates back to the date of the institution of the suit. But it is not necessary to consider this contention since, in our opinion, the institution of the suit on 5-12-1970 was valid even though no consent had been obtained on that date. By virtue of the Constitution (26th Amendment) Act under which the privileges of the former Indian Rulers were abolished, it became no longer necessary to obtain the consent of the Central Government under Section 87-B of the Code of Civil Procedure. Hence, after 29-12-1971, it could not be said that the suit instituted by the plaintiff was incompetent for want of consent of the Central Government. Since the suit was pending on the date of the Constitution (26th Amendment) Act coming into force the plaintiff was entitled to continue the suit against defendant-1 after 29-12-1971.

12. Mr. Narayana Rao relied on AIR 1967 Orissa 160 (Orissa Cement Ltd. v. Union of India) wherein it is held that the terms of Section 80 of the Code of Civil Procedure are imperative and admit of no exceptions or implications. In AIR 1964 Andh Pra 172 (Union of India v. Eastern Match Co.) it has been held that the terms of Section 80 C. P. C. are imperative and that a suit not complying with its provision cannot be entertained by any court and if instituted, must be rejected under Order VII Rule 11 C. P. C. But in the present case, it was not necessary for the plaintiff to obtain the consent under Section 87-B C. P. C. on the date of the institution of the suit.

13. Mr. Narayana Rao next relied on the decision in (1897) ILR 21 Bom 351 (Chandulal v. Awad). In that case the consent

of the Governor General in Council under Sec. 433 of the Civil Procedure Code (Act XIV of 1882) had not been obtained or applied for when the suit was filed, but it was given more than a year afterwards. It was held that a consent not to the suit being instituted, but to its being proceeded with is not a sufficient consent, and if consent has not been obtained before the commencement of the suit, the Court should dismiss the suit or allow the plaintiff to withdraw it with liberty to bring a fresh suit. But in that case, consent was necessary on the date of the institution of the suit. Moreover, consent given in that case was to continue the suit. But in the present case, we have already held that consent was not necessary on the date the suit was filed. Hence, these decisions do not apply to the facts of the present case.

14. It is contended by Mr. Benadikar that by virtue of the Constitution (26th Amendment) Act 1971 the recognition accorded to defendant-1 by the President of India was withdrawn and that therefore the de-recognition relates back to the date of the institution of the suit and no consent was necessary prior to the institution of the suit. But the wording of Article 363-A (a) makes it clear that de-recognition is to take effect on and from the commencement of the Constitution (26th Amendment) Act 1971. Hence, this contention has to be rejected. But since the suit was validly instituted and was pending on the date when the recognition of defendant-1 by the President of India ceased, the suit could be continued against defendant-1 after the Constitution (26th Amendment) Act 1971 came into force without obtaining the consent of the Central Government for the continuation of the suit. Mr. Narayana Rao relied on the decision in AIR 1958 Bom 30 (Bai Shakri v. Babusinghji Takhsat Singhji) wherein it is held that the provisions contained in Section 86 of Code of Civil Procedure are imperative and a decree passed by the Court without the requisite certificate would be by a court which has no jurisdiction at all to entertain the suit, it would be a case of total absence of competence, the decree would be a nullity and would not operate as res judicata. But that was a case where the recognition of the Ruler had not been withdrawn on the date of the institution of the suit as in the present case. Hence, that decision also has no application to the present case.

15. It is next urged by Mr. Narayana Rao, that the suit is barred by limitation. The alleged dispossession is on 18-8-1970. The plaintiff would be entitled to deduct the time

taken for obtaining the certificate under Section 15 (2) of the Limitation Act, i. e., the period between 29-7-1971, the date on which he applied for a certificate, and 10-10-1971, the date on which the certificate was granted. It is urged that since the suit is under Section 6 of the Specific Relief Act 1963, the certificate should have been obtained within six months from the date of dispossession, namely, on or before 18-2-1971. Since the plaintiff chose to apply for the certificate only on 29-7-1971, it is urged that even assuming that the defect in the institution of the suit could be cured by the certificate issued subsequent to the suit, such certificate should have been obtained before 18-2-1971. According to him, limitation under Section 6 of the Specific Relief Act begins to run from the date of dispossession i. e., from 18-8-1970 and since no certificate was obtained even subsequent to the institution of the suit within the period of six months, the certificate obtained on 10-10-1971 does not prevent the suit being barred under that section. In (1893) ILR 17 Bom 169 (Jijaji Pratapji Raje v. Balakrishna Mahdeo) the suit had been instituted without a certificate under the Pensions Act (XXIII of 1871). It was held that the suit was not bad ab initio but that the court is only precluded by taking cognizance of it until the certificate is produced, following the decision of the Privy Council in (1881) 9 Ind App 8 (PC) (Nawab Muhammad Azmat Ali Khan v. Mt. Lalli Begum). In 36 Bom LR 84 = (AIR 1934 Bom 91) (Ramgopal v. Ramsarup) the plaint was presented to an officer in the Prothonotary's office on the last day of limitation. The plaint showed on its face that leave to sue was required under clause 12 of the Letters Patent, which could be given only by a Judge. On a consideration of Explanation to Section 3 of the Indian Limitation Act 1908, wherein it is provided that a suit is instituted when the plaint is presented to the proper officer, it was held that there was a difference between the "presentation of the plaint" and "the admission or receipt of the suit". Considering the terms of Order IV Rules 1 and 2 of the Code of Civil Procedure, it was held that the requirements as to obtaining of the leave of the Chamber Judge and the admission of the plaint do not affect in any way the presentation of the plaint for the purposes of the Indian Limitation Act and that the suit was not barred under Section 3 of the Limitation Act. Since in the present case the institution of the suit on 5-12-1970 was valid, the suit must be said to have been instituted within the period of limitation under Section 6 of the Specific Relief Act, 1963.

16. The next question is whether the suit became barred by limitation subsequent to 15-12-1970 and before 29-7-1971. In AIR 1956 Mad 15 (Thayammal v. Ranga Swami) it has been observed as follows:—

".....it is obvious that the question whether a suit is barred by limitation should be decided on the facts as they stood on the date of the presentation of the plaint. There is no provision in the Limitation Act under which a suit, which was in time on the date of the institution, could subsequently become barred by time. We are, of course not referring to the case of an additional party coming on record."

It can be said that the suit could not be continued without the certificate under Section 87-B after the decision of the Supreme Court i. e., after 15-12-1970. It was open to the Court to come to the conclusion that the suit became incompetent in the absence of the necessary certificate under Section 87-B after 15-12-1970. But since the suit continued to be pending even on 29-7-1971, the date when the plaintiff applied for the grant of a certificate under Section 87-B, as well as thereafter even after 10-10-1971 when the certificate was actually granted, it cannot be said that the suit became barred by limitation.

17. The suit was pending even on the date the Constitution (26th Amendment) Act, 1971 came into force when the privileges of defendant-1 ceased to exist. Hence, though it was necessary for the plaintiff to obtain the certificate for the continuation of the suit after the decision of the Supreme Court, no such certificate became necessary for the continuation of the suit after 29-12-1971. Hence, it cannot be said that the suit is barred by limitation.

18. There is no reason to interfere with the order of the lower court. This revision petition is accordingly dismissed with costs of Respondent-1.

Petition dismissed.

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K. JAGANNATHA SHETTY J.

M. Vaikunta Prabhu, Petitioner v. Rosari D' Almeda and others, Respondents.

Civil Revn. Petn. No. 2577 of 1974, D/- 2-3-1976.*

*(Against order of Principal Munsiff, Karkala, in C. R. No. 222 of 1968, D/- 3-7-1974).

GT/GT/B947/76/MVJ

(A) Karnataka Land Reforms Act (10 of 1962), Sections 48-A (5), 112 (B) (b) and Section 133 (as substituted by Kant. Ord. 24 of 1975) — Suit involving question of tenancy — Suit for injunction on the claim of tenancy — Defendant alleging that he was himself a tenant — Civil Court after framing the issue must refer it to Tribunal for decision.

Where in a suit for injunction claiming tenancy, the defendant claims that he himself was a tenant the Civil Court should not embark upon the enquiry to decide the question of tenancy. Section 112 (B) (b) confers exclusive jurisdiction on the Tribunal to decide whether a person is a tenant or not. Section 48-A provides for enquiry by the Tribunal on the application made for occupancy right. Under Section 48-A (5), the Tribunal is required to make an enquiry not only on the objection filed disputing the validity of the applicant's claim but also on the rival claim set up by any other party. When that power is thus specially conferred on the Tribunal to adjudicate the rival claims, it is difficult to say that the civil court still retains its general jurisdiction to decide the same question.

(Para 4)

Section 133 also lends support to this view. It is now wide in its amplitude and covers any such question or claim. It provides that in any suit for injunction in respect of an agricultural land, if the defendant denies the allegations of the plaintiff, and claims that he is in possession of the suit land on the strength of a tenancy existing prior to first March 1974, such issue, question or claim shall be referred to the Tribunal for decision. The question or claim set up by the defendant need not be in respect of the tenancy pleaded by the plaintiff under his alleged landlord but may be under a third party. Such question also falls within the scope of Section 133 and must be referred to the Tribunal as required thereunder. Section 133 (2) is also a source of power to the Tribunal to decide the question of rival tenancy if it is referred to it for determination, by the Civil Court.

(Para 5)

Padubidri Raghavendra Rao, for Petitioner; B. P. Holla, (for No. 1) and K. S. Ramadas, (for No. 2), for Respondents.

ORDER:— As law now stands, who is to decide the question of rival tenancy set up by the parties, whether the Civil Court under its general jurisdiction or the Tribunal in its limited jurisdiction, is the short question for decision in this case. The Tribunal is constituted under the Karnataka Land Reforms Act, 1961 (called shortly "the Act").

2. Before going to the facts, I will set out hereunder the relevant provisions of the Act. Section 133 which has been substituted by Karnataka Ordinance 24 of 1975, provides:

"133. Suits involving issues required to be decided under this Act.— (1) If any suit instituted in any Civil Court involves any issues or questions which are required to be settled, decided or dealt with by the Tribunal or any suit is instituted in any such court for possession of or injunction in respect of any land on the allegation that the defendant has trespassed or is trying to trespass on such land and the defendant denies such allegation and claims that—

(i) such land is an agricultural land;

(ii) he is in possession of such land on the strength of a tenancy existing from prior to first March 1974, then the Civil Court shall stay the suit and refer such issues, questions or claims, as the case may be, to the tribunal for decision.

(2) On receipt of such reference the Tribunal shall deal with and decide such issues, questions or claims in accordance with the provisions of this Act and shall communicate its decision to the Civil Court which has made the reference.

(3) Wherein any suit instituted or proceedings commenced in any court, the defendant makes a claim as is referred to in subsection (1), any order made by such court granting temporary injunction or appointing a receiver shall stand dissolved or vacated, as the case may be, in respect of such land." Section 48-A (5) provides:

"48-A. Enquiry by the Tribunal, etc.—

(1) Every person entitled to be registered as an occupant under Section 45 may make an application to the Tribunal in this behalf. Every such application shall, save as provided in this Act, be made on or before the 31st day of December 1974 provided that the Tribunal may, within one year from that date for sufficient cause shown admit an application made beyond six months.

xx xx xx xx

(5) Where an objection is filed disputing the validity of the applicant's claim or setting up a rival claim, the Tribunal shall, after enquiry determine, by order, the person entitled to be registered as occupant and pass orders accordingly."

3. Let me now turn to the facts. Respondent-1 filed a suit for injunction claiming tenancy in respect of certain agricultural lands and complaining interference from defendant-3. He said that he was a tenant under one Panduranga Prabhu. Defendant-3 denied that claim and said that he

himself was a tenant in possession of the lands, but under one Manjunatha Prabhu. On these rival contentions, the trial Court framed several issues out of which only issue No. 12 is relevant for our purpose it reads:

"whether the chalgeni tenancy set up by the 3rd defendant in respect of the plots in S. Nos. 49/10, 18, 19 and 20 of Palimar village and the chalgeni chit dated 20-5-1951 relied on by him are true and valid? Defendant-3 filed an application I. A. No. 18 requesting the Court to refer the said issue to the Tribunal for determination, but the plaintiff opposed the said application. He said that the rival tenancy pleaded by defendant-3 could be investigated by the civil court and that jurisdiction of the Civil Court is not taken away by the provisions of the Act. The trial Court upheld the plea and dismissed I. A. No. 18.

Hence this revision petition by defendant-3.

4. It seems to me that in a case like this, the civil court should not embark upon an enquiry on the claim of rival tenancy set up by the parties. Section 112 (B) (b) confers exclusive jurisdiction on the Tribunal to decide whether a person is a tenant or not. Section 48-A provides for enquiry by the Tribunal on the application made for occupancy right. Under Section 43-A (5), the Tribunal is required to make an enquiry not only on the objection filed disputing the validity of the applicant's claim, but also on the rival claim set up by any other party. When that power is thus specially conferred on the Tribunal to adjudicate the rival claims it is difficult to say that the civil court still retains its general jurisdiction to decide the same question. If the Civil Court is held to have that power, it would lead to conflicting decisions on the same question, one by the Tribunal and another by the Civil Court. The decision of the Civil Court would not bind the parties when the Tribunal adjudicates the question for the purpose of granting occupancy rights. I think that it is better that the civil court shall keep such question away.

5. Section 133 also lends support to my above view. It is now wide in its amplitude and covers any such question or claim. It provides that in any suit for injunction in respect of an agricultural land, if the defendant denies the allegations of the plaintiff, and claims that he is in possession of the suit land on the strength of a tenancy existing prior to first March 1974, such issue, question or claim shall be referred to the Tribunal for decision. The question or claim set up by the defendant need not be in respect

of the tenancy pleaded by the plaintiff under his alleged landlord like Panduranga Prabhu in the present case. His tenancy claim may be under a third party. Such question also falls within the scope of Section 133 and must be referred to the Tribunal as required thereunder. Whenever such question is referred, the Tribunal is required under Section 133 (2) to decide that question or claim in accordance with the provisions of the Act and shall communicate its decision to the Civil Court which has made the reference. The suit thereafter will have to be disposed of in accordance with the decision of the Tribunal. Section 133 (2) is also a source of power to the Tribunal to decide the question of rival tenancy if it is referred to it for determination, by the Civil Court.

6. In the result, the revision petition is allowed, the order under revision is set aside, and the trial Court is directed to refer Issue No. 12 to the Tribunal for determination, while staying the suit till a finding is received from the Tribunal.

7. No costs.

Revision allowed.

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B. VENKATASWAMY, J.

Smt. R. S. Leela Venugopal, Petitioner
v. V. T. Rajasekhara Shetty, Respondent
Civil Revn. Petn. No. 859 of 1975, D/-
4-2-1976*.

(A) Mysore Rent Control Act (22 of 1961), Sections 43 and 44 — Theft of water meter from premises in possession of tenant — Water meter in sound position and not requiring repairs — Provisions of Sections 43 and 44 do not apply — Tenant cannot replace it and deduct its cost from rent payable.

The fact alleged by the lessee was that the meter had been stolen, while the leased premises was in the possession of the lessee himself. It is quite obvious that such theft is not attributable to any act on the part of the lessor. Hence, the provisions of Section 43 of the Act cannot come into the picture at all. Section 44 of the Act, *inter alia*, imposes an obligation on a landlord to maintain the leased premises in 'good repair' during the period of a tenancy. It further provides that if the landlord neglects to make such repairs when called upon by the

* (Against order of Judge, Sm. C. C. Mangalore in S. C. No. 1618 of 1972, D/- 25-9-1974).

lessee through a notice, the lessee would become entitled to effect such repairs himself and recover the cost in accordance with the terms prescribed therein. It may be noticed that the case in question did not involve the replacement of an article which had become totally defective, worn out or unserviceable and, therefore, beyond any repair, and in respect of which the lessor had been duly notified by the lessee, even before its theft. The meaning of the expression 'repair' occurring in Section 44 of the Act would not take within its ambit the replacement of an article which was not in need of any repair but was lost by theft, while in the possession of the lessee. Therefore, the tenant cannot replace the stolen meter and deduct the costs from the rent payable to the landlord.

(Paras 6, 7, 9)

Cases Referred: Chronological Paras
 (1972) 1 Mys LJ 576 = 1972 Ren LR 535 8
 (1968) 1 Mys LJ 213 = 13 Law Rep 496 5
 AIR 1960 Mad 24 9

C. M. Kamath, for Petitioner; Mohandas Hegde, for K. B. Yuvaraj Ballal, for Respondent.

ORDER:— This revision under Section 18 of the Small Cause Courts Act is by the plaintiff in S. C. 1618/72 on the file of the Court of the Small Causes at Bangalore.

2. The undisputed facts are: The defendant-respondent was a lessee of a premises belonging to the petitioner-lessor on a monthly rent of Rs. 200/-. He was in arrears of rent for the month of November 1971 (i. e. Rs. 200) which had to be paid by 1-12-1971. It would appear that the water meter attached to and situated within the leased premises, and which was in a sound condition, had been stolen on the night of 6-12-1971. The lessee, therefore, called upon the lessor to have the same replaced presumably by way of repair. On lessor's refusal to comply, the lessee himself got it replaced at a cost of Rs. 78/-, through the Water Supply and Sewerage Board. He, therefore, deducted the same from out of the rent due for the previous month of November and sent the balance of rent of Rs. 122/- which was refused by the lessor. Thereupon, the lessor sued for the month's rent in question. The defence of the lessee-defendant was that he was entitled to such deduction and, therefore, not liable to pay the rent in question in full.

3. The learned Small Cause Judge while rightly addressing himself to the question whether the lessor was liable to meet the cost of such replacement, which he considered to be a mere repair, held that the lessor was so liable and in the absence of ac-

tion on her part to effect the same, the lessee was entitled to do so and deduct the cost from out of the rent payable. He made a decree, therefore, for a sum of Rs. 122/- only. Hence the petition.

4. The court below is concluding as above, relied on two grounds. They are: (1) Section 43 of the House Rent Control Act imposed an obligation on the lessor to effect the repair in question; and (2) Section 44 of that Act enabled the lessee to recover the cost thereof if he had got the necessary repair done by himself. In my view, neither of these grounds is tenable, in the facts and circumstances of this case.

5. It is plain from the language of Section 43 of the H. R. C. Act that when an amenity like water supply to the leased premises has been cut off or impaired by any act on the part of the lessor, then alone a right would accrue to the lessee to demand for its restoration. That this is the true scope of that provision has been laid down in the case of *The Deputy Commissioner v. Mahalingappa Kenchappa* ((1968) 1 Mys LJ 213), wherein Somnath Iyer, J. as he then was, has observed thus:

"The water supply to which the tenant was entitled was undoubtedly an essential supply, and so, it was impermissible for the landlord to cut off or withhold such essential supply. But the words 'cut off or withhold' connote normally some positive act which results in the essential supply or service becoming unavailable to the tenant. It is obvious that the Deputy Commissioner who occupied the position of the landlord did not cut off any water supply, since the water mains became blocked not by any act attributable to human agency but by reason of the collapse of the kitchen and latrine walls which resulted in blocking the flow of water through the mains."

6. In the instant case, the fact alleged by the lessee is that the meter had been stolen, while the leased premises was in the possession of the lessee himself. It is quite obvious that such theft is not attributable to any act on the part of the lessor. Hence, the provisions of Section 43 of the H. R. C. Act cannot come into the picture at all. The conclusion of the court below on the point based as it was on the said provision, is clearly erroneous and has to be set aside.

7. Turning to the remaining ground, it is to be noticed that Section 44 of the H. R. C. Act, inter alia, imposes an obligation on a landlord to maintain the leased premises in 'good repair' during the period of a tenancy. It further provides that if the landlord neglects to make such repairs when call-

ed upon by the lessee through a notice, the lessee would become entitled to effect such repairs himself and recover the cost in accordance with the terms prescribed therein. The question, therefore that arises for consideration is whether a replacement of a meter which had been stolen as in this case falls within the scope and ambit of the expression 'good repair' occurring in Section 44 of the H. R. C. Act. It may be noticed that the present case did not involve the replacement of an article which had become totally defective, worn out or unserviceable and, therefore, beyond any repair, and in respect of which the lessor had been duly notified by the lessee, even before its theft.

8. In *Digambar Narayan Tagore v. Firm Gadmal Motiji Marwadi* ((1972) 1 Mys LJ 576), in the context of Section 44 of the H. R. C. Act, it is observed by Jagannatha Shetty, J. thus:

"Section 44 does not give any guidance about the kind of repairs which the landlord is bound to make. It must depend upon the condition of the building at the commencement of the lease and if the house is an old one, the landlord is bound only to keep the house in good repair as an old house....."

9. From the above enunciation, it would not follow that the meaning of the expression 'repair' occurring in Section 44 of the H. R. C. Act would take within its ambit the replacement of an article which was not in need of any repair but was lost by theft, while in the possession of the lessee, as has happened in the case on hand. The true meaning of the said expression can be gathered from the Law Lexicons referred to hereunder:

(1) *Murray's New English Dictionary* "Repair: The act of restoring to a sound or unimpaired condition; the process by which this is accomplished; the result attained.

Relative state or condition of something admitting or susceptible of restoration in event of actual or possible damage or decay; chiefly of buildings or other composite structures and in phrase, in good (or bad) repair".

(2) *Ballantine's Law Dictionary* (1954): "Repair:.....the word 'repair' contemplates an existing structure or thing which has become imperfect by reason of the action of the elements, or otherwise. Work done on a structure which has not been demolished, but which has been damaged. The word is to be distinguished from reconstruction which properly applies only to work done upon a structure which had been demolished in whole or in part."

(3) *Stroud's Judicial Dictionary* (third edition);

"Repair: To repair means to make good defects, including renewal where that is necessary, i. e. patching, where patching is reasonably practicable and, where it is not, you must put in a new piece But 'repair does not connote a total reconstruction. (emphasis supplied — Reproduced from AIR 1960 Madras 24).

10. Viewed in the light of the above enunciations, I am unable to agree with the view of the court below that the facts of the present case fall within the scope of the provisions of Section 44 of the H. R. C. Act, thus enabling the lessee to recover the cost of replacement of the meter.

11. In the result, this petition succeeds and is accordingly allowed. Consequently, the suit stands decreed for a sum of Rs. 200/- only with costs. In the peculiar circumstances of the case, there will be no direction for payment of interest, current or future. If the sum of Rs. 122/- originally decreed has already been paid in court as indicated in the judgment impugned, there will be a decree for the balance of Rupees 78/- only. The costs payable however shall be computed on the basis of principal sum of Rs. 200/-. Parties are directed to bear their own costs in this Court.

Petition allowed.

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D. M. CHANDRASHEKHAR AND
B. VENKATASWAMI JJ.

Arun Narayan, Petitioner v. The State of Karnataka and another, Respondents.

Writ Petn. No. 4251 of 1975, D/- 5-3-1976.

(A) *Constitution of India, Article 226* — Writ petition against private Medical College — Maintainability — (Karnataka Medical Colleges (Selection for Admission) Rules (1975), Rule 3).

A writ petition against the State (Respondent 1) and a private Medical College (Respondent 2) for a direction against Respondent 2 to affirm the petitioner's admission to the college ignoring Rule 3 of the Rules of 1975 cannot be dismissed as not maintainable. Though respondent-2 is a private institution which does not come within the definition of "State" in Article 12 of the Constitution and is also not a public authority, since it feels obliged to obey the direction of the Government to admit cer-

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tain number of "Karnataka" students to its College, the petitioner can ask for a writ restraining respondent-1, the State of Karnataka from enforcing any direction given by it. Hence, it would be too technical to dismiss this petition solely on the ground that the respondent-2 is a private institution. Though the petitioner has asked for a writ, direction or order as against respondent-2, what he has in substance, sought for is a writ to respondent-1, the State of Karnataka, not to enforce its direction to admit certain number of "Karnataka" students to respondent-2 College. (Para 18)

(B) Interpretation of Statutes — Meaning of a section or a rule — Can be ascertained by taking aid from other section or rules in an enactment or body of rules. (Para 24)

(C) Interpretation of Statutes — Statutory provision or rule capable of two constructions — That which accords with probable intention of Legislature or rule making authority should be preferred. (Para 28)

(D) Karnataka Medical Colleges (Selection for Admission) Rules (1975), Rule 3 (1) — Interpretation of.

The requirement of Rule 3 (1) of having studied for 10 years in educational institutions in Karnataka State, is in addition to, but not as an alternative to, the requirement of Indian citizenship. (Para 29)

(E) Constitution of India, Article 11 and Sch. 7 List I Entry 17 and Sch. 7 List II Entry 11 — Scope of Article 11 — Law not relating to political status of citizens or acquisition, continuance or termination of citizenship falls outside scope of Article 11 and List I entry 17 — Karnataka Medical Colleges (Selection for Admission) Rules (1975), Rule 3 (1) — Subject-matter of rule falls under List II entry 11 and not under Article 11 or List I entry 17.

In the light of the distinction between citizenship and domicile as pointed out by the Supreme Court in AIR 1955 SC 334, it follows that a law that makes distinction in regard to civil rights of citizens based on the ground of domicile or residence in a part of India, does not necessarily affect the political status or rights of citizens. What Article 11 of the Constitution states is that the provisions of Articles 5 to 11 are not intended to lay down exhaustive or unalterable law relating to acquisition, continuance and termination of citizenship and that Parliament has power to enact laws regulating citizenship, including acquisition, continuance and termination of citizenship. But laws which do not relate to political status of citizens or acquisition, continuance or termination of citi-

zenship, are outside the scope of Article 11 and Entry 17 of List I of the Seventh Schedule to the Constitution. By virtue of Entry 11 of List II of the Seventh Schedule to the Constitution (which reads "Education including universities, subject to the provisions entries 63, 64, 65 and 66 of List I and Entry 25 of the List III"), the State Government would be within its right to prescribe qualifications for admission to colleges so long as its action does not contravene any other law. As the requirement that an applicant for admission to medical Colleges should have studied for 10 years in educational institutions in Karnataka State, does not relate to the political status of a citizen or acquisition, continuance or termination of citizenship, Rule 3 (1) cannot be said to lie within the ambit of Article 11 or Entry 17 of List I of the Seventh Schedule to the Constitution. (Para 46)

(F) Constitution of India, Articles 15 and 29 (2) — Admission to educational institutions — Citizen if has right to admission without discrimination on ground of domicile or residence.

There is no right either expressly or impliedly conferred on a citizen to be admitted to any educational institution maintained or aided by the State or a right that he should not be discriminated in regard to admission to such educational institutions on the ground of domicile or residence, as distinguished from race, religion, caste, sex, language, or place of birth. When the several grounds on which a citizen shall not be discriminated against in regard to admission to educational institutions, have been expressly specified in Articles 15 and 29 (2) of the Constitution, it is unreasonable to imply any other ground not expressly mentioned in those two Articles. (Para 49)

(G) Constitution of India, Articles 14 and 19 (1) (d) and (e) — Scope of freedoms guaranteed to citizen under Article 19 (1) (d) and (e) — Admission to Medical Colleges in State — Requirement of domicile or residence for 10 years in State in addition to citizenship of India — Not violative of Article 14.

The right to move freely throughout the territory of India, bars any restrictions on such movement and the right to reside and to settle in any part of India, bars any restriction, either temporary or permanent, on inter-State migration, except where such restriction is reasonable and in public interest. Those rights do not, by themselves, ensure that every citizen of India will have all the advantages and privileges in every State available to citizens domiciled or residing

therein and that no kind of preference is permissible to citizens who are domiciled in, or residents of, that State. But such differential treatment will be bad in law if it is not based on reasonable classification contemplated by Article 14 of the Constitution. But every preference given by a State to citizens who are domiciled therein or have resided therein, is not necessarily bad. AIR 1955 SC 334, Foll. (Para 52)

(H) Constitution of India, Article 301 — Right of person to be admitted to an educational institution in any part of India — Article 301 has no application.

Freedom of trade, commerce, intercourse throughout the territory of India enjoined by Article 301, has no application to the right of a person to be admitted to an educational institution in any part of the territory of India. (Para 53)

(I) Constitution of India, Article 246 and Sch. 7 List II Entry 11 — Legislative competence of State Legislature — Karnataka Medical Colleges (Selection for Admission) Rules (1975), Rule 3 (1) — State Legislature was competent to make legislation similar to Rule 3 (1). (Para 54)

(J) Constitution of India, Article 162 — Executive power of State — Power to make rules regulating its activities — Limitations on.

Except where Constitution has expressly provided that exercise of executive power in any matter should be under a law enacted by legislature, the executive power of the State would, in the absence of legislation, extend to making rules regulating the action of the executive. But, such rules cannot offend the provisions of the Constitution and should not be repugnant to any legislative enactment of the appropriate legislature. Such rules will, no doubt, be superseded by any legislation of the appropriate legislature in respect of the matters covered by the rules. Subject to the aforesaid limitations, such rules may relate to matters of policy, may make classification for purposes of those rules and may determine the conditions of eligibility for receiving any advantage, privilege, grant or aid from the State. (Para 62)

As the State Legislature itself had power to make a legislation similar to Rule 3 (1) the State had also power to make that Rule in exercise of its executive power. AIR 1964 SC 1823 Foll. (Para 62)

(K) Karnataka Medical Colleges (Selection for Admission) Rules (1975), Rule 3 (1) — If invalid on ground of impermissible delegation of legislative powers — (Constitution of India, Article 245).

The questions of the legislature not performing its essential legislative functions and

excessive delegation of powers by the legislature, will arise only when the legislature has enacted a law on any matter. If in the absence of a legislative enactment on any matter, the executive has, in exercise of its executive power, made certain rules regarding such matter, there can be no question of abdication of the essential legislative function or excessive delegation even if such rules relate to important matters of policy. Hence, the contention that Rule 3 (1) is invalid on the ground of impermissible delegation of the legislative powers cannot be accepted as correct. (Para 63)

Cases Referred: Chronological Paras
AIR 1971 SC 1439 = (1971) 2 Civ App J 32 (SC) 19, 20, 52
AIR 1967 SC 1170 = (1967) 2 SCR 454 58
AIR 1964 SC 1823 = (1964) 6 SCR 368 46, 62
AIR 1959 SC 249 = 1959 Cal LJ 105 57
AIR 1955 SC 334 = (1955) 1 SCR 1215 19, 45, 52
AIR 1952 Trav Co 274 = ILR (1952) Trav Co 347 34
AIR 1950 SC 211 = 1950 SCR 519 34
(1947) 92 Law Ed 249 = 332 US 633 43
(1941) 86 Law Ed 119 = 314 US 160 41
(1934) 79 Law Ed 446 = 293 US 388 59
(1898) 43 Law Ed 432 = 172 US 239 39
(1872) 21 Law Ed 394 = 16 Wall 36 38
(1871) 20 Law Ed 449 = 12 Wall 418 36

B. R. Iyengar, M. K. Vasudev Reddy and T. R. Rangaraju, for Petitioner; M. P. Chandrantraj Urs., Govt. Pleader, (for No. 1) and S. Tukaram Pai, (for No. 2), for Respondents.

CHANDRASHEKHAR, J.:— This petition has been referred to a Division Bench by Venkataramiah, J.

2. The petitioner was an applicant for admission to Kasturba Medical College at Manipal (respondent-2). In this petition under Articles 226 and 227 of the Constitution of India, he has prayed for quashing Rule 3 of the Karnataka Medical Colleges (Selection for Admission) Rules, 1975, (hereinafter referred to as the Rules). He has also prayed for issue of a writ in the nature of mandamus directing respondent-2 to affirm his admission to that College ignoring Rule 3 of the Rules.

3. Before advertng to the facts of the case, it is useful to state the set up of Medical Colleges in Karnataka State and how students are admitted to them.

4. In Karnataka State, the State Government has been running 4 Medical Colleges at Mysore, Bangalore Hubli and Bellary and there are 5 non-Government Medical Colleges including respondent-2 College. These

Dilbande Hussain, AIR 1967 MP 14 = (1964 Jab LJ 707) is no longer good law.

4. Section 250 of the Revenue Code, which enacts a remedy for reinstatement of a Bhumiswami, improperly dispossessed, reads thus:—

"250. Reinstatement of Bhumiswami improperly dispossessed.

(1) If a Bhumiswami is dispossessed of the land otherwise than in due course of law or if any person unauthorisedly continues in possession of any land of the Bhumiswami to the use of which such person has ceased to be entitled under any provisions of this code, the Bhumiswami or his successor-in-interest may apply to the Tahsildar for restoration of the possession within two years from the date of dispossession or from the date on which the possession of such person becomes unauthorised, as the case may be.

(2) The Tahsildar shall, after making an enquiry into the respective claims of the parties, decide the application and when he orders the restoration of the possession to the Bhumiswami put him in possession of the land.

(3) The Tahsildar may at any stage of the enquiry pass under sub-section (2) an interim order for handing over the possession of the land to the applicant, if he finds that he was dispossessed by the opposite party within six months prior to the submission of the application under this section. In such a case the opposite party shall, if necessary, be ejected under orders of the Tahsildar.

(4) When an interim order has been passed under sub-section (3) the opposite party may be required by the Tahsildar to execute a bond for such sum as the Tahsildar may deem fit for abstaining from taking possession of land until the final order is passed by the Tahsildar.

(5) If the person executing a bond is found to have entered on into or taken possession of the land in contravention of the bond, the Tahsildar may forfeit the bond in whole or in part and may recover such amount as an arrear of land revenue.

(6) If the order passed under sub-section (2) is in favour of the applicant, the Tahsildar shall also award a reasonable compensation to be paid to the applicant by the opposite party;

Provided that the amount of compensation shall not exceed ten times the revenue of the land for each year's occupation.

(7) The compensation awarded under this section shall be recoverable as an arrear of land revenue.

(8) When an order has been passed under sub-section (2) for the restoration of the possession to the Bhumiswami the Tahsildar may require the opposite party to execute a bond for such sum as the Tahsildar may deem fit for abstaining from taking possession of the land in contravention of the order.

(9) Where an order has been passed under sub-section (2) for the restoration of the possession to the Bhumiswami, the opposite party shall also be liable to a fine which may extend to five thousand rupees;

Provided that it shall not be competent to the Tahsildar to impose a fine of amount exceeding one thousand five hundred rupees, but if in any case he considers that circumstances of the case warrant imposition of a higher fine, he may refer the case to the sub-divisional officer who shall after giving the party concerned an opportunity of being heard, pass such orders in respect of fine as he may deem fit."

Then Section 257 of the same Code provides for exclusive jurisdiction of Revenue authorities as follows:—

"257. Except as otherwise provided in this code, or in any other enactment for the time being in force, no civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the board, or any Revenue officer is, by this code empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no civil court shall exercise jurisdiction over any of the following matters:—

(x) any decision regarding reinstatement of a Bhumiswami improperly dispossessed under Section 250."

5. The ambit and scope of Section 250 and the effect of clause (x) of Section 257 of the Revenue Code were considered by a Division Bench of this court in *Nathu v. Dilbande Hussain* (Supra), (AIR 1967 Madh Pra 14) where it was held:—

"By sub-section (2) of Section 250, it is no doubt provided that the Tahsildar shall decide the application of the Bhumiswami for possession after making an enquiry into the respective claims of the parties. The enquiry that is contemplated is of a summary nature. In disposing of an application under Section 250 the

Tahsildar has no doubt to decide whether the person complaining of dispossession or of continued unauthorised possession on the part of some one is or is not a Bhumiswami and whether he has been dispossessed or whether there has been unauthorised and illegal continuation of possession of the land by the person complained against. But the questions, both as regards title of the Bhumiswami to the land and of possession, are not finally decided by the Tahsildar. Even after the revenue court makes an order under Section 250, the aggrieved party has the remedy of filing a civil suit for establishing his title to the land and for obtaining possession of the same. The decision of the revenue court cannot operate as *res judicata* in the civil suit; nor can Section 257 (x) of the Code stand in the way of institution of a suit for possession of a land founded on title. What is excluded from the cognizance of a civil court under clause (x) of Section 257 is a suit of the type of one under Section 9 of the Specific Relief Act for restoring possession of land to a dispossessed Bhumiswami."

6. The above dictum may be analysed thus:—

(1) Section 250 (2) confers jurisdiction on the Tahsildar to decide a Bhumiswami's application for restoration of possession.

(2) The Tahsildar has to make an enquiry into the respective claims of the parties.

(3) The enquiry, which is contemplated, is of a summary nature.

(4) The Tahsildar has to decide whether the person complaining of dispossession is or is not a Bhumiswami and whether he has been dispossessed or there has been unauthorised and illegal continuance of possession by the person complained against.

(5) But both the questions, (a) as regards title of the Bhumiswami, and (b) of possession, are not finally decided by the Tahsildar. The party aggrieved by an order under Section 250 has a remedy to file a civil suit for establishing his title to the land and for obtaining possession of the same.

(6) Section 257 (x) of the Code does not bar such a civil suit, i.e. a suit for possession of land founded on title. It is only a suit of the type of one under Section 9 of the Specific Relief Act for restoration of possession of land, which is barred by Section 257 (x) of the Code.

(7) The decision of the Revenue Court will not operate as *res judicata* in such a civil suit.

7. Nathu v. Dilbande Hussain (Supra) (AIR 1967 Madh Pra 14) held the ground all these years and numerous cases have been decided on its basis. However, in the present case, Shri Mishra learned counsel for the defendant, urged before the Single Judge that this decision must be held to be *pro tanto* overruled by their Lordships' decision in Hatti v. Sunder Singh, AIR 1971 SC 2320 in which it has been held that the civil court has no jurisdiction in view of Section 185 (1) of the Delhi Land Reforms Act (8 of 1954), to entertain a suit in which the plaintiff, alleging that he is the proprietor of the suit land, asks for a declaration that he is entitled to Bhumidhari rights in respect of that land. Shri Mishra however argued before us that if no suit is brought in the Revenue Court within two years of dispossession, a civil suit is not barred having regard to the provisions of the Land Revenue Code.

8. We are clearly of the view that the decision in Hatti v. Sunder Singh (Supra) (AIR 1971 SC 2320) was rendered on the particular provisions of the Delhi Land Reforms Act (8 of 1954) and the application of that authority has to be confined to those provisions of that Act. The M. P. Land Revenue Code does not contain those provisions. Under the M. P. Code, a proceeding before the Revenue Court is much different in nature, character and scope.

Section 185 (1) of the Delhi Act provides as follows:—

"Except as provided by or under this Act, no Court other than a court mentioned in column 7 of Schedule I shall notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application or proceedings mentioned in column 3 thereof."

Their Lordships considered the relevant entries Nos. 4, 19 and 39 in the First Schedule of that Act. Entry No. 4 mentions application for declaration of Bhumidhari rights. There is no period of limitation prescribed at all. Entry No. 19, which refers to Section 84 of that Act, relates to a suit for ejectment of a person occupying land without title or for damages. The period of limitation is three years, the starting point varying according to three categories of plaintiffs. Entry No. 28 refers to Section 104 and relates to a declaratory suit under that section,

"No period of limitation is prescribed for such a suit and the court of original jurisdiction is, again, the Revenue Assistant." In that case, the High Court referred to section 186 of the Act under which any question raised regarding the title of any party to the land, which is the subject-matter of a suit or proceeding under the First Schedule has to be referred by the Revenue Court to the competent civil court for decision after framing an issue on that question. From this, inference was sought to be drawn that the question of title could be competently agitated by a suit in the civil court, as the jurisdiction of the civil court was not barred. Their Lordships saw no justification for drawing such an inference. It was held:—

"Section 186 envisages that question of title will arise before the Revenue Courts in suits or proceedings under the First Schedule and, only if such a question arises in a competent proceeding pending in a revenue court, an issue will be framed and referred to the Civil Court. Such a provision does not give jurisdiction to the civil court to entertain the suit itself on a question of title. The jurisdiction of the civil court is limited to deciding the issue of title referred to it by the Revenue Court. This clearly implies that if a question of title is raised in an application for declaration of Bhumidhari rights under item 4 of Schedule I of the Act, that question will then be referred by the Revenue Assistant to the Civil Court; but a party wanting to raise such a question of title in order to claim Bhumidhari right cannot directly approach the civil court."

Their Lordships have found:—

"The Act is a complete Code under which it is clear that any one, wanting a declaration of his right as a Bhumidar, or aggrieved by a declaration issued without notice to him in favour of another, can approach the Revenue Assistant under item 4 of the First Schedule and this he is allowed to do without any period of limitation"

In conclusion, their Lordships found that all the reliefs claimed by the plaintiff in that suit were within the competent jurisdiction of the Revenue-Assistant and the Civil Court had no jurisdiction to entertain the suit.

9. In the Madhya Pradesh Land Revenue Code, the provisions are not analogous to those of the Delhi Act. The remedy provided in Section 250 of this

Code can be resorted to by a Bhumiswami by an application to the Tahsildar. He has to show either (a) that he was dispossessed by the non-applicant otherwise than in due course of law, or (b) that he was dispossessed within two years from the date on which the possession of such person became unauthorised (although initially the possession of that person may be authorised). Thus, clearly enough, this section provides for a remedy at the hands of the Tahsildar for restoration of possession, when a Bhumiswami is improperly dispossessed, that is without due process of law. Clause (x) of Section 257 excludes the jurisdiction of the Civil Court to challenge "any decision regarding reinstatement of a Bhumiswami, improperly dispossessed under Section 250." In both these provisions, the subject-matter of enquiry is possession not title. (See Abdul Waheed Khan v. Bhawani, 1966 Jab LJ 1022 = (AIR 1966 SC 1718) under the Delhi Act if the question of title is raised, it is referred to the Civil Court for decision. There is no analogous provision in the Madhya Pradesh Code.

10. Determination of the question of title is the province of the Civil Court and unless there is any express provision to the contrary, exclusion of the jurisdiction of the Civil Court cannot be assumed or implied, AIR 1966 SC 1718.

11. It was strenuously argued by Shri Mishra that since remedy under Section 250 is available to a Bhumiswami, the applicant has necessarily to prove that he is a Bhumiswami, which means that the Tahsildar can go into the question of title in order to determine whether the applicant is or is not a Bhumiswami, and on that basis it is argued that since the Tahsildar is empowered under the Revenue Code, his decision will be within the mischief of clause (x) of Section 257, or the general provision contained in the opening part of Section 257. We are clearly of the view that having regard to the language of Section 250 and the scheme of the Land Revenue Code, the question before the Tahsildar whether the applicant is Bhumiswami will be merely ancillary and incidental, which will be decided on the basis of the revenue record. If the entry in the revenue record is not correct, the person aggrieved has the right under Section 111 of the Code to get the entry corrected and in that case also, if a dispute as to title arises, it can be decided by the Civil Court, (AIR 1966 SC 1718).

12. The scheme of the Code consistently preserves the jurisdiction of the civil Court to decide questions of title and that jurisdiction is not excluded. For instance, in the Chapter relating to mutation and record of rights (Chapter IX), Section 111 enacts:—

"The Civil Court shall have jurisdiction to decide any dispute to which the State Government is not a party relating to any right which is recorded in the record-of-rights."

Again, in a proceeding for partition, under Section 178, if any question of title is raised, the Tahsildar shall not make any partition until the question of title has been decided by the Civil Court.

13. If Shri Mishra's argument that in proceedings under Section 250 of the Revenue Code, the Tahsildar has jurisdiction to go into the question of title, is accepted it will lead to anomalous results.

14. It must be remembered that a Bhumiswami has a title though he is not the "Swami" of the "Bhumi" which he holds, in the sense of absolute ownership, because as declared in Section 257 of the Revenue Code, ownership of land vests in the State Government, yet, he is a Bhumiswami. He is not a mere lessee. His rights are higher and superior. They are akin to those of a proprietor in the sense that they are transferable and heritable, and, he cannot be deprived of his possession, except by due process of law and under statutory provisions, and his rights cannot be curtailed except by legislation.

15. Under the general law, a suit for possession based on title can be instituted in the Civil Court within 12 years from the date of dispossession. The principle that possession must follow title has received greater weight and sanctity when the distinction between the scope and effect of Article 142 and those of Article 144 of the Limitation Act, 1908, has been watered down and simpler provisions have been substituted in Articles 64 and 65 of the Limitation Act of 1963. It will be anomalous to read Section 250 as providing for a suit for possession based on title, which is to be instituted within two years only. It will entail a fantastic result that if a suit is not brought within two years under Section 250, the Bhumiswami's right will be extinguished, because, by virtue of Section 26 of the Limitation Act, if a suit for possession is not instituted within the

period of limitation prescribed therefor, not only the remedy is barred but the right is also extinguished. Section 26 is an exception to the general rule that limitation bars the remedy but does not extinguish the right.

16. Even under the Delhi Reforms Act (supra), which was for consideration before their Lordships in *Hatti v. Sunder Singh* (supra), (AIR 1971 SC 2320) it is mark-worthy that the question of title has to be referred to the Civil Court and, moreover, there is no period of limitation prescribed. Thus, there is no deviation from the consistent policy of the law that the question of title relating to immovable property must be determined by the Civil Court. We do not see any deviation from that policy in any of the provisions of the M. P. Land Revenue Code either. On the other hand, Sections 111 and 178 are in concordance with that policy.

17. We, therefore, hold that a Bhumiswami is not bound to avail himself of the speedy remedy provided in Section 250 of the Code. It is open to him to take recourse to the summary remedy under Section 250, or even without it straightway bring a suit in the Civil Court for declaration of his title and possession. Even if there has been a decision under Section 250 by a revenue Court, the party aggrieved may institute a civil suit to establish his title to the disputed land. We further hold that *Nathu v. Dilbande Hussain*, AIR 1967 Madh Pra 14 = 1964 Jab LJ 707 was correctly decided. The Civil Court can take cognizance of a suit. This is our answer to the questions referred to us.

Answered accordingly.

AIR 1976 MADHYA PRADESH 164

G. P. SINGH AND S. M. N. RAINA, JJ.

The 'Ad Hoc' Committee, the Indian Insurance Company Association Pool, Bombay Appellant v. Smt. Radhabai Respondents.

Misc. Civil Appeals Nos. 175 and 191 of 1971 and 16 of 1972 D/- 21-2-1976.*

(A) Tort—Vicarious liability—Liability of owner of Motor Vehicle, in case of accident — Wrongful and unauthoris-

*(Against Award D/- 18-9-1971 by D. P. Agarwal, Dist. J. (Claims Tribunal), Seoni in M. V. C. No. 27 of 1976).

DT/DT/A943/76/GGM

ed mode of doing the act on the part of servant — Driver of the Motor vehicle in the course of employment entrusting control of steering wheel to an unauthorised person — Accident resulting — Owner liable for unauthorised mode of doing the act by Driver. (Motor Vehicles Act (1939), Section 110-B).

The master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) wrongful act authorised by the master (2) a wrongful and unauthorised mode of doing some act authorised by the master. Where in respect of motor vehicle belonging to the Government the driver who was given the control of the vehicle not merely to drive it but to take it to a place in the course of an employment viz. for bringing the ailing children to the Primary Health Centre, and the driver who was in control of the vehicle gave control of the steering wheel to one unauthorised person, the act of the driver in giving the control of the steering wheel to such an unauthorised person is merely a wrongful and unauthorised mode of doing the act authorised by the master being the act of driving the vehicle and taking it to the place where the children were, for bringing them to the hospital. In such circumstances the Government viz. the owner of the vehicle is vicariously liable for the negligence of driver in permitting unauthorised person to drive the vehicle. AIR 1966 SC 1697 and (1915) 1 KB 644 and (1949) 2 KB 208 and (1963) 1 WLR 991, Ref. (Para 10)

(B) Tort — Vicarious liability — Liability of the State for accidents arising from the State owned vehicle — Accident whether arose in execution of delegated sovereign function of the State — Test to determine — Vehicle belonging to Primary Health Centre — Work of bringing ailing children from a place to the hospital is not the sovereign function of the State — In case of accident due to negligence of driver the State is vicariously liable.

In cases where the State is sued for the tortious act on its servant and where plea of immunity based on employment referable to sovereign functions is raised, the Court before upholding the plea must find that the impugned act was committed in the course of an undertaking or employment which falls within the area of traditional sovereign functions. Gene-

rally the traditional sovereign functions are the making of laws, the administration of justice, the maintenance of order, repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. The socio-economic and welfare activities undertaken by a modern State are not included in the traditional sovereign functions. Consequently where ailing children are required to be brought to the hospital run by the State in Primary Health Centre, the work of medical relief undertaken by the State through the Primary Health Centre is not a sovereign function in the traditional sense. When, therefore, a vehicle belonging to the State and engaged in the course of bringing ailing children to the hospital run by the Primary Health Centre caused an accident due to the driver entrusting the control of the steering wheel to an unauthorised person, the State is liable vicariously for the negligent act of its driver and the act not being the sovereign function of the State no immunity can be claimed. AIR 1965 SC 1039 and AIR 1960 SC 610 and AIR 1960 SC 675 and (1883) 9 AC 61 (HL) and AIR 1962 SC 933 and AIR 1974 SC 890 Ref. (Paras 12 and 13)

(C) Civil Procedure Code (1908), O. 41 R. 27 — Taking of additional evidence — Motor accident case — Insurer failing to file an additional copy of insurance policy containing a particular term — Absence of any reasons as to why such policy was not filed before the Accident Claims Tribunal — In appeal, the Insurer was not allowed to file the copy of the policy as additional evidence, conditions of O. 41 R. 27, held, not being satisfied. (Para 15)

Cases Referred: Chronological Paras
 AIR 1975 Madh Pra 31 = 1974 Acc CJ 481 16
 AIR 1974 SC 890 = 1974 Lab IC 598 13
 1971 AC 115 (HL) 16
 AIR 1966 SC 1697 = (1966) 3 SCR 527 8
 AIR 1965 SC 1039 = (1965) 1 SCR 375 13
 (1963) 1 WLR 991 = (1963) 2 All ER 879 9, 10
 AIR 1962 SC 933 = 1962 Supp (2) SCR 989 13
 AIR 1960 SC 610 = (1960) 2 SCR 866 13
 AIR 1960 SC 675 = (1960) 2 SCR 942 13
 (1949) 2 KB 208 = (1949) 2 All ER 27 9
 (1915) 1 KB 644 = 84 LJ KB 342 8, 9, 10
 (1883) 9 AC 61 (HL) 13

A. K. Khaskalam, for Appellant; V. G. Patil (for No. 1) and K. K. Adhikari (for No. 6) for Respondents.

G. P. SINGH J. (For himself and S. M. N. Raina J.):— This order shall also dispose of Miscellaneous First Appeal No. 191 of 1971 and Miscellaneous First Appeal No. 16 of 1972.

2. The facts leading to these appeals are that a motor vehicle bearing registration number MPJ 9132 was involved in an accident on 3rd June 1965 at Nainpur in which one Babulal died. Babulal's widow and son, namely, Radhabai and Ravishankar, applied to the Motor Accidents Claims Tribunal for award of compensation. The Tribunal by its award, dated 18th September 1971, has allowed the claim for compensation to the extent of Rs. 9,486/-. Interest from the date of the claim petition upto payment at the rate of 4% per annum has also been allowed. All these appeals have been filed against the award.

3. The facts found are that the vehicle involved in the accident belonged to the State and that at the relevant time it was allotted to the Primary Health Centre, Nainpur. At about 10 P. M., one Satyanarayan approached Dr. Tiwari, Assistant Civil Surgeon, Nainpur, with a request that the vehicle be allowed to be taken to a place at a distance of 12 miles from Nainpur where some children were seriously ill with a view to bring them for treatment at Nainpur. This request was allowed by Dr. Tiwari. The vehicle was entrusted to Lallu, who was a driver in Government employment, for bringing the ailing children. When the vehicle left the hospital premises, it was being driven by Lallu. Satyanarayan was also in the vehicle. Lallu stopped the vehicle near the Petrol Depot of Narendra Kumar Jain and got down to take petrol in a petrol can. After taking petrol, when the vehicle left the depot of Narendra Kumar Jain, it was driven by Satyanarayan, who was on the steering wheel and Lallu was sitting beside him. After some distance from the petrol depot, the accident happened. The vehicle first struck an empty cot belonging to one Pande which was on the right hand side of the road. The vehicle then swerved towards the left and hit the cot on which Babulal was sleeping. Babulal, it appears, died on the spot. The Tribunal has found that the road was sufficiently wide and had the vehicle been properly driven, the accident would not have happened. The Tribunal further found that although Satyanarayan was actually driving the vehicle, Lallu was negligent in permitting Satya-

narayan, who had no driving licence, to drive the vehicle. The Tribunal held that the accident happened in the course of employment and the State was vicariously liable for the negligence of Lallu. The Tribunal also held that apart from the State, Satyanarayan, Lallu and the Insurance Company were also liable. The claim was, however, dismissed against the Civil Surgeon who was also joined as a party before the Tribunal.

4. In the appeal preferred by Satyanarayan (Misc. First Appl. No. 16 of 1972), the only argument addressed to us is that at the time when the accident happened, Satyanarayan was not driving the vehicle and the vehicle was being driven by Lallu. In our opinion, there is no merit in this argument. The most important evidence in this connection is the evidence of Narendra Kumar Jain (3-4 O. P. W. 4) who is the owner of the petrol depot from where petrol was taken in a can by Lallu. The witness is definite that at the time when the vehicle started after taking petrol, Satyanarayan was on the steering wheel and Lallu was sitting beside him in the front. It is clear from the evidence of Narendra Kumar Jain that after the vehicle left the petrol depot, it was being driven by Satyanarayan. Radhabai (P. W. 1) and Bhikamlal (P. W. 4) have also stated that at the time when the vehicle dashed against the cot on which Babulal was sleeping, Satyanarayan was on the steering wheel and Lallu was sitting beside him.

It has been stated by Bhikamlal that there was light in the vehicle. The Tribunal has relied on the evidence of these witnesses and we do not find any good reason to take a different view. Satyanarayan has examined three witnesses to prove that Lallu was driving the vehicle. These witnesses are Chhotelal (1 O. P. W. 1), Rajkumar (1 O. P. W. 2) and Rupnarayan (1 O. P. W. 4). The evidence of these witnesses is clearly false because they even denied the presence of Satyanarayan in the vehicle. Satyanarayan has himself not dared to enter the witness-box. In the circumstances, the Tribunal was right in disbelieving Satyanarayan's story that the vehicle was being driven by Lallu at the time of the accident and that it was not being driven by him.

5. Satyanarayan had no driving licence. The manner in which the accident happened itself shows that the vehicle was negligently driven. Although there was ample space on the road for

the vehicle to pass, it dashed against an empty cot on the right hand side and then suddenly swerved towards the extreme left and hit the cot of Babulal. On these facts, the maxim *Res ipsa loquitur* applies. The case of negligent driving resulting in the death of Babulal is clearly made out. There is no merit in Satyanarayan's appeal and it must be dismissed.

6. In the appeal filed by the State of Madhya Pradesh (Miscellaneous First Appeal No. 191 of 1971), the first contention of the learned Government Advocate is that as Lallu had permitted Satyanarayan to drive the vehicle without any authority, the State was not vicariously liable.

7. We have already stated the relevant facts that the vehicle was entrusted to Lallu, who was the driver in the employment of the State, to take the vehicle for bringing to the hospital the ailing children. At the time when the accident happened, Satyanarayan was on the steering wheel and Lallu was sitting beside him. The vehicle was on its way to the village where the ailing children were for the purpose of bringing them to the hospital.

8. As stated by Salmond (Law of Torts, 15th Edition, page 620) "a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master." This passage from Salmond has been cited in a number of cases with approval. In *Sitaram v. Santanu Prasad*, AIR 1966 SC 1697 which is the leading Indian case, the law on the point of vicarious responsibility of master was stated in almost identical terms (Page 1704). In *Sitaram's* case, the facts were that the owner had entrusted his car to the driver for plying it as a taxi. The driver took the cleaner, who was under his employment, to the R. T. O.'s office for driving test. The accident happened when the cleaner was driving while giving the driving test. The driver was then not in the vehicle. On these facts, it was held that the owner was not liable. It will be seen that in *Sitaram's* case the accident did not happen when the vehicle was being driven in the execution of the owner's business.

The vehicle was then engaged in the work of the cleaner which had no connection whatsoever with the

owner's business. The driver was also not in the vehicle and could not be said to be in control of the vehicle at the time when the accident happened. The Supreme Court in *Sitaram's* case referred to *Ricketts v. Thos Tilling Ltd.* (1915) 1 K. B. 644 and distinguished it. In *Ricketts' case*, the facts were that the conductor of an omnibus drove the omnibus for the purpose of turning it in the right direction for the next journey and in that process by his negligence the vehicle mounted the foot pavement and injured a person. The driver was sitting beside the conductor. The Court of Appeal held that on these facts the master could be held liable and a new trial was ordered. Distinguishing this case, the Supreme Court in *Sitaram's* case said as follows:

"the turning round of the vehicle was an act within the employer's business and not something outside it. When the driver asked the conductor to drive the omnibus for his master's business, he did the master's work in a negligent way. The master was therefore rightly held responsible."

9. *Ricketts' case* (1915) 1 K. B. 644 was followed in *Marsh v. Moores* (1949) 2 K. B. 208 and *Ilkiw v. Samuels* (1963) 1 WLR 991. In *Samuel's* case the facts were that a lorry driver was employed by a transport company to drive their lorry to a sugar warehouse, pick up a load of sugar and transport it to its destination. The driver took the lorry to the warehouse and backed it into position by a conveyor belt from which the sugar was to be loaded on to the lorry. The driver stood on the back of the lorry to take the sacks from the conveyor belt and stack them on the lorry. When loaded, the lorry had to be moved a short distance to enable the driver to sheet the load and to make room for other lorries. A person employed at the warehouse offered to move the lorry. The driver accepted the offer. The person concerned while moving the lorry was unable to stop it and due to his negligence, a labourer was injured. The driver throughout remained at the back of the lorry. The driver had strict instructions from his employer not to allow any one else to drive the lorry. On these facts, the Court of Appeal held that the employer was liable on the ground that at the time when the accident happened, the lorry was being used for the purpose of the employer's business, although it was being used in an unauthorised way.

10. The facts in the instant case are nearer to the facts in Ricketts' case, (1915) 1 K. B. 644 and Samuel's case (1963) 1 WLR 991. Lallu, the driver was given the control of the vehicle not merely to drive it but to take it to the place where the ailing children were and to bring them in the vehicle to the hospital. At the time when the accident happened, the vehicle was engaged in this work and Lallu was in control of the vehicle sitting in the front. He had given control of the steering wheel to Satyanarayan and that was undoubtedly an unauthorised act on his part. But on the facts all that can be said is that Lallu's act of giving control of the steering wheel to Satyanarayan was merely a wrongful and unauthorised mode of doing the act authorised by the master, the act authorised by the master being the act of driving the vehicle and taking it to the place where the children were for bringing them to the hospital. In our opinion, the State was clearly vicariously liable for the negligence of Lallu in permitting Satyanarayan to drive the vehicle.

11. The Second contention of the learned Government Advocate is that the accident happened in the execution of delegated sovereign function of the State and, therefore, the State was not liable.

12. In cases where the State is sued for the tortious acts of its servants and where plea of immunity based on employment referable to sovereign functions is raised, the Court before upholding the plea must find that the impugned act was committed in the course of an undertaking or employment which falls within the area of traditional sovereign functions *Kasturi Lal v. State of U. P.* AIR 1965 SC 1039 at p. 1048. The question as to what are traditional sovereign functions of the State was considered by the Supreme Court in another context in *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610 at p. 615 and *Nagpur Corporation v. Its Employees* AIR 1960 SC 675 at p. 681. In both these cases, their Lordships referred with approval to Lord Watson's observation on this point in *Coomber v. Justice of Berks*, (1883) 9 AC 61 (HL). These cases show that traditional sovereign functions are the making of laws, the administration of Justice, the maintenance of order, the repression of crime, carrying on of war, the making of treaties of peace and other consequential functions. Whether this list be exhaustive or not, it is at least

clear that the socio-economic and welfare activities undertaken by a modern State are not included in the traditional sovereign functions.

The case of *Hospital Mazdoor Sabha* is a direct authority on the point that the activity of running Government hospital for giving medical relief to citizens is not a sovereign function in the traditional sense. In *State of Rajasthan v. Mst. Vidhyawati*, AIR 1962 SC 933 the accident happened when a jeep car belonging to the Government was being driven from the workshop to the Collector's bungalow for the Collector's use. It was held that the State was liable for the negligence of the driver. In *Shyam Sunder v. State of Rajasthan*, AIR 1974 SC 890 a truck belonging to the Public Works Department was engaged in famine relief work when the accident happened. In holding that the State was liable, the Supreme Court observed:

"It is not possible to say that famine relief work is a sovereign function of the State as it has been traditionally understood."

13. Applying the principle of these cases to the facts of the instant case, we are of opinion that the medical relief work undertaken by the State through the Primary Health Centre, Nainpur, in which the vehicle in question was engaged at the time when the accident happened, is not a sovereign function in the traditional sense. The defence of immunity must therefore fail.

14. As a result of the above discussion, we are of opinion that the appeal filed by the State has no force and must be dismissed.

15. Coming to the appeal filed by the Insurance Company (*Miscellaneous First Appeal No. 175 of 1971*), the argument of the learned counsel appearing for the Company is that there was a condition in the insurance policy absolving the Insurance Company in case the vehicle was driven by an unlicensed person. It is pointed out that Satyanarayan had no licence to drive a vehicle and, therefore, the Company was not liable. Section 96 of the Motor Vehicles Act allows the Insurance Company to have a condition in the policy of insurance excluding driving by any person not duly licensed and to claim exemption in case there is a breach of the condition. The difficulty before the Company in the instant case is that the policy of insurance was not produced and proved before the Tribunal.

An application was made in this Court under Order 41, Rule, 27, of the

Code of Civil Procedure for taking a copy of the policy as additional evidence. But we do not think that the conditions under which additional evidence can be taken in appeal under that provision are satisfied. No reason has been shown why the policy was not produced and proved before the Tribunal, we do not require the policy for pronouncing judgment. We, therefore, reject the application for taking a copy of the policy as additional evidence in the appeal. The position, therefore, remains that the Company has failed to prove that there was a condition in the policy of insurance exempting the Company from liability in case the vehicle was driven by a person who was not duly licensed. The appeal of the Insurance Company must, therefore, fail.

16. The claimants have filed a cross-objection for enhancement of compensation. In awarding compensation, the principle is to estimate what amount must be set aside so that its income supplemented by drawings on capital from year to year will cover the amount of annual dependency during the remaining period of dependency or the estimated remainder of the working life of the deceased whichever may be shorter. Growing inflation has led to the caution of emphasising that the sum to be awarded should be assumed to be invested in 'growth' stocks carrying a low rate of interest. This, in effect, is the same thing as saying that the valuation should be made of an annuity on the basis of low interest rates such as 4 to 5 per cent. which assume that the money values are steady but involve a higher number of years' purchase (See *Taylor v. O' Connor*, 1971 AC 115 (HL) *Munkman's Damages for Personal Injuries and Death*; Fifth Edition, pages 156-7 and *Chaurasia & Co. Chhatarpur v. Pramila Rao*, AIR 1975 Madh Pra 31 at p. 35).

17. The relevant facts in the instant case are that the deceased was earning on an average Rs. 90/- per month out of which he was spending about Rs. 60/- on his dependants who are the claimants in this case. The deceased at the time of his death was 50 years of age. His parents had died at the age of 70 to 75 years. The Tribunal, therefore, inferred that had the accident not happened, the deceased would have lived and worked up to the age of 70 years, that is, 20 years more. The deceased's widow Radhabai was aged 48 years at the time of the accident and his son Ravishankar was aged 10 years at that time. So far

as the widow is concerned, the dependency would continue throughout her life. It may be assumed that she will also live upto the age of 70 years. The amount of annual dependency works out to be Rs. 720/- per year and the estimated period of dependency is 20 years. On the principles stated above, the claimants were entitled to a lump sum which, when invested, would make available to them an annuity of Rs. 720/- per year for 20 years.

The value of an annuity of Rs 720/- for 20 years, on the basis of interest rate at 5% comes to Rs. 8,971.00 (See *Archer's Loan Repayment and Compound Interest Tables*, page 366). This would be the amount which the claimants are entitled to get under Section 1-A of the Fatal Accidents Act, 1855. The claimants are further entitled to recover pecuniary loss to the estate of the deceased under Section 2 of the Act. Under this head, the claimants can recover the damages for pain and suffering and loss of expectation of life which the deceased could have recovered had he not died. Only moderate and conventional sums are awarded under these heads. In our opinion, a sum of Rs. 500/- would be the amount which the claimants can get under Section 2 of the Act. In our estimate, therefore, the claimants are entitled to get in all Rs. 9,471/- as compensation. As earlier stated, the Tribunal has awarded a sum of Rs. 9,486/- which is nearly the same amount which we have estimated. No case, in our opinion, is made out for enhancing the amount of compensation.

18. As a result of the above discussion, all the appeals fail and are dismissed with costs, but there shall be only one set of counsel's fee for all these appeals. The cross-objection is dismissed but without any order as to costs.

Appeals dismissed.

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C. P. SEN AND S. S. SHARMA, JJ.

The Madhya Pradesh State Road Transport Corporation, Bhopal, Petitioner v. State Transport Appellate Tribunal M. P. Gwalior and others, Respondents.

Misc. Petns. Nos. 1654, 528, 775 and 1354 of 1975, D/- 6-2-1976.

CT/CT/A644/76/RSK

(A) Motor Vehicles Act (1939), Section 68-F (1-D) — Draft Scheme published — Portion of route covered by draft scheme — Grant of permit or renewal thereof must be stayed till finalisation of scheme.

Looking to the purpose and object of sub-sections (1-A) to (1-D) it is evident that no permits can be granted or renewed in relation to area or route or portion thereof covered by the draft scheme. If the new permit that has to be granted overlaps a portion of the proposed nationalised route, then granting of the permit has to be stayed till finalisation of the scheme. This will be so even if the overlapped portion is proposed to be of conjoint operation in the draft scheme. In such a case, permit could only be granted after finalisation of the scheme and not earlier in view of the prohibition contained in sub-section (1-D); till then needs of the travelling public are to be served by issuance of temporary permits. Case law discussed. (Para 4)

(B) Motor Vehicles Act (1939), Section 68-F (1-D) — Appeal against order granting permit to rival operator — Pending appeal draft scheme covering portion of route published — Appellate authority reversing R. T. A's order and granting permit to appellant — Order is invalid as Section 68-F (1-D) prohibits grant of such permit during finalisation of scheme. (Para 5)

Cases Referred: Chronological Paras

AIR 1976 Madh Pra 18 = 1975 MP LJ 478	6
(1975) 4 SCC 192 = (1975) 1 SCWR 410	8
AIR 1975 Madh Pra 181 = 1974 MP LJ 862	11
(1975) MP No. 1225 of 1975 D/- 3-12-1975 (Madh Pra)	6
AIR 1974 SC 1174 = 1974 SCD 805	9
AIR 1974 SC 1876	5
AIR 1974 SC 1940 = (1973) 1 SCR 615	8
1973 MPLJ 1033 = 1973 Jab LJ 1023	11
1973 MP LJ (SN) 115	5
(1971) MP No. 325 of 1971 D/- 12-11-1971 (Madh Pra)	5
AIR 1969 Madh Pra 182 = 1969 MP LJ 145	3
AIR 1966 SC 1366 = (1966) 3 SCR 7	11
AIR 1966 SC 1661 = 1962 Supp (1) SCR 717	8
AIR 1962 SC 1135 = 1962 Supp. (1) SCR 728	8
AIR 1961 Madh Pra 23 = 1960 MP LJ 1137	5
AIR 1957 SC 489 = 1957 SCR 663	5

V. S. Dabir, for Petitioner; P. C. Pat-hak (for Nos. 3 to 5) B. K. Rawat (for

No. 6) S. Kutmbale (for No. 7) A. Kutmbale (for No. 8), for Respondents.

C. P. SEN, J.:— By this petition under Articles 226 and 227 of the Constitution, the petitioner has prayed for quashing of the grant of permits to the respondents 6 to 8 by the State Transport Appellate Tribunal. The connected petitions of Mohanlal & ors. v. S. T. A. T. & ors M. P. No. 528 of 1975, Rangnath v. S. T. A. T. & ors. M. P. No. 775 of 1975 and Samrathmal Agarwal v. S. T. A. T. & ors. M. P. No. 1354 of 1975 are also disposed of as they arise out of the same order and common questions are involved. The said petitioners are also parties in this petition.

2. The Regional Transport Authority, Indore invited applications for three return trip permits on the regional route Dhar-Badwani (via Mangod, Amzera, Zirabad, Awalda, Manawar, Singhana, Chikalda, Rajghat). There were as many as 43 applicants and the R. T. A. by order dated 22-5-1972 granted one permit to each of the respondents 3 to 5 i. e. Mohanlal, Bhoj Yatayat Sahakari Samiti Ltd. and Gendalal for a period of three years. Appeals were preferred against the order by the present petitioner and the respondents 6 to 11. The State Transport Appellate Tribunal has set aside the order of the R. T. A. and instead granted permits to the respondents 6 to 8 i. e. Abdul Hakim, M/s. Dayabhai & Co. and Ramcharanlal by order dated 27-5-1975. Here it may be mentioned that during pendency of the appeals, the M. P. S. R. T. Corporation published the draft Scheme no. 80 in M. P. Rajpatra on 18-5-1973, proposing nationalisation of the inter-State routes Ujjain-Ahmadabad via Indore, Dohad etc. The present route i. e. Dhar-Badwani overlapped the proposed routes on the portion between Dhar and Mangod for a distance of 15 miles. Aggrieved by the order, the original grantees i. e. the respondents 3 to 5 have preferred M. P. No. 528/75, respondent no. 10 Rangnath M. P. No. 775/1975, respondent No. 11 Samrathmal M. P. No. 1354/1975 and the present petition by the M. P. S. R. T. Corporation.

3. The case of the M. P. S. R. T. Corporation is that its claim has been rejected on untenable and flimsy grounds by both the R. T. A. and the S. T. A. T. and the Appellate Tribunal also erred in granting permits to the respondents 6 to 8 as there was bar in granting the permits in view of sub-section (1-D) of Sec-

tion 68-F of the Motor Vehicles Act, 1939, because the draft scheme no. 80 was published during pendency of appeals and the present route overlapped a portion of the proposed nationalised routes. The original grantees, i.e. Mohanlal, Bhoj Yatayat Sahakari Samiti Ltd. and Gendral in their petition further submitted that their grants have been wrongly set aside by the Appellate Tribunal, mainly because they were small operators and that Mohanlal had experience only on temporary permits. The respondents Rangnath and Samarathmal in their petitions have contended that both the authorities erred in rejecting their claims in spite of their being superiors in all respects in comparison to the original and the present grantees. Samarathmal has further contended that the authorities had no jurisdiction to consider the claims of those applicants who had applied in pursuance to the earlier notification dated 24-5-1968, which was quashed by this Court in *M. P. S. R. T. Corporation v. R. T. A.*, Indore M. P. No. 352 of 1968 = (reported in AIR 1969 Madh Pra 182) and although it was clearly mentioned in the subsequent notification dated 7-2-1969 that all earlier applications made in pursuance to the repealed notification have stood cancelled. It is, however, contended by both of them that sub-section (1-D) of Section 68-F is not attracted inasmuch as the proposed nationalised routes are inter-State routes whereas the present route is only regional one and so the present route is outside the draft scheme. Moreover, it is said that the proposed scheme can have no application to pending appeal, the original grant by the R. T. A. being prior to the publication of the draft scheme No. 80. In reply the respondents 3 to 5 i.e. the present grantees denied that the grants in their favour were illegal or invalid. The appellate Tribunal have taken into consideration all relevant facts in applying the correct principles. The route being regional one, the draft scheme no. 80 for inter-State route cannot affect the present route. It is also said that it is not open to this Court under its writ jurisdiction to reappraise the material on record and come to another conclusion on merits. The respondent No. 9 Balmukund has neither entered appearance nor has challenged the order of the S. T. A. T. by separate petition. It is further said that the petitions are liable to be rejected on the short ground that all the claimants have not been joined as parties.

4. First of all the main question regarding effect of sub-section (1-D) of Section 68-F on the present grants is taken up. Sub-sections (1-A) to (1-D) were added to Section 68-F by amending Act No. 56/1969, which came into force on 2-3-1970. This was necessitated because prior to the amendment there was no bar in granting permits or renewals thereof on any area or route covered by a draft scheme. It was only after publication of the approved or modified scheme that such applications for grants or renewals in contravention of the scheme could be refused. The permits so granted in the intervening period between publication of the draft scheme and the approved or modified scheme were held to be not affected by the final scheme inasmuch as possibly such permits could not have been mentioned in the draft scheme for cancellation. So by amendment this difficulty has been got over and there is now total prohibition under sub-section (1-D) in granting permits or renewals in relation to an area or route or portion thereof till finalisation of the scheme. This is subject to one exception, namely, with regard to renewals falling due after the publication of the draft scheme, only such renewals could be granted but the same also would cease to be effective after publication of the approved or modified scheme. Clearly, the sub-section has been introduced in order to avoid complications by creation of new competitors in the intervening period. But in order that the interests of the travelling public are not affected in any way during the intervening period, provisions have been made for granting temporary permits to the State Road Transport Corporation or to private operators under the new sub-sections (1-A) to (1-C). Looking to the purpose and object behind the amendments, it is evident that no permits can be granted or renewed in relation to area or route or portion thereof covered by the draft scheme. If the new permit that has to be granted overlaps a portion of the proposed nationalised route, then granting of the permit has to be stayed till finalisation of the scheme. This will be so even if the overlapped portion is proposed to be of conjoint operation in the draft scheme. In such a case, permit could only be granted after finalisation of the scheme and not earlier in view of the prohibition contained in sub-section (1-D); till then needs of the travelling public are to be served by issuance of temporary permits.

5. The view we have taken finds support from two decisions of this Court. In *M. P. S. R. T. C. v. R. T. A.*, Gwalior M. P. No. 325 of 1971, D/- 12-11-1971 (Madh Pra) it has been said that in view of provisions contained in sub-section (1-D) to section 68-F, from and after 2-3-1970 the R. T. A. could not have jurisdiction to grant permit under Section 48 in regard to a route covered by the proposed scheme. In that case, the amendment came into force while the application for the grant was pending before the R. T. A. Following this decision, in *M. P. S. R. T. C. v. R. T. A.*, Gwalior, 1973 M. P. LJ (SN) 115 = MP No. 135 of 1971, D/- 25-2-1971 it has been held that the language of the sub-section (1-D) does not make any distinction between a route reserved for exclusive operation and conjoint operation, it prohibits grant of any permit or renewal thereof between the publication of the scheme and its approval by the State Government in relation to a route or a portion of a route covered by the scheme, there is therefore no scope for holding that Section 68-F (1-D) only prohibits grant of permit on routes exclusively reserved for the Corporation. It is however contended here that the draft scheme No. 80 could not apply to pending appeals. This cannot be so because in appeal the permits of original grantees have been revoked and instead new permits have been given to the respondents 6 to 8. These new permits are not continuation of the old permits but they take effect after the date of the appellate order and for a full period of 3 years. Besides the appellate order wipes out the grant by the R. T. A. and substitutes its order in its place for all intents and purposes and such permits cannot be issued during finalisation of the draft scheme No. 80. In *J. T. Development Co. v. S. T. A. Authority*, AIR 1961 MP 23 it has been said that a condition could be implied in every permit that in the event of an appeal against the grant being allowed, the grant would lapse, the reason being that the reversing appellate order wipes out the order appealed against and stands in its place for all legal purposes, relying on *V. C. K. Bus Service Ltd. v. R. T. A.* AIR 1957 SC 489. The Supreme Court in *Ali Ahmad & Sons v. R. S. Narain*, AIR 1974 SC 1876 applied Section 68-F (1-D) in a case where proposed scheme came into operation during pendency of appeal in the Supreme Court and dismissed the appeal. The Appellate

Tribunal had therefore no jurisdiction to grant permits to the respondents 6 to 8.

6. Reliance has been placed on two decisions of this Court for the proposition that the present route being a regional one and the proposed nationalised routes in the draft scheme being inter-State route, sub-section (1-D) cannot be bar in issuing permits for the regional routes. It is contended that the bar under the sub-section would have applied if the present route was also an inter-State one. This is also view taken by the appellate Tribunal. In *M. M. Asati v. S. T. A. T.* 1975 MP LJ 478 = (AIR 1976 Madh Pra 18) this Court considered an approved scheme and not a draft scheme, it was also held that route in that case did not cover scheme No. 66. So question of application of sub-section (1-D) did not arise in that case. Moreover, this sub-section was introduced during pendency of appeal in that case and in view of sub-section (4) of Section 58 introduced by the same amending Act that the amended provision would not apply to appeals pending on the date of coming into force of the amendment, there was no question of applying this sub-section (1-D). In *Asghar Ali v. S. T. A. T.*, M. P. No. 1225 of 1975 D/- 3-12-1975 (Madh Pra) the question was whether an appeal could be dismissed in default by the Appellate Tribunal and it was answered in the negative. It was also contended in that case by one of the petitioners that since the draft scheme no. 72 has been published on 31-12-1965, the S. T. A. T. could not have given the permit to the respondent no. 5 in place of the original grantee. The Court was of the view that the route in question in that case was not covered by the scheme and so Section 68-F (1-D) has no application. So in both the above mentioned two cases, this Court had no occasion to construe sub-section (1-D). Those two cases have also not laid down that because the proposed nationalised routes are inter-statal, they cannot cover the regional routes. On reading the schemes in those cases, the Court found that intra-statal routes were excluded from the purview of the schemes.

7. So we have to see the draft scheme itself to find out whether there is scope for other operators and whether the nationalised routes are to be of exclusive or conjoint operation. The relevant clauses of the scheme No. 80 is as under:—

"Clause-2:— The State Road Transport Services shall be provided by the M. P. State Road Transport Corporation on the following inter-state routes of Indore region:—

(1) Ujjain — Ahmedabad via Indore Dohad, Nadiad,

(2) Ujjain — Himmatnagar via Indore-Dohad, Jhalod; Santrampur.

Clause-3:— The nature and extent of the State Road Transport Services to be provided by the M. P. State Road Transport Corporation on the routes mentioned in clause (2) above are specified in the schedule annexed hereto. The provision of transport services otherwise than under the scheme is prohibited. Except (i) The vehicles of Gujarat State nominees plying under the terms of Reciprocal Agreement between the State of Madhya Pradesh and Gujarat covering routes or portions thereof mentioned in clause (2) above, (ii) Vehicles plying in Gujarat State territory only covering portion of the routes specified in clause (2) above, and (iii) Vehicles plying on the routes in Madhya Pradesh only not included in the scheme shall be allowed to ply.

Clause-4:— No person other than Madhya Pradesh State Road Transport Corporation 'State Transport Undertaking' will be permitted to provide Road Transport Services (Stage carriage or contract carriages) on the inter-state routes specified in clause (2) above.

Clause-5:— All Road Transport Services will be provided by Madhya Pradesh State Road Transport Corporation 'State Transport Undertaking' exclusively on the inter-state routes specified in clause (2) above except as provided in clause (3) above."

8. On reading the aforesaid clauses, it is clear that under clause 4 no person other than the M. P. S. R. T. Corporation will be permitted to provide Road Transport Services on the inter-state routes specified in clause 2. Clause 5 provides that all Road Transport Services will be provided by the M. P. S. R. T. Corporation exclusively on the inter-state routes specified in clause 2, except as provided in clause 3. The exceptions mentioned in clause 3 are as follows:—

(i) Vehicles of Gujarat State nominees plying under the terms of Reciprocal Agreement between the two States covering the proposed nationalised routes.

(ii) Vehicles plying in Gujarat State territory only covering portion of the proposed nationalised route and

(iii) Vehicles plying on the routes in M. P. only not included in the scheme.

It is evident from above that intra-statal routes plying in Gujarat State only have been excluded from the operation of the scheme i. e. portion of the proposed nationalised routes in the Gujarat State will be of conjoint operation. So far as Madhya Pradesh is concerned, Vehicles plying on routes not included in the scheme alone are excluded i. e. vehicles plying on portions of the proposed nationalised routes in M. P. are not to be excluded, otherwise there is no reason as to why same language has not been used in sub-clauses (ii) and (iii). Therefore while vehicles on the regional routes in Gujarat are totally excluded that is not so in case of vehicles on the regional routes in M. P. and are not totally excluded, only those vehicles plying on routes not included in the scheme alone are excluded. Which means those routes having one of their termini outside the nationalised routes and overlapping only a portion of the proposed nationalised routes in M. P. alone are exempted. If both the termini of these regional routes are on the nationalised routes and the route completely overlaps portions of the proposed nationalised routes, then such vehicles are excluded. Under clause (28-A) of Section 2, route means a line of travel which specifies the highway which may be traversed by a motor vehicle between one terminus and another. The Supreme Court in *C. P. C. Motor Service v. State of Mysore*, 1962 Supp (1) SCR 717 = (AIR 1966 SC 1661) has held that by 'route' is meant not only the notional but also the actual road over which the omnibus runs. In *Nilkanth Prasad v. State of Bihar*, AIR 1962 SC 1135 it has further been held that portion of route of private operator forming part of notified scheme—Private operator is completely excluded from the portion—the portions are not different routes. The Supreme Court in *Mysore State Road Transport Corporation v. Mysore Revenue Appellate Tribunal*, (1975) 4 SCC 192 has held:—

"A difference in the two termini will make two routes different even if there is overlapping surface of the road common to two routes. In other words, two termini are an essential part of the concept of the route."

The Supreme Court in *Mysore S. R. T. Corpn. v. Mysore S. T. A. Tribunal*, AIR 1974 SC 1940 has held:—

"State Transport Undertaking granted exclusive right to run on certain

route—Private operator cannot be granted permit on such route if his route overlaps even a very small portion of notified route.”

As in the route in the present case, both the termini are outside the proposed nationalised routes and only a small portion overlaps the notified routes, so this route is saved from nationalisation if the draft scheme is approved as it is. On publication of the approved scheme, the R. T. A. is free to grant permits on this route.

9. Now about the question on merits of respective operators as decided by the S. T. A. T. and the R. T. A. The Supreme Court in *Patiala Bus Pvt. Ltd. v. S. T. A. Tribunal, Punjab*, AIR 1974 SC 1174 has laid down:—

“The main considerations required to be taken into account in granting permit under S. 47 are the interest of the public in general and the advantages to the public of the service to be provided. These would include inter alia consideration of factors such as the experience of the rival claimants, their past performance, the availability of stand-by vehicles with them, their financial resources, the facility of well equipped workshop possessed by them etc. Failure to take into account any of these considerations and proceeding as if the stage carriage permits were a largesse to be divided fairly and equitably amongst the rival claimants is a wholly erroneous approach suffering from an infirmity.”

10. In the present case, the Appellate Tribunal rejected the claim of the M. P. S. R. T. Corporation on the basis of general and vague allegations without any material on record to sustain the allegations, though at the same time the Tribunal observed that it is the largest operator, it has well equipped depot at both the terminals and it has coverage on parts of the route by many buses. Similarly, the claims of Rangnath and Samrathmal have been rejected simply because they are not residing on the route, without considering that these two operators have their establishments on the route and they have also coverage on the route, but in their case also the Tribunal found Rangnath and Samrathmal to be experienced and competent operators. The case of the original grantees i. e. the respondents 3 to 5, have also been rejected because they happen to be small and comparatively new operators, failing to consider that if the

smaller operator is efficiently operating the service, larger resources of the other would not put him in superior position. The Tribunal could not have altogether ignored the experience gained by the respondent no. 3 on temporary permits, but such experience ought to have been compared with the experiences of other operators, whether temporary permit obtained by him were valid or not could not be gone into in the present proceedings. The Tribunal did not consider that possession of latest model was a relevant consideration. The appellate tribunal gave preference to the respondents 6 to 8 mainly because they happened to be residents of Dhar District and it was said that they had better social contacts in the District. On the other hand, the R. T. A. brusquely rejected the claims of the M. P. S. R. T. Corporation and respondents M/s Dayabhai & Co. and Ramcharanlal because they were earlier granted certain permits, without specifying when and in respect of which routes such grants were made. Similarly, the claims of all the respondents except the respondents 3 to 5 were rejected because they were not residing at one of the termini on the route. The R. T. A. failed to consider that these respondents have establishments and coverage on the route. Preference was given to the respondents 3 to 5 because they were residing in one of the termini or near about and they had paid high percentage of passenger taxes. The respondent no. 4 was preferred because it is a co-operative society, without considering that only when other conditions are equal then alone a co-operative society has to be given preference. Therefore, both the authorities have not applied correct principles in assessing relative merits and have ignored material and relevant facts and have based their findings on irrelevant considerations. Under the circumstances, the grants of the R. T. A. and the Appellate Tribunal have to be quashed.

11. Regarding the last objection about tenability of applications filed in pursuance to the notification of 24-5-1968, the submission is factually incorrect. What was cancelled by the subsequent notification dated 7-2-1969 was cancellation of all applications prior to 24-5-1968 and not applications in pursuance to the notification of that date. As the parties here had filed their applications for the grant after 24-5-1968, their applications were not cancelled by the notification of 7-2-1969. Even otherwise, this Court in

Madanmohan v. S. T. A. T., 1973 MPLJ 1033 has held that striking down of notification dated 24-5-1968 by High Court did not mean that the applications filed in pursuance to the repealed notification were also liable to be cancelled and that for those who had already applied, no fresh application in pursuance to the subsequent notification dated 7-2-1969 was necessary. The objection is without any substance. The other objection regarding non-joinder of all claimants as parties is also without any merit in view of decision of the Supreme Court in Cumbum Roadways Ltd. v. Somu Transport Ltd., AIR 1966 SC 1366 that such of the parties who have not challenged the grants are not necessary parties. Since the orders of both Appellate Tribunal and the R. T. A. are being set aside, the applications of the parties in these petitions are to be kept pending till publication of the approved or modified scheme. Only thereafter, the R. T. A. will have to consider the relative merits of the present parties afresh in accordance with law. This Court in M. P. S. R. T. C., Gwalior v. S. T. A., M. P. 1974 MP LJ 862 = (AIR 1975 Madh Pra 181) has held:—

"Effect of section 68-F (1-D)—Only prohibits grant of or renewal of permit and does not provide for dismissal of application for renewal of permit expiring before publication of scheme. Such application should be kept pending till approval of scheme."

12. Accordingly, the petition is partly allowed, the orders of the State Transport Appellate Tribunal and the Regional Transport Authority, Indore, are set aside and the matter is remitted to the Regional Transport Authority Indore for decision on merits afresh after publication of the approved or modified scheme. Till such time, the R. T. A. is free to grant temporary permits under sub-sections (1-A) to (1-C) of Sec. 68-F of the Act to the M. P. S. R. T. Corporation or private operators if he is satisfied that it is necessary to grant temporary permits in the public interest. There shall be no order as to costs. The outstanding security deposit be refunded to the petitioner.

Petition partly allowed

AIR 1976 MADHYA PRADESH 175

G. P. SINGH AND M. L. MALIK JJ.

The State of Madhya Pradesh, Appellant, v. Sunder Lal Jaiswal, Respondent.

First Appeal Nos. 36 and 31 to 35 of 1972, D/- 16-12-1975*

(A) Madhya Pradesh Land Revenue Code (1959), Ss. 150 and 257 — Licence for supply of country liquor — Breach of conditions by State — Suit for compensation — Arrears of licence fee can be adjusted in claiming total compensation — Suit not barred. C. R. No. 579 of 1974 D/- 24-3-1975 (MP), Overruled, (M. P. Excise Act (1915), S. 64).

Neither Section 150 nor Section 257 of the Madhya Pradesh Land Revenue Code prevents a plaintiff in adjusting the amount of arrears of licence fee against the compensation payable to him for breach of contract by Government and in suing for the balance amount of compensation. By giving adjustment in plaint of the arrears due, the plaintiff admits the claim of the State to that extent. The civil Court trying the suit is not to adjudicate upon the arrears of licence fee because that is admitted by the parties. The court only determines the amount of compensation payable to the plaintiff for breach of contract and if the amount of compensation is more than the amount due to the State on account of licence fee, a decree for the balance is passed in favour of the plaintiff. A claim of this nature cannot be adjudicated upon by any revenue officer. It is true that after the court has adjudicated the amount of compensation payable to the plaintiffs and after it is found that the arrears of licence fee are partly or wholly adjusted against the amounts of compensation payable to the plaintiffs, the State will not be in a position to recover the licence fee to the extent it is found to be adjusted. But from this consequence it cannot be said that the suit instituted by the plaintiffs is a device for stopping recovery without payment. C. R. No. 579 of 1974 D/- 24-3-1976 (MP), Overruled. (Para 9)

(B) M. P. Excise Act (1915), Section 63 — Rules for supply of country liquor — Licence in form C. S. 2 — There is an implied obligation on State to supply minimum quantity of liquor which the licensee binds himself to take from Go-

*From decree of J. A. Khare, Addl. Dist. J. Chhindwara in Civil Suit No. 10-A of 1970 D/- 30-11-1971.

vernment warehouse — There is, however, no obligation to meet requirements beyond the minimum quantity though licensee is bound to apply to State for quantities beyond minimum quantity — Implied obligation of State can be enforced. AIR 1975 SC 2008 and AIR 1971 SC 517, Ref. (Para 12)

(C) Civil P. C. (1908), O. 11 R. 21 — Striking off defence — Wilful default — Failure to answer interrogatories — No extension of time for answering them sought — Subsequent application by plaintiff for striking off defence — No satisfactory reason given for not answering interrogatories — Order striking off the defence passed — Default in answering interrogatories, held, was, wilful — Order was proper. AIR 1959 Nag 8, Ref.

(Para 3)

(D) M. P. Excise Act (1915), Section 68 — Applicability — Section does not apply to breach of contract — Failure to supply liquor in accordance with terms of licence — Suit for damages — Suit is not "in respect of any thing done or alleged to have been done in pursuance of this Act" — Special limitation does not apply. AIR 1975 SC 763, Rel. on.

(Para 4).

Cases Referred: Chronological Paras
AIR 1975 SC 763 = (1975) 1 SCC 828 4
AIR 1975 SC 2008 = (1975) 2 SCC 633 12
(1975) CR No. 579 of 1974 D/- 24-3-1975
(Madh Pra) 5, 9

(1972) 1 All ER 105 = (1972) 2 WLR 71 8
AIR 1971 SC 517 = (1970) 2 SCC 467 12
AIR 1971 SC 530 = (1971) 3 SCR 9 8
AIR 1968 SC 271 = 1968 Lab IC 224 8
(1959) 3 All ER 1 = (1959) 3 WLR 346 8
AIR 1950 Nag 8 = 1949 Nag LJ 511 3
(1865) 1 QB. 173 = 122 ER 1391 12

M. V. Tamaskar, Govt. Advocate, for the State; R. N. Rai and R. P. Agarwal, for Respondent.

SINGH, J.:— This judgment shall also govern the disposal of First Appeals Nos. 31, 32, 33, 34 and 35 all of 1972. All these appeals have been preferred by the State of Madhya Pradesh and they arise out of six suits filed against the State by six excise contractors for damages for non-supply of country liquor.

2. The plaintiffs in these suits were granted licences for the retail sale of country liquor under the supply system for shops in Balaghat District for the year 1967-68. The grant of licences was preceded by auction and the plaintiffs were the successful bidders as a result of which they received the licences. The plaintiffs were to pay the licence

fee mentioned in the licences. The plaintiffs were to receive supply of liquor from the Government Warehouse on payment of price at issue rates mentioned in the licences and they were required to sell the same at the selling rates also mentioned in the licences. The case of the plaintiffs was that because of shortage of liquor in the warehouse, they could not get adequate supplies and they had to close their shops for a number of days causing loss in business. All the plaintiffs except the plaintiff in Civil Suit No. 2-B of 1970 (F-A No. 35 of 1972) had default in payment of licence fee. The unpaid amounts of the licence fee were adjusted against the compensation claimed by the plaintiffs in these suits and decrees were claimed for the balance amounts of compensation. In Civil Suit No. 2-B of 1970 (F-A No. 35 of 1972) there was no question of adjustment of any part of the licence fee as the entire amount of fee had been paid to the Government and the relief in the suit was for recovery of the whole of the compensation claimed by the plaintiff. All these suits were consolidated and decided by a common judgment by the Additional District Judge, Chhindwara. It would be convenient first to take up the common questions involved in these cases and then to deal with them separately with reference to their special facts.

3. The first question that has been argued by the learned Government Advocate is that the Additional District Judge was in error in striking off the defence of the State in five suits. Except in Civil Suit No. 2-B of 1970 (F. A. No. 35 of 1972) the defence of the State was struck off in all the suits by order of the Additional District Judge passed on 15th November 1971 for failure to answer interrogatories. Leave to deliver interrogatories under Order 11, Rule 1 of the Code of Civil Procedure was granted in these five suits on 29th July 1971. No affidavit answering the interrogatories or taking objections to them was filed by the State. Thereafter, applications were made under Order 11, Rule 11, for an order requiring the State to answer the interrogatories. These applications were allowed on 12th August 1971 and the State was ordered to answer the interrogatories. In spite of this order, no affidavit in reply was filed by the State. The plaintiffs then applied on 15th November 1971 under Order 11, rule 21 praying that the defence of the State be struck off. At the time of hearing of this application,

Side of the High Court, but it is quite a different thing to say that the application for such a transfer should be made to the Original Side of this court."

5. Thus it is clear from the observations made in the decision in *Srirangam Municipality v. Palaniswami Pillai*, 1951-1 Mad LJ 281 at p. 283 = (AIR 1951 Mad 807 at p. 808), that the court sitting for admission work is competent to transfer any suit or proceedings pending before any court subordinate to it. The question of disposal may be by the Original Side of this High Court. It is only the High Court that has the power to transfer and there is no question of transferring that to the Original Side specifically but to the High Court in general. As soon as it is transferred to the High Court the case will be posted automatically before the Judge sitting on the Original Side. Hence Section 24 (1) (b), (2), C.P.C. has no application to the facts of this case.

6. Mr. D. K. Srinivasagopalan referred to another decision in *Kondayya v. Official Receiver, Nellore*, 1951-1 Mad LJ 97 = (AIR 1951 Mad 676) and argued that the High Court has no power under Section 24 (b), C. P. C. to transfer an Insolvency petition pending before a Subordinate Court to the file of the Original Side of this court. On an analogy, learned counsel wants to state that this Bench decision can be taken to prohibit even transfer of pauper suits pending before a Subordinate Court. It has been made clear in this decision that the High Court has no power at all to try that insolvency petition when there is no jurisdiction for the High Court to try an insolvency proceeding. As for the facts of that case it is clear that the court has held that a transfer cannot be made under Section 24, C. P. Code. But as far as the present case is concerned, the High Court has jurisdiction to try a pauper suit and I do not think that the decision in *Kondayya v. Official Receiver, Nellore*, 1951-1 Mad LJ 97 = (AIR 1951 Mad 676) will be of any use to the learned counsel for the respondent herein.

7. The High Court has ample powers under Section 24, C.P.C. to transfer a pauper suit also. The question of procedural difficulties will not arise in cases of transfer made under Section 24, C.P.C. Even if it is so, those difficulties can be cured in the larger interests of justice and equity. The present case is fit case for transfer inasmuch as the respondent herself has admitted that the pauper

petition filed before the court below has to be amended enlarging the value of the suit. If that be so, admittedly, the High Court of Judicature in its Original Side alone has jurisdiction to try the matter in which the value is over and above Rupees 50,000. Taking all these aspects into consideration, I think in the interests of justice and also to avoid unnecessary complications and difficulties to the petitioner herein, by asking him to withdraw the suit and present it to the High Court. O. P. 254 of 1971, together with all pending applications on the file of the Asst. City Civil Judge, Madras, will stand transferred to the file of this court to be tried by the Original Side of this High Court. There will be no order as to costs.

Petition allowed.

AIR 1976 MADRAS 273

MOHAN, J.

Thamas, Appellant v. Victor, Respondent.

Second Appeal No. 582 of 1970, D/- 19-9-1975.*

(A) Travancore Regulation (6 of 1100 ME), S. 20 — Purakodum — Execution attracts S. 20 — Limitation period of 50 years to be counted from the date of Purakodum. (Para 9)

(B) Transfer of Property Act (1882), S. 61 (Before the amendment of 1929) — Principle applicable to Travancore — All mortgages over the same property and in favour of same person must simultaneously be redeemed.

Where the mortgage deed recites to redeem the prior mortgages, the mortgagors ought to consolidate the mortgages and their piecemeal redemption is impossible under S. 61 of the T. P. Act as it stood before the Amending Act 2 of 1929. Although T. P. Act was not law in Travancore and Cochin before its introduction there, the principles which S. 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and Cochin, and all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed. (1913) 40 Ind App 74 (PC), Distinguished. (Paras 10, 11, 12)

*(Against decree of Dist. Court, Kanyakumari at Nagarcoil, in A. S. No. 244 of 1958.)

CT/DT/A921/76/ABR/LGC

Cases Referred: Chronological Paras

AIR 1967 SC 1318 = (1967) 2 SCR 318 7, 9
 AIR 1952 Trav-Co 295 = 1952 Ker LT 129 7, 12
 AIR 1948 PC 36 = 74 Ind App 285 7
 AIR 1947 Mad 18 = (1946) 2 Mad LJ 35 7, 10
 1946 Trav LR 546 7, 11
 (1913) 40 Ind App 74 = ILR 35 All 227 13

JUDGMENT:— The 8th defendant is the appellant in the second appeal. The short facts are as follows:— The father of the plaintiff, Vedamani Nadar, was the owner of 28 cents, while the father of defendants 2 and 3 was the owner of another 22 cents. Both of them jointly executed a mortgage deed under Ex. A-5 dated 10-4-1107, M.E., in favour of the first defendant. In Ex. A-5, it was undertaken to deal with the prior mortgage, Ex. A-1, dated 3-2-1076 M.E., which prior mortgage was executed by the predecessors in title of the mortgagor's principal under Ex. A-5 in favour of one Poruthiyudayan. The mortgagee Poruthiyudayan died leaving behind 5 sons. On 7-4-1093 M.E., under Ex. A-2, the mortgagor executed a Purukadam deed in favour of the 4 sons of Poruthiyudayan. It is only after these transactions that the mortgagors executed Ex. A-5 directing the redemption of the prior mortgages under Exs. A-1 and A-2. The first defendant paid 2500 fanams, towards the discharge of these deeds. Out of the mortgage amounts, the plaintiff's father being the owner of 28 cents, received 1300 fanams and defendants 2 and 3 together received 1200 fanams being the owners of 27 cents. As per the mortgage, the first defendant is in possession and enjoyment of the suit property as mortgagee.

2. While so, Vedamani Nadar, father of the plaintiff, partitioned his property by Ex. A-7, dated 5-10-1933, by which the 28 cents fell to the share of the plaintiff. By the deeds dated 6-10-1105 and 23-2-1109 M.E., the mortgage dated 3-2-1076 M.E., is acknowledged and hence the mortgage is not barred by limitation. Under these circumstances, the suit is filed for redemption.

3. In the written statement of the first defendant, it is contended that the mortgage deed recites to redeem the prior mortgages Exs. A-1 and A-2. The first defendant has redeemed from only 2 of the 5 sons. Therefore, the other three sons of the original mortgagee ought to have

been impleaded. In any event, without paying for the mortgage, there cannot be any redemption by the plaintiff.

4. On similar lines, the other defendants also filed written statements. It was mainly contended that the right of redemption had become barred.

5. The learned trial Munsif, on a consideration of the oral and documentary evidence passed a preliminary decree for redemption. On appeal, in A. S. No. 244 of 1958, the said finding of the trial court, was confirmed by the learned District Judge of Kanyakumari. Hence, the present second appeal.

6. The only point that arises for my determination is, as to whether the suit is barred by limitation.

7. Mr. Ganapathisubramania Iyer, learned counsel for the appellant, strenuously contends before me that upon the execution of the purukadam Section 20 of the Travancore Regulation VI of 1100 M.E., gets attracted, as a result of which the limitation of 50 years will have to be computed from the date of the purukadam. In 1951 the Part B States (Laws) Act 1951, came into force and extended the Indian Limitation Act 1908, to Travancore, the result of which would be that within two years since the coming into force of Part B States (Laws) Act 1951, the suit ought to have been filed. In so far as it has not been done, the present suit for redemption is barred. In support of this submission the learned counsel relied on Syed Yousuf v. Syed Mohammed, 1967-2 SCR 318 = (AIR 1967 SC 1318). These submissions are countered by Mr. S. Padmanabhan by contending as follows— (a) the recitals in Ex. A-2 are to the effect that the mortgagee's possession will be on the basis of Ex. A-2. Such being the position, it was not open to the mortgagor to redeem the mortgage piecemeal. Therefore even without reference to the Travancore-Cochin Limitation Act, if the period of 50 years of limitation is reckoned from Ex. A-1 of the year 1076 M.E. (1918), it is well open to the mortgagors to redeem the property; (b) though the provisions of the Transfer of Property Act were not made applicable directly to the Travancore-Cochin, the principles adumbrated therein were made applicable to Travancore-Cochin. One such provision was Section 61, as it stood prior to the Amending Act 2 of 1929, under which the mortgagor was duty bound to consolidate all the mortgages. If, therefore, a separate redemp-

tion of Ex. A-1 was not possible, it cannot be contended that the right of redemption had become barred; (c) In any event, before the expiry of the period of limitation, the new Limitation Act of 1963 had come into force, and therefore, it cannot be contended that the suit ought to have been filed within 2 years after the passing of Part B States (Laws) Act, 1951. In support of these submissions, the learned counsel relies on Nachappa Goundan v. Samiappa Goundan, AIR 1947 Mad 18; Bhaskaran Moothathu v. Agnisaramaru Nanboori, 1946 Trav LR 546, Neelakantan v. Ummi Pillai, AIR 1952 Trav-Co 295 and Mohamed Akbar Khan v. Mst. Motai, 74 Ind App 285 = (AIR 1948 PC 36).

8. In reply, Mr. Ganapathisubramania Iyer, learned counsel for the appellant, says that the execution of Purakadam does not give an extended period of limitation and once limitation started running, it cannot be arrested.

9. Undoubtedly, by the execution of Purakadam under Ex. A-2, Section 20 of Travancore Regulation No. 6 of 1100 M.E. will be applicable; that categorically states that the period of limitation has to be reckoned from the date of such Purakadam and the said period is 50 years. On 1st April the Part B States (Laws) Act of 1951 came into force and extended the Limitation Act, 1908 to Travancore-Cochin. The result was that the Travancore Regulation No. 6 of 1100 stood repealed by Section 30 of the Indian Act. On this basis, it is contended that there is no period of limitation prescribed for a purakadam under the Indian Limitation Act, 1908, and consequently, the suit ought to have been filed within 2 years viz., by 1953. Therefore, the present suit filed in 1966 is hopelessly barred by limitation. In advancing this contention, the following passage in Syed Yousuf v. Syed Mohamed, 1967-2 SCR 318 = (AIR 1967 SC 1318) is pressed into service:

"Ex facie, Section 30 applied to a suit for which the period of limitation prescribed by the Indian Limitation Act 1908 is shorter than the period of limitation prescribed by the corresponding law in force in the Part B State. Now, the Hyderabad Limitation Act did not apply to a suit for recovery of possession of a wakf property. The result was that under the corresponding law in force in Hyderabad, there was no limitation for such a suit. In other words, the period of limitation prescribed for the suit by the

corresponding law in Hyderabad was an unlimited period. Art. 142 of the Indian Limitation Act 1908, applied to a suit for recovery of possession of the wakf property. As it prescribes a shorter period of limitation for the institution of the suit, Section 30 enabled the plaintiffs to institute the suit within a period of two years after 1st April 1951. The Part B States (Laws) Act 1951 while extending the Indian Limitation Act 1908 to Hyderabad thus allowed the plaintiffs reasonable time to institute the suit for recovery of the property. The extension of the Indian Limitation Act of 1908 to Hyderabad and the consequential change in law prescribing a shorter period of limitation did not confiscate the existing cause of action and must be regarded as an alteration in the law of procedure for its enforcement. We must, therefore, apply the normal rule that the law of limitation applicable to the suit is the law in force at the date of the institution of the suit. The suit is, therefore, governed by the Indian Limitation Act 1908."

10. Though these observations seem to support the contention of the learned counsel, for the appellant, to a great extent, in making these submissions, he ignores the recitals occurring in Ex. A-2, since thereunder it is stated that the possession under the mortgage deed shall be on the basis of Ex. A-2 also. Under these circumstances, the mortgagors ought to consolidate both the mortgages and redeem Exs. A-1 and A-2 together and piecemeal redemption was impossible, as per the law under the Transfer of Property Act that stood prior to the amending Act 2 of 1929. This right of consolidation was not a mere right to have the advantage of an existing statute, but it was a vested right in the property. This is the dictum laid down in Nachappa Goundan v. Samiappa Goundan, AIR 1947 Mad 18.

11. No doubt, the Transfer of Property Act, as such did not apply to Travancore-Cochin then. But the principles enunciated therein were made applicable. It was held in Bhaskaran Moothathu v. Agnisaramaru Namboori, 1946 Trav LR 546 that all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed. It was further held that the right of redemption involves the obligation to discharge all the debts due to the particular creditor, as against whom redemption is sought.

12. Again in Neelakantan v. Umini Pillai, AIR 1952 Trav-Co 295 it was held—

"Notwithstanding the fact that the Transfer of Property Act was not law in Travancore and Cochin before its introduction there, the principles which Section 61 (before its amendment in 1929) impliedly recognised was applicable to Travancore and Cochin, and all the mortgages over the same property in favour of one and the same person must be simultaneously redeemed, and the mortgagor is not entitled to redeem one without redeeming the other or others." The above rulings fully support the stand of Mr. Padmanabhan, learned counsel for the respondent.

13. Lala Soniram v. Kanhaiyalal, (1913) 40 Ind App 74 (PC), was a case wherein the question arose whether by reason of acknowledgment by deeds of 1866 and 1867, the limitation could be extended. It was held that it was not so extended, since those acknowledgments were not made by a person through whom the defendants claimed title, and therefore, the statutory time continued to run during the period between 1883 and 1898. This case is clearly distinguishable.

14. To my mind, it appears that the recitals in Ex. A-2, to which I have made a reference earlier, are of great consequence and of immense value in deciding the point of limitation. The fallacy in the argument of Mr. Ganapathisubramania Iyer is, that he wants to reckon the 50 year period of limitation from the date of the purakadam Ex. A-2, without reference to the recitals contained therein.

15. Thus, I am in entire agreement with the findings of the courts below. Consequently, I hold that there are no merits in the second appeal and the same shall stand dismissed. In the circumstances of the case, I make no orders as to costs. No leave.

Appeal dismissed.

AIR 1976 MADRAS 276

MOHAN, J.

G. Muthuvel Pillai, Appellant v. Hararath Syed Sha Mian Sakkaab Kadhiri Thaikal and others, Respondents.

A. A. A. O. No. 4 of 1975, D/- 20-8-1975.*

(A) Madras City Tenants Protection (Amendment) Act (16 of 1964), S. 3— Suit for ejectment — Decree in terms of compromise for purchase of building on suit site — Coming into operation of Amending Act afterwards — Effect on proceedings in execution of compromise decree.

If the legislation intervenes and says that all proceedings shall abate, it is well settled that the decree or order or any proceeding thereon will be unenforceable and will come to a close. It is the courts which are disabled by the operation of the legislation. It does not depend upon whether such a contention was raised by the party or not. Equally, there cannot be any waiver by a party. It does not matter at what stage the proceedings stand.

(Para 13)

If in a suit for ejectment the parties chose to enter into a compromise, whereby what was contemplated was a simple purchase of the superstructure at a price to be fixed by the court, this compromise has nothing to do with the benefits conferred under the Act. If it is case of a simple purchase of the superstructure dehors the Act, it cannot be contended at all, that any rights still remained surviving under the Act concerning which proceedings are pending, which would abate under S. 3 of the Amending Act 16 of 1964.

Where, even before the Amending Act came into operation, the rights of the parties are finally determined by their entering into a compromise and in execution of the said compromise, execution proceedings are taken for delivery of possession, it cannot be contended that by virtue of S. 3 of the Amending Act, the said proceedings will abate, since it is totally outside the scope of the Act. 1973-1 Mad LJ 77, Distinguished. (Para 15)

Cases Referred: Chronological Paras
(1973) 1 Mad LJ 77 = 86 Mad LW 772

9, 13

(1972) A. A. O. No. 90 of 1972 (Mad)

4, 12

*(Against order of Dist. J. West Tanjore in C. M. A. No. 118 of 1974.)

CT/CT/A871/76/VSS

(1970) E. P. No. 31 of 1969, D/- 13-11-1970
(Mad) 5

(1968) S. A. No. 1658 of 1964, D/- 5-11-1968 (Mad) 4, 5, 12

Govind Swaminathan for M. Ramachandran, for Appellant; S. Kothandarama Nayanar, for Respondents.

JUDGMENT:— This case illustrates how very resourceful a judgment-debtor could be and ingenuously set at naught the valid orders of court, including a compromise decree. Undaunted by the adverse judgments right from 1963, the judgment-debtor has been making repeated onslaughts under the umbrage of some technical plea or other and thereby has been preventing the decree-holder from realising the fruits of the decree.

2. The facts relating to the civil miscellaneous second appeal are as follows: The first defendant in O. S. No. 30 of 1962 on the file of the District Munsif Court, Thanjavur, and respondents in the execution petition, is the appellant. O. S. No. 30 of 1962, was a suit filed by the plaintiff, Hazareth Syed Shamiyah Sakkab Saheb Kadhiri Thaikkal, represented by its trustee, for the recovery of the vacant possession from defendants 1 and 2, after removing the superstructure put up thereon. The case of the plaintiff was that the property was leased out in favour of defendants 1 and 2 (the second defendant being the mother of the first defendant) and they sublet the property in favour of the third defendant. Defendants 1 and 2 put up a superstructure and the lease period having expired, they have got to surrender vacant possession, after removing the superstructure. Since vacant possession was not so delivered, the necessity for the suit.

3. Pending the suit, I. A. 564 of 1963 was filed, whereby the parties entered into a compromise. The said compromise memorandum, dated 28th June 1963, inter alia stated as follows: (I am extracting the compromise memorandum since that is material for a decision in the present case):

"1. The parties agree that a Commissioner may be appointed to make a local investigation of the suit property to assess the value at present of the superstructure that stands on the suit site and to report the same to this Hon'ble Court.

2. The parties further agree that on this Hon'ble Court enquiring into the Commissioner's report and fixing the price, the plaintiff is to buy the super-

structure from defendants 1 and 2 at a price to be fixed by this Court after deducting rent due from them for the site till the time of purchase. Defendants 1 and 2 may receive the amount to be deposited after delivery of the possession". On 6th August 1963, the learned District Munsif decreed the suit, whereunder the plaintiff was directed to purchase the suit building and to deposit the sale consideration of Rs. 6,000 on or before 6th February 1964. It may be relevant to note at this stage that O. P. No. 20 of 1963 was filed by the second defendant, under Section 9 of the Madras City Tenants Protection Act, 1921 (Tamil Nadu Act III of 1922), hereinafter referred to as the Act. But, that was rejected, on the ground that the suit site being non-residential in character, no benefit could be claimed under the Act, as it was then applicable to Thanjavur. Further, the application was beyond the period of limitation of one month.

4. On appeal, the sale consideration was increased to Rs. 10,000 by the lower appellate court. But, when S. A. No. 1658 of 1964 (Mad) was preferred, the following decree was passed on 5-11-1968:

"The parties agree that the appellant (plaintiff) may deposit Rs. 2,000 more, in addition to the sum of Rs. 6,000, he has already deposited within 2 months from this date and the respondent will give possession immediately on deposit. On failure to do so, execution can be taken out immediately and proceedings taken. The respondents 1, 4 and 5 can withdraw the sum of Rs. 6,000 already deposited as well as Rs. 2,000 to be deposited only after giving possession. Out of this amount the rents up-to-date would naturally be deducted. The parties will bear their own costs."

The plaintiff, on the strength of this decree, preferred E. P. 31 of 1969. Delivery was ordered. Thereupon C. M. A. 116 of 1971 was preferred. That was also dismissed. As against the same, A. A. O. 90 of 1972 (Mad) was filed before this court and that too was dismissed by Gokulakrishnan, J.

5. At this stage, one important fact is to be stated: Pending C. M. A. No. 116 of 1971, the first defendant filed C. M. P. 12552 and 12553 of 1970 in S. A. 1658 of 1964, to clarify that the compromise would be binding only between the appellant (the mother) and the 5th respondent, inasmuch as the first respondent therein remained ex parte. Conse-

quently, according to him, the terms of the decree in S. A. 1658 of 1964 (Mad) should be confined only to the quantum of valuation. Later, an application was filed for staying all further proceeding in E. P. 31 of 1969 (Mad). Ramamurthi J. by his order dated 13-11-1970, held:—

"There is no substance in the petitions. The petitioner did not care to participate even though he was duly served in the second appeal both in his own capacity as the first respondent as well as in his capacity as the legal representative of his deceased mother. The judgment also indicates that the compromise was merely the acceptance of the suggestion of the court in the course of the hearing, to the effect that the compensation amount might be fixed at Rs. 8,000. It is clear that the petitioner herein is taking advantage of the fact that in the preamble portion of the judgment there is some reference to the agreement between the parties. That apart, the petitioner who did not participate in all these proceedings, is not entitled to file this petition. It is clear that he has been set up by the other members of the family to rake up the question over again after having obtained an advantage of the amounts being fixed at Rs. 8,000 by this court (High Court)."

6. After all these proceedings, when E. P. 933 of 1973 was filed under Order XXI, Rule 35, C.P.C., for delivery of possession, the first defendant opposed delivery, contending, chiefly, that he was not a party to the compromise, dated 28-6-1963. In any event, no rights would accrue in favour of the decree-holder after the passing of the Amending Act (Tamil Nadu Act 16 of 1964). In view of Section 3 of the said Act, the proceedings by the plaintiff will have to abate and no rights remain for being enforced.

7. The learned Additional District Munsif of Thanjavur held—

"The dispute between the parties has been fully and finally set at rest in S. A. 1658 of 1964 and A. A. O. 90 of 1972. The High Court has also passed a decree in S. A. 1658 of 1964, finally determining the dispute. Therefore, the decree in S. A. 1658 of 1964 and the judgment in A. A. O. 90 of 1972, are binding upon the respondent in this petition. For all these reasons, I hold that Act 16 of 1964 is not applicable to the decree passed in this suit."

On appeal, in C. M. A. 118 of 1974, the learned District Judge confirmed the find-

ings of the trial court mainly on the ground of constructive res judicata. He further held that after the Amending Act of 1964 came into force and after the notification extending it to Thanjavur town, the appellant never claimed the benefits of the Act and was content to enter into a compromise. Therefore, he must be deemed to have waived the benefits under the Act and elected to receive compensation for the superstructure.

8. Aggrieved by this judgment, the present civil miscellaneous second appeal has been preferred.

9. The learned Advocate General, appearing for the appellant, strenuously contends before me that the finding of the lower appellate court, and equally the Executing Court, are unsustainable in law. Having regard to the sweeping language of Section 3 of the Amending Act, viz., Tamil Nadu Act 16 of 1964, if the proceedings abate by the operation of legislation, so submits the learned Advocate General, no question of constructive res judicata or waiver would arise. In support of the same, reliance is placed on the ruling in Pattu Iyer v. Arunachala Padayachi, 1973-1 Mad LJ 77.

10. The simple, but effective, reply of Mr. Kothandarama Nayanar, learned counsel for the respondent, is that notwithstanding the reasonings of the courts below, which may not be quite sound in law, the conclusion is unassailable, since the rights of the parties under the compromise were determined, as early as 28th June 1963, long before the Tamil Nadu Act 16 of 1964 came into force. That decree was merely for the purchase of the building, on the suit site, in a suit for ejectment. Where, therefore, even before the Amending Act came into operation, the rights of the parties were finally determined, no further right remained under the Madras City Tenants Protection Act, 1921, in which event alone, Section 3 of the Amending Act would apply and the proceedings taken out by the landlord will get abated.

11. In order to appreciate the respective contentions, the history relating to this legislation may briefly be noted. The Madras City Tenants Protection Act was extended to Thanjavur by a notification under G. O. No. 1345 with effect from 28th March 1956. As a result of the same, all benefits under the Act, both with regard to residential and non-residential buildings were made available to the tenants. The Amending Act 13 of 1960

was passed with the object of withdrawing the protection to tenants of non-residential buildings, as a result of which, the proceedings pending in courts in respect of non-residential buildings were extinguished. That was the position till the Amending Act 16 of 1964 was enacted, whereby the original position was restored, the benefits of the Act being extended to non-residential buildings also. The said Amending Act 16 of 1964 was made applicable to Thanjavur by G.O.Ms. 2622 dated 7-11-1964. Section 3 of this Act states as follows—

"3. Certain pending proceedings to abate: Every proceeding instituted by a landlord in respect of any non-residential building or part thereof situated in any municipal town specified in the notification issued under sub-section (1) of clause (1) of Section 2 of the Principal Act as amended by this Act and the villages within five miles of such municipal town and pending before any court or other authority or officer on the date on which the said notification takes effect shall, in so far as the proceeding relates to any matter falling within the scope of the principal Act as amended by this Act in respect of such building or part, abate, and all rights and privileges which may have accrued to that landlord in respect of any such building or part and subsisting immediately before the date on which the notification aforesaid takes effect shall, in so far as such rights and privileges relate to any matter falling within the scope of the principal Act as amended by this Act, cease and determine and shall not be enforceable:

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date on which the notification aforesaid takes effect."

It may be relevant to note, at this stage, that the compromise in this case was entered into on 28th June 1963. Under these circumstances, the only question that would arise is, whether the appellant can claim the benefit of Section 3 of the Amending Act 16 of 1964, though such a plea was not put forth in any one of the prior proceedings.

12. At the outset, I am constrained to state that the reasoning of the learned District Munsif, a portion of which I have extracted above, that the rights of the parties were concluded by

the two judgments of this court in S. A. 1658 of 1964 (Mad) and A. A. O. No. 90 of 1972 (Mad) and hence Act 16 of 1964 is not applicable, is not correct. Equally, the reasoning of the learned District Judge that the principle of constructive res judicata would apply is also incorrect.

13. The learned Advocate General is right only this far, since if the legislation intervenes and says all proceedings shall abate, it is well settled that the decree or order or any proceeding thereon will be unenforceable and will come to a close. It is the courts which are disabled by the operation of the legislation. It does not depend upon whether such a contention was raised by the party or not. Equally, there cannot be any waiver by a party. The attention of the court may be drawn to the said legislation and its disability to deal with the matter can be pointed out. It does not matter at what stage the proceedings stand. As a proposition of law, no exception could be taken to this argument of the learned Advocate General. To the same effect is the decision in Pattu Iyer v. Arunachala Padayachi, 1973-1 Mad LJ 77. But, I am afraid that that decision has no application to the facts of the present case.

14. If at a time, when Amending Act 13 of 1960 was operating, the parties chose to enter into a compromise on 28th June 1963, whereby what was contemplated was a simple purchase of the superstructure at a price to be fixed by the court, this compromise has nothing to do with the benefits conferred under the Act. What was agitated in second appeal was only about the quantum, which ultimately came to be fixed as seen above at Rs. 8,000. Thanks to the appellant, whatever doubts remained about the binding nature of the compromise, by filing C. M. P. 12552 and 12553 of 1970 the matter was clarified by Ramamurthi J. by reason of which it is now clear that there is an effective compromise binding on the appellant. It is here, I have to state that the appellant himself was served both in his personal capacity and also as the legal representative of his deceased mother, which fact also was noted by Ramamurthi J. If it is case of a simple purchase of the superstructure de hors the Act, it cannot be contended at all, that any rights still remained surviving under the Act concerning which proceedings are pending, which would abate under Section 3 of the Amending Act 16 of 1964.

15. As seen above, the Amending Act 16 of 1964 itself was extended to Thanjavur only on 7-11-1964. Even before that, the rights of the parties were concluded by their entering into a private treaty on 28th June 1963. Where in execution of the said compromise, execution proceedings are taken for delivery of possession, it cannot be contended, by virtue of Section 3 of the Amending Act 16 of 1964, the said proceedings will abate, since it is totally outside the scope of the Act.

16. It may be of interest to note that as seen from the above narration, O. P. 20 of 1963 filed by the second defendant under Section 9 of the main Act was dismissed. In such a case, no rights survive for the application of Section 3 of the Amending Act. Therefore, I uphold the submission of Mr. Kothandarama Nayanar, learned counsel for the respondent.

17. In the result, agreeing with the ultimate conclusion of the Courts below, but on a different reasoning, I hold that there are no merits in the Civil Miscellaneous Second Appeal. It will stand dismissed with costs. No leave.

Appeal dismissed.

AIR 1976 MADRAS 280

RAMANUJAM, J.

K. Thangavelu, Petitioner v. The Joint Registrar of Co-operative Societies, Tiruchirappalli and others, Respondents.

Writ Petn. No. 3846 of 1975, D/- 11-8-1975.

(A) Tamil Nadu Co-operative Societies Act (53 of 1961), S. 72 (1) and (6) — Supersession of Bank — Consultation with financing Bank by Registrar — Issue of show cause notice without consultation is not illegal — Consultation is necessary before final order of supersession is passed. AIR 1973 Mad 460, Foll. (Para 4) Cases Referred: Chronological Paras AIR 1973 Mad 460 = (1973) 2 Mad LJ 200

N. S. Varadachari and J. V. Ramanujam, for Petitioner; The Asstt. Govt. Pleader, for Respondents.

ORDER:— The petitioner was the president of the Perambalur Co-operative Primary Land Development Bank, Perambalur. He had been elected as a director and later as president on 18-5-1974.

CT/CT/A731/76/MVJ

By a show cause notice dated 22-5-1975, the first respondent called upon the petitioner and other directors of the bank to show cause as to why the bank should not be superseded under Section 72 (1) of the Tamil Nadu Co-operative Societies Act, 1961. It is to quash that notice that the above writ petition has been filed.

2. According to the petitioner before issuing the impugned show cause notice the first respondent did not make any consultation with the financing bank as contemplated by Section 72 (6) of the Act and, therefore, the show cause notice is invalid. It is also his case that the impugned show cause notice proceeds on the basis that the irregularities referred to in the notice have already been established and this shows that the first respondent has already made up his mind to supersede the society under Section 72 (1) and that the issue of the show cause notice is a mere formality. The petitioner further contends that the first respondent has initiated proceedings under Section 72 (1) by issuing show cause notice at the instance of his political opponents and, therefore, his action in issuing the show cause notice should be taken to be a mala fide one. It is also stated that the first respondent has got considerable bias against the petitioner in that petitioner had filed more than one writ petition before this court questioning certain actions of the first respondent and, therefore, even if the matters referred to in the show cause notice were to be enquired into, it should be by a different officer. It is also contended that most of the irregularities relate to an earlier period when the present society did not come into existence and, therefore, the show cause notice, so far as it relates to those irregularities, should be taken to be bad.

3. As regards the first contention regarding the requirement as to consultation with the financing bank contemplated by Section 72 (6), in paragraph 8 of the counter-affidavit it has been stated that the financing bank was consulted by sending a letter on 19-5-1975. It is not the first respondent's case that he received any communication from the financing bank in answer to the said letter. Even if it is taken that the first respondent sent a communication to the financing bank that will not be sufficient to satisfy the requirement as to consultation. Perhaps realising this position the first respondent has taken the stand in the counter-affidavit that the consultation is required

only for the passing of the order of supersession and not for issuing a show cause notice. Mr. N. C. Raghavachari, the learned counsel for the petitioner, contends that having regard to the language of Section 72 (6) the first respondent has to consult the financing bank before taking any action under Section 73 (1) including the action of issuing the show cause notice, that by issuing the show cause notice the first respondent had initiated the proceedings under Section 72 (1) and that for such initiation of the proceedings the consultation with the financing bank is necessary.

4. But on a due consideration of the matter, I am inclined to think that, having regard to the object of the provision under Section 72 (6) which requires the consultation of the financing bank, such consultation is necessary before the final order is passed under Section 72 (1). At the stage of the issue of the above-show cause notice no one knows as to what is going to happen ultimately. It is only when the first respondent makes up his mind after due enquiry in relation to the irregularities referred to in the show cause notice, that the financing bank has to be consulted with regard to the action proposed to be taken. If the consultation is before the issue of show cause notice and if the first respondent ultimately finds that the irregularities referred to in the show cause notice have not been established, the consultation earlier obtained will become a mere formality and it would be a sheer waste of time. The matter is also clear if we consider the question of prejudice that will be caused to the petitioner. The petitioner can complain that the consultation has not been made only if the enquiry arising out of the show cause notice ultimately results in an order of supersession under Section 72 (1). I am, therefore, of the view that consultation as contemplated by Section 72 (6) is necessary before the final order is passed under Section 72 (1) and not before the issue of show cause notice. This view finds support from the observation of Ramaprasada Rao, J. in *P. M. V. Credit Society v. Registrar of Co-operative Society*, 1973-2 Mad LJ 200 at p. 202 = (AIR 1973 Mad 460 at p. 461). After holding that the consultation contemplated under Section 72 (6) with the financing bank is pre-requisite for the exercise of the statutory power under Section 72 (1) the learned Judge proceeds to observe as follows:—

"Obviously such consultation begins after the Registrar is subjectively satisfied on objective materials placed before him that a prima facie case has been made out for the purpose of superseding the co-operative society. It is only at that point of time that the necessity for consulting the financing bank arises. This has been held to be a mandatory requirement by the highest court of the land. Such a consultation, therefore, cannot be avoided. Though consultation is not equivalent to concurrence, yet, there must be material on record to show that, after the Registrar entertained an opinion about the unsatisfactory working of a registered society, he should consult the financing bank to whom the society is indebted before he finally passes an order of supersession under Section 72 of the Act."

5. As regards the contention that the show cause notice has been issued by the first respondent at the instance of the political opponents and that, it shows that he had already made up his mind, it is not possible to assume the first respondent who is a statutory authority would stoop to hear the advice of the petitioner's political opponents and to initiate action under Section 72 (1) without any basis. I am not, therefore, inclined to quash the show cause notice on the basis that the show cause notice has been issued mala fide or that the first respondent had a closed mind in relation to the irregularities alleged.

6. On the question as to whether the first respondent has shown any bias in the matter, it is not in dispute that there were certain writ petitions before this court initiated by the petitioner against certain orders passed by the first respondent in relation to the affairs of this Bank. The petitioner, therefore, apprehends that if the irregularities pointed out in the show cause notice were to be inquired into by the first respondent such enquiry may not be fair. Having regard to the said earlier proceedings between the petitioner and the first respondent it cannot be said that the said apprehension is not justified. In the circumstances of this case, I consider that the further enquiry in relation to the show cause notice may have to be conducted by a different officer.

7. Regarding the next contention that the charges relate to a period prior to the present committee took charge on 18-5-1974 and, therefore, these charges

cannot be sustained, I consider that the matter should be urged before the concerned enquiry officer who will consider the tenability of this objection before passing the final orders in this matter.

8. With the above observations this writ petition is dismissed. However, I consider that further proceedings under Section 72 (1) will have to be conducted by some officer other than the officer who issued the show cause notice.

Order accordingly.

AIR 1976 MADRAS 282

RAMAPRASADA RAO, J.

Angammal, Petitioner v. Muthupechiammal and another, Respondents.

C. R. P. No. 3779 of 1974, D/- 31-7-1975.

(A) Civil P. C. (1908), O. 6, R. 17 — Amendment of pleadings — Amendment seeking relief totally unconnected with original prayer cannot be allowed.

An amendment of the plaint seeking a relief not connected with the original prayer at all cannot be allowed. Thus where the plaintiff sought for an easement of necessity and a consequential declaration therefor, an amendment seeking for a declaration that he is the owner of the property and for a consequential relief of mandatory injunction to demolish the wall on the disputed pathway cannot be allowed. (1968) 81 Mad LW 95, Distinguished. (Para 2)

Cases Referred: Chronological Paras
(1968) 81 Mad LW 95 = (1968) 1 Mad LJ 502 2

N. Sivamani, for Petitioner; K. Yamunan, for Respondents.

ORDER :— It is by now well settled that the invocation of Order 6, Rule 17, C. P. Code, is possible only when the substance of the relief asked for in the original pleading is maintained, though in a different form it is sought to be corrected so as to suit the convenience of the litigant. In a case, however, when the amendment sought for by the plaintiff would alter the very foundation of the claim and the said amendment prima facie is distinct, separate and independent of the original relief asked for, then it would not come within the purview of amendment of pleading at all. On the other hand, it would be a substitution of a relief which is different and not asked for

in the original plaint. In the instant case, the respondents as the plaintiffs came forward with an application under Order 6, Rule 17, C. P. Code, under the following circumstances. In the plaint as originally filed the plaintiffs sought for a declaration that they were entitled to an easementary right over a particular portion of the suit house to a particular length. Later, they sought for an amendment by stating that no proper instructions were given to the advocate at the time when the original plaint was drafted and they wanted the relief of mandatory injunction directing the defendant to remove a wall on that portion of the property referred to in the original plaint and for a declaration that they are the owners of the pathway or the suit site. The court below thought that in order to avoid multiplicity of proceedings the amendment sought for by the plaintiffs could be allowed under Order 6, Rule 17, C.P.C. It is as against this, the defendant has come up to this court.

2. I have already referred to the basis on which the amendment of pleadings is allowed under Order 6, Rule 17, C.P.C. So long as the distinctiveness and the force of the original relief asked for in the earlier pleadings is maintained and an attempt is made only to make an inroad into the form of the relief asked for, it is permissible to allow an amendment of such pleading, but in cases where, under the guise of an amendment, a distinct and separate prayer is sought to be introduced in the pleading, it would not be an amendment at all, but it would be the setting up of a new cause, not thought of and not even pleaded by the person concerned. The instant case is one in which the plaintiffs are seeking for a totally different relief. Mr. Yamunan, however, would say that in order to avoid multiplicity of proceedings and as no prejudice will be caused to the petitioner before me, the amendment could be allowed. These are not normal tests deployed for considering whether an application for amendment of a pleading has to be allowed. Particularly when a plaint is sought to be amended and when the relief sought for, appears, on the face of it, to be an afterthought and totally disjunct from the prayer in the original plaint, then such an application for amendment ought not to be countenanced at all. The case cited by Mr. Yamunan, Palaniswami Naicker v. Chinmasami Naicker, (1968) 81 Mad LW 95 is one where

the plaintiff even in the original plaint sought for alternative reliefs and at the appropriate time elected to rest his relief on one of such alternative pleas. The court said that the plaintiff could adopt such an attitude, provided in the pleadings such inconsistent pleas were raised. That is not, however, the case here. The plaintiffs are seeking for a relief not connected with the original prayer at all. They sought for an easement of necessity and a consequential declaration therefor, whereas in the amendment they seek for a declaration that they are the owners of the property and for a consequential relief of mandatory injunction to demolish the wall on the disputed pathway. These are not reliefs which have any semblance, one with the other.

3. In these circumstances, the lower court exceeded its jurisdiction in having allowed the amendment. The order is, therefore, set aside and the civil revision petition is allowed. There will be no order as to costs.

Revision allowed.

AIR 1976 MADRAS 283

ISMAIL, J.

N. E. Vedammal, Appellant v. S. R. Krishnamoorthy Iyer, Respondent.

Appeal No. 237 of 1970, D/- 25-3-1975.*

(A) Limitation Act (1963), Art. 65 — Adverse possession — Institution of suit for title and possession before acquisition of prescriptive title — Effect — Running of time arrested.

When a suit for declaration of title to and recovery of possession of the suit property is instituted before the adverse possession has culminated in the acquisition of prescriptive title to the said property, the time during which the suit is pending cannot be taken advantage of by the person in wrongful possession and tacked on to the period during which he was in possession before the institution of the suit for the purpose of claiming prescriptive title. AIR 1923 Mad 88 (2); AIR 1948 Bom 149, Distinguished; AIR 1958 Cal 437; 1969 All LJ 975; AIR 1916 Mad 415; AIR 1943 Mad 425; AIR 1944 All 17, Followed. (Para 10)

*(Against decree of 8th Asst. Judge, City Civil Court, Madras, in L. A. C. No. 118 of 1967, D/- 1-11-1969.)

LS/BT/E634/75/PRK

Cases Referred: Chronological Paras
1969 All LJ 975 = ILR (1969) 2 All 468

AIR 1958 Cal 437 10
AIR 1948 Bom 149 = 49 Bom LR 767 9, 16
AIR 1944 All 17 = 1943 All LJ 485 13, 14
AIR 1943 Mad 425 = (1943) 1 Mad LJ 212 12
AIR 1923 Mad 88 (2) = 43 Mad LJ 737 12
AIR 1916 Mad 415 = 29 Ind Cas 168 9, 16
11, 14

R. Deenadayalu and P. Nagasundarajan, for Appellant; V. Natesan and B. Motilal Jain, for Respondent.

JUDGMENT:— The second claimant in L. A. C. No. 128 of 1967 on the file of the City Civil Court, Madras, is the appellant herein. The said land acquisition case is a reference under Sections 30 and 31 of the Land Acquisition Act made to the Court in respect of the compensation awarded for certain lands acquired by the Government. Having regard to the nature of the controversy between the parties, it is unnecessary to refer to the land acquisition proceedings themselves in detail.

2. The case of the first claimant, who is the first respondent herein, was that the entire block of land of 6.15 acres belonged to him, the same having been purchased by his father-in-law in the Court auction held in O. S. No. 525 of 1936 on the file of the Court of the District Munsif of Poonamallee, benami for him and taken possession of as early as 1941; that while so, one Rajagopala Pillai claiming some right in the said property, trespassed into the same and started making some alienations to various persons who also began to trespass into the property; that thereupon the first claimant and his father-in-law filed C. S. No. 56 of 1951 on the file of this Court, which was later on transferred to the City Civil Court, Madras, and numbered as O. S. No. 1162 of 1955, against the said Rajagopala Pillai and other trespassers in possession in a representative character; that the said suit after contest was decreed in favour of the first claimant directing possession of the said lands with mesne profits past and future to be delivered to the first claimant and his father-in-law; that 11 persons filed an appeal in C. C. C. A. No. 51 of 1957 on the file of this Court in which a conditional decree by consent was passed in favour of those appellants declaring their rights to the properties in their possession on their

paying to the first claimant the value of the said properties, as taxed in that decree; that subject to that condition and modification, the decree of the trial Court was confirmed against the other defendants and it had become final against them; that the claim of the appellant that she had purchased the acquired properties from one Rajagopala Pillai was not true and the same was rejected in those proceedings; that the first claimant filed E. P. No. 381 of 1962 for taking possession from the appellant herein; that when the bailiff went to deliver possession, she set up three obstructors to resist the delivery; that the first claimant filed M. A. No. 800 of 1963 for removal of obstructions which was ordered; that after all these proceedings, the appellant was coming forward to claim the compensation to which she was not entitled; and that therefore the first claimant prayed that the entire amount of compensation might be paid to him, as he alone was entitled to the same.

3. The case of the appellant was that she purchased the acquired property, that is, one ground and 1200 sq. ft. from Rajagopala Pillai under Ex. B-1, sale deed dated 2-3-1950 for a consideration of Rs. 1,300, that she had been in possession and enjoyment of the same since then upto the date on which the Government acquired the same; that she allowed some persons to occupy some huts put up by her in the said plot at her own costs and she had been collecting rents from them; that later on the appellant brought the 3rd claimant who is a close relation of her and permitted him to put up a hut; that the third claimant was there as a lessee by putting up the superstructure; and that the compensation of Rs. 500 might be paid to the third claimant who appeared to have realised a major portion of his mortgage due from several other purchasers from his mortgagee. The appellant prayed for marshalling the security and also stated that the first claimant can claim only a proportionate part according to the respective extents of plots held by the various purchasers. She also contended that she did not admit the ownership of the first claimant.

4. The third claimant contended that he was looking after the acquired property of the appellant and that with her permission he put up the structure at a cost of Rs. 1,000. He prayed that a sum of Rs. 1,200 for the superstructure and a sum of Rs. 500 for the well dug by him might be paid to him.

5. Under these circumstances, the question for consideration before the learned trial Judge was whether the first claimant was entitled to the entire compensation amount for the lands acquired or whether it was the second claimant-appellant who was entitled to the compensation in the present case.

6. The learned VIII Assistant Judge, City Civil Court, Madras, by his judgment and decree dated 1st November, 1969 held that it was the first claimant who was entitled to the entire compensation for the lands acquired and decreed accordingly. It is against this judgment and decree that the present appeal has been filed by the second claimant.

7. Ex. A-2 dated 26-7-1956 is a certified copy of the judgment in O. S. No. 1162 of 1955 on the file of the City Civil Court, Madras. Ex. A-3 dated 26-7-1956 is a certified copy of the decree therein and Ex. A-4 dated 23-9-1960 is a certified copy of the decree in C. C. C. A. No. 51 of 1967 on the file of this Court. Ex. A-2 clearly shows that the appellant herein was the 26th defendant in that suit, O. S. No. 1162 of 1955. Ex. A-4 shows that except to the extent of compromise arrived at between the appellants and the respondents therein, the appeal was dismissed as against the other respondents, and the consequence is that the decree for declaration of title and recovery of possession passed in O. S. No. 1162 of 1955 was confirmed as far as the present appellant is concerned. Rajagopala Pillai, the alleged vender of the appellant, was the first defendant in O. S. No. 1162 of 1955. Since the judgment in that case negatived the title of Rajagopala Pillai, the learned counsel for the appellant proceeded on the basis that the appellant herein perfected title to the suit property by adverse possession. Therefore, the question for consideration is, whether the appellant has established that case.

8. The learned trial Judge was not sure whether the appellant was in possession of the property at all. He held that even assuming that she was in possession, the suit O. S. No. 1162 of 1955 and the decree passed therein, to which she was a party interrupted her possession and prevented her from acquiring title to the property by adverse possession. Even according to the appellant, she came into possession of the suit property under Ex. B-1 dated 2-3-1950 and therefore her possession must have commenced

ed only thereafter. As I have pointed out already, the decree in O. S. No. 1162 of 1955 is dated 26-7-1956. Consequently, neither at the time of the institution of the suit, O. S. No. 1162 of 1955, nor at the time of the passing of the decree therein, the appellant had perfected her title by adverse possession. The argument of the learned counsel for the appellant is that notwithstanding the decree passed in O. S. 1162 of 1955 and the order directing the removal of obstruction in E. A. No. 800 of 1963, as evidenced by Ex. A-9 dated 18-2-1963, the appellant continued to be in possession of the property till the same was taken possession of by the Government in 1966 and that therefore she had acquired title to the property by adverse possession. This case was rejected by the trial court and I am of the opinion that it was rightly rejected.

9. The learned counsel for the appellant placed great reliance on a decision of this Court in Singaravelu Mudaliar v. Chokka Mudaliar, AIR 1923 Mad 88 (2). That was a case where the defendant who was in possession of the property continued to be in possession of the property even after the suit for declaration of title was decreed and was not dispossessed and therefore this Court took the view that the defendant had acquired title by adverse possession. The learned counsel for the appellant relied upon some observations contained in that judgment and contended that there was no difference between a suit for a mere declaration and a suit for declaration and recovery of possession and that even if a suit for declaration and recovery of possession was decreed, the defendant would acquire title by adverse possession, if he was not dispossessed within 12 years, pursuant to the decree passed therein. I am unable to accept this argument. The learned counsel for the appellant concedes that the decision of this Court referred to above did not deal with a case where a suit for declaration of title and recovery of possession was instituted and decreed and dealt with a case which involved merely a suit for declaration of title. However a Bench of the Calcutta High Court has considered this decision and observed in Achiman Bibi v. Abdul Rahim Nasker, AIR 1958 Cal 437 as follows:—

"We hold that there is considerable difference between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It is true

that by a decree for declaration without more the position of a person in wrongful occupation will not be disturbed, even if the decree be passed in his presence. If such person continues in possession even after the declaratory decree, he may, nevertheless, acquire prescriptive title. The consequences are different, if the suit for declaration is coupled with a claim for possession, as was done in the present case, and such suit is decreed."

The view of the learned Judge was that if a suit for declaration coupled with a claim for possession is filed and such suit is decreed in the presence of the person in wrongful occupation, the decree arrests the running of time against the true owner and that if the person in wrongful possession continues in possession even after the decree, the wrongful possession does not ripen into prescriptive title by efflux of time. The learned Judge referred to the decision of this Court mentioned by me above and distinguished the same on the ground that that case involved only a suit for declaration and not a suit for declaration coupled with a prayer for recovery of possession.

10. A similar argument was considered by a Bench of the Allahabad High Court in Ragho Prasad v. Pratap Narain Agarwal 1969 All LJ 975. The learned Judges considered a suit for partition and recovery of possession of the plaintiff's share therein and held:

"The suit in the instant case was not a suit for declaration, it was a suit for partition and possession. In a suit such as this, it is not possible to hold that if the defendant has been in adverse possession before the institution of the suit such adverse possession continues to run even after the institution of the suit so as to prescribe a good title in favour of the defendant. Were that so it could result in the frustration of the suit because while it was pending and before it terminated in a decree the defendant could have acquired title by adverse possession. Such a result is wholly unwarranted in law."

Let us test the proposition of the learned counsel for the appellant from a practical point of view. Suppose a person is in wrongful possession of the property and after he has been in such wrongful possession for three years, the real owner files a suit for declaration of title and recovery of possession. Assume that for some reason or other the suit was pending for nearly 9 years before

the Court and after 12 years from the commencement of the possession of the defendant (person in wrongful possession) the suit was decreed. Can it be held that since the decree itself was passed 12 years after the adverse possession commenced the defendant had perfected title to the suit property by adverse possession and therefore acquired a good title and the decree-holder cannot thereafter execute the decree and recover possession of the property? That merely emphasises the fact that when a suit for declaration of title and recovery of possession is instituted before the adverse possession has culminated in the acquisition of prescriptive title the time during which the suit is pending cannot be taken advantage of by the person in wrongful possession and tacked on to the period during which he was in possession before the institution of the suit for the purpose of claiming prescriptive title.

11. In fact, the above view is well supported by authority. In *Ratna Bai v. Official Assignees of Madras* 29 Ind Cas 168 = (AIR 1916 Mad 415), Sadasiva Aiyar, J., stated:—

"Now it is clear law in an ordinary suit if A sues on a good title for possession of his land after 11 years of possession, even if the defendant continued in possession for another 12 years during the pendency of litigation and before the suit became finally ripe for decision, judgment ought to be given for possession in plaintiff's favour, the continuance of the defendant's possession for 12 years during the pendency of the suit being wholly ignored."

12. A Bench of this Court in *Fatima Bibi v. Muhammad Usman*, AIR 1943 Mad 425 dealing with a suit instituted under Order 21, Rule 63, Code of Civil Procedure, held that "the institution of the suit arrests the running of time in favour of defendant."

13. A Bench of the Allahabad High Court in *Nand Lal v. Sunder Lal*, AIR 1944 All 17; pointed out:

"The effect of the institution of a suit within limitation is to destroy previously existing adverse possessions with effect from the date of institution or at any rate to suspend it from that date until the suit is finally decided one way or the other."

14. I have already pointed out that the adverse possession, if any, of the appellant herein commenced only on or after 2-3-1950 when she purported to

purchase the property from one Rajagopala Pillai under Ex. B-1 and C. S. No. 56 of 1951 (which was later transferred to the City Civil Court, Madras, and numbered as O. S. No. 1162 of 1955) was instituted the very next year and the judgment in that suit was pronounced on 26-7-1956, as evidenced by Ex. A-2. Consequently, the period from the institution of the suit upto the date of the judgment and decree has necessarily to be ignored in the language of this Court in *Ratna Bai v. Official Assignee of Madras*, 29 Ind Cas 168 = (AIR 1916 Mad 415) referred to above or the institution of the suit has destroyed the previously existing adverse possession or suspended it from that date in the language of the Allahabad High Court in *Nand Lal v. Sunder Lal*, AIR 1944 All 17, referred to already, and as possession was taken by the Government pursuant to the acquisition of the land under the provisions of the Land Acquisition Act only in 1966, the appellant cannot be held to have prescribed title to the property by adverse possession.

15. The learned counsel for the appellant placed great reliance on a judgment of the Bombay High Court in *Dagadabai Fakirmahomed v. Sakharan Gavaji*, AIR 1948 Bom 149. The head note of the decision states:—

"Whether a decree for possession in favour of the plaintiff does or does not interrupt adverse possession is purely a question of fact to be decided on the circumstances of each case. If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession; nor can it in law affect the nature of the possession, unless it does so in fact. A decree for possession followed by an unsuccessful execution cannot be deemed as a matter of law to have the effect of either interrupting possession or altering its character."

With regard to the facts, the headnote itself points out:

"The plaintiff mortgaged certain lands and the mortgagee obtained a decree which provided that the mortgagee should have possession of the lands for two years and the possession should thereafter go to the plaintiff. The mortgagee attempted to execute the decree but could not get possession from the defendants who were in possession as heirs of the husband of the plaintiff. The possession was never in fact obtained by

anybody. The plaintiff then brought a suit against the defendants claiming as an heir of her husband to eject the defendants. The defendants set up adverse possession. The question was whether possession was interrupted by mortgage decree:

Held, that the possession of the defendants must, on the facts, be deemed to have been adverse throughout and could not be said to have been interrupted by the mortgage decree."

I am of the opinion that on facts this case is distinguishable. Apart from that, the High Court of Bombay did not consider the distinction between a suit for declaration of title and a suit for declaration coupled with a prayer for recovery of possession, which was subsequently decreed, but instituted at the time when the defendant in possession had not perfected his title by adverse possession. In view of this, I am unable to hold that the said decision is helpful to the appellant in the present case. In any event, on the basis of the decisions referred to above, if the time during which the suit instituted by the first respondent herein for declaration of title and recovery of possession was pending is excluded, the question of the appellant acquiring title by adverse possession does not arise.

16. I also gave time to the counsel for the appellant yesterday to produce any authority of this Court to show that this Court has dealt with a case where a suit for declaration of title and recovery of possession has been decreed and still it has held that the defendant's possession was uninterrupted in spite of that decree. The learned counsel frankly represented to me today that he is not able to lay his hands on any authority excepting the decision in Singaravelu Mudaliar v. Chokka Mudaliar, AIR 1923 Mad 88 (2) referred to already. Under these circumstances, I prefer to follow the decision of the Calcutta High Court referred to above, namely, Achiman Bibi v. Abdul Rahim Naskar, AIR 1958 Cal 437 laying down the principle mentioned by me above and distinguishing the decision of this Court in Singaravelu Mudaliar v. Chokka Mudaliar, AIR 1923 Mad 88 (2) referred to above.

17. Consequently, it must be held that the appellant has not acquired title to the suit property by adverse possession. Since I have come to the conclusion that the appellant has not acquired title to the property by adverse possession, it is unnecessary to consider the question

whether the appellant was actually in possession of the property at all, because even if she was in actual possession of the property, I have held that she has not acquired title to the same by adverse possession.

18. Under these circumstances, the appeal fails and is dismissed with costs of the first respondent.

Appeal dismissed.

AIR 1976 MADRAS 287

K. VEERASWAMI, C. J. AND
SURYAMURTHY, J.

Muniyandi, Appellant v. Rajangam Iyer, Respondent.

A. A. O. No. 213 of 1975, D/- 21-1-1976.*

(A) Tamil Nadu Agricultural Lands Records of Tenancy Rights Act (10 of 1969), S. 16-A (as introduced by Act 34 of 1972) — Scope — Exclusion of jurisdiction of Civil Court in respect of matter which the Record Officer, District Collector, or other officer empowered under the Act has to determine is express. (Para 3)

U. Somasundaram, for Appellant; K. Sarvabhauman, for Respondent.

K. VEERASWAMI, C. J.:—The question in this case is whether the civil Court has jurisdiction to decide whether a particular person is a cultivating tenant or not under Madras Act 10 of 1969. A suit was instituted for deciding that question, which was dismissed on the ground that Section 16-A barred the civil Court's jurisdiction to decide that matter. But an appeal against that order succeeded with a direction that the matter should be disposed of afresh. The present Appeal is against the order of remand by the lower appellate Court. When the matter came before N. S. Ramaswami, J., in the first instance, he felt that the question as to how far the provisions of Madras Act 10 of 1969 oust the jurisdiction of the civil Court to decide the question whether a particular party is a cultivating tenant or not, was an important one which would arise in several litigations. On that view, he gave notice to the Advocates' Association, and Bar Association and desired that the matter should be decided by a Division Bench, and that is how it comes before us. Madras Act 10 of 1969 provides

*(Case referred by N. S. Ramaswami J. on 30-9-1975.)

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for the preparation and maintenance of record of tenancy rights in respect of agricultural lands in the State of Tamil Nadu. While the Act extends to the whole State, it has a definition section. A tenant in relation to any land, to which the Madras Cultivating Tenants Protection Act, 1955, applies, means a cultivating tenant as defined in clause (aa) of Section 2 of that Act. The inclusive part of the definition takes in certain other tenures as well, with which we are not concerned at the moment. We have then the provision for preparation of record of tenancy rights. That is done by the Government by a notification directing the preparation of a record of tenancy rights for any specified village. Such record shall be prepared, maintained and revised in accordance with the provisions of the Act and the rules made thereunder. That record should contain the survey number or sub-division number, extent and local name, if any, of the land, the name and address of the landowner, the name and address of the intermediary, if any, the name and address of the tenant cultivating the land and such other particulars as may be prescribed. Then a procedure is prescribed for modification of this record. Where, subsequent to the publication of the approved record of tenancy rights, any land has been let for cultivation, the landowner, intermediary or the tenant having interest in such land shall make an application to the record officer for inclusion of particulars relating to such land in the approved record of tenancy rights, and may have the land included in the approved record of tenancy. If any modification in the record of tenancy rights is required, entries mentioned in Section 5, that is permitted by following the procedure provided therein. Against orders under sub-section (8) of Section 3, sub-section (3) of Section 4 or sub-section (3) of Section 5 appeals are provided with a period of limitation fixed for filing. A further remedy by way of revision also is provided. These are to be found in Sections 6 and 7 of the Act. A further provision is made by Section 8 for amendment of approved record of tenancy rights to give effect to the orders under Section 6 or Section 7. There are then the provisions providing for obligation to furnish information, penalty for failure to furnish information as also for furnished false information. Section 13 provides for certain cognisable offences. Section 15 lays down a rule of presumption, which says that any entry in the

approved record of tenancy rights shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor. As the Act stood originally before Act 34 of 1972, there was no specific bar of the Civil Court's jurisdiction to decide any matter which the record officer or the District Collector or other officer or authority empowered by or under the Act has to decide. We need not stop to consider whether, having regard to the scheme of the Act indicating matters to be decided, the officers who have the authority to decide and further remedies by way of appeal and revision, the Civil Court's jurisdiction, by necessary implication, would stand excluded in respect of matters which those officers have to decide.

2. But Section 16-A, introduced by Tamil Nadu Act 34 of 1972, introduces such a bar, which reads:

"16-A. Bar of jurisdiction of Civil Courts.— No Civil Court shall have jurisdiction in respect of any matter which the record officer, the District Collector or other officer or authority empowered by or under this Act has to determine and no injunction shall be granted by any Court in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under this Act."

The section admits of no doubt that a Civil Court has no jurisdiction to decide any matter which the record officer, District Collector or other officer or authority empowered by or under the Act should determine. The Court is also forbidden from granting injunction in respect of any action taken or to be taken by such officer or authority in pursuance of any power conferred by or under the Act. We are told that what lead N. S. Ramaswami, J., to make the reference to a Division Bench was a consideration of the latter part of Section 15. Apparently he thought that if an entry in the approved record of tenancy rights should be presumed to be true and correct until the contrary was proved or a new entry was lawfully substituted therefor, to that extent the Civil Court's jurisdiction should not be taken to have been excluded. In other words, evidently his impression was that a certain area of Civil Court's jurisdiction was still available and the ambit of Section 16-A, should be read accordingly. We are of opinion that Section 15 is not jurisdiction section. It only provides for a rule of evidence,

namely, presumption of correctness of entries in the approved record of tenancy rights. This presumption can, of course, be rebutted until the contrary is proved or a new entry is lawfully substituted therefor. The words 'until the contrary is proved' and the words 'or a new entry is lawfully substituted therefor' are to be read with reference to the provisions of the Act. This is not as indicative of an area of jurisdiction still left with the Court to decide any matter which is entirely within the jurisdiction of the officers who are empowered by or under the Act to decide. As a matter of fact, Section 5, as we have already indicated, provides for modification of entries in the approved record of tenancy rights and if a decision of the record officer is taken up in appeal and a direction is given for modification, Section 8 provides for amendment to be made in the record of tenancy rights according to the appellate decision. Same thing applies also to a revision order. The Act, therefore, indicates and provides for the remedy to correct the record by following the procedure laid down. Until the contrary is proved or a new entry is lawfully substituted therefor, the entry shall be presumed to be correct. It is perfectly clear and has nothing to do with the question of jurisdiction.

3. The language of Section 16-A as indicated by us, admits of no doubt that the Civil Court's jurisdiction is expressly excluded in respect of any matter which the record officer, District Collector or other officer empowered by or under the Act has to determine.

4. The order of the Munsif in this case dismissing the suit is restored and the appeal is allowed. No costs.

Appeal allowed.

AIR 1976 MADRAS 289

GOKULAKRISHNAN, J.

R. Shanmughavelu Pillai, Petitioner
v. R. Karuppannan Ambalam, Respondent.
Civil Revn. Petn. No. 2015 of 1974,
D/- 25-2-1975.*

(A) Civil P. C. (1908), Ss. 115, 2 (2),
O. 7, R. 11 — Revision — Order rejecting
plaint — Rejection of plaint on whatever
ground is a 'decree' — Revision held not

*(Against order of Dist. Munsif, Madurai,
D/- 9-4-1974.)

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maintainable. AIR 1937 All 280, Dissented from.

When an appeal lies to the High Court whether directly or indirectly from any order or decree, revision will not be maintainable. Proper remedy is to go in appeal to the High Court. AIR 1964 SC 497, Foll. (Para 5)

Rejection of plaint on whatever ground is a 'decree' within the meaning of S. 2 (2). It is not limited to such cases wherein plaint is rejected for reasons stated in O. 7, R. 11. AIR 1937 All 280, Dissented from. (Case law discussed.)

(Para 7)

Thus, where the damages sought to be recovered was more than Rs. 2,000 and as such a second appeal was maintainable, the revision against the rejection of plaint held was not maintainable. (Para 8)

Cases Referred: Chronological Paras

(1975) 2 Mad LJ 17 = 88 Mad LW 793 5
(1971) 1 Mad LJ 76 = (1971) 1 Lab LJ 79 6

(1970) C. R. R. Nos. 1853 of 1970 and 2542
of 1970 (Mad) 6

AIR 1969 Mad 191 = ILR (1968) 3 Mad 335 6

AIR 1964 SC 497 = 1964 SCD 435 5

AIR 1960 Andh Pra 540 6

AIR 1957 Pepsu 14 7

AIR 1956 Hyd 133 = ILR (1956) Hyd 514 7

AIR 1952 Mad 86 = (1951) 2 Mad LJ 74
(FB) 7

AIR 1943 Mad 645 = (1943) 2 Mad LJ 133 6

AIR 1937 All 280 = 1937 All LJ 171 6

1936 Mad WN 448 6

AIR 1924 Oudh 413 = 11 Oudh LJ 260 7

AIR 1915 Mad 483 = 1 Mad LW 875 7

M. Veluswami, for Petitioner; P.
Venkataraman, for Respondent.

ORDER:— The plaintiff in an unfilled plaint No. —/74 (A. 2394/74) on the file of the District Munsif of Madurai Taluk at Madurai has preferred the above revision petition against an order rejecting the plaint on 9th April 1974.

2. The petitioner herein as plaintiff claimed damages for Rs. 2,250 for three crops from the suit land for the period from 15-7-1972 to 15-9-1973. The suit land was also the subject-matter of the suit in O. S. No. 358 of 1972 on the file of the District Munsif, Madurai Taluk at Madurai. It was a suit for permanent injunction against the defendant. The plaintiff obtained interim injunction on 24-7-1972, and the order was served on the defendant on 26-7-1972. After full

trial, the suit in O. S. No. 358 of 1972 was decreed ordering permanent injunction against the defendant. The plaintiff has pleaded in that suit that he was in possession of the suit lands on the date of the filing of the suit and the decree was passed on 29-9-1973. It is for the same period the plaintiff in the unnumbered suit claimed damages as stated above. It was alleged by the plaintiff that the defendant has been restrained from entering into the suit land from 24-7-1972 to 29-9-1973. The defendant obstructed the plaintiff from enjoying the suit land. The trial court observing that the plaintiff never complained that he was dispossessed by the defendant for the relevant period that inasmuch as the plaintiff has been in possession of the suit property from the date of taking delivery, the suit for damages for three crops is not maintainable, and that the plaintiff cannot claim damages by way of mesne profits from the defendant against whom a decree for permanent injunction was in force during the relevant period held the plaint is not maintainable. On these grounds the trial court rejected the plaint ordering the court-fee paid on the plaint be refunded.

3. Aggrieved by the said order of the Court below, the plaintiff has preferred the above Civil Revision Petition. Prima facie it looks that the order of rejection upon a suit for damages on the ground stated by the trial court is erroneous. Nevertheless the matter has to be discussed and decided upon proper evidence and arguments by the respective parties before the appropriate forum. Mr. Venkataraman the learned counsel appearing for the defendant (respondent herein) took up an objection that the revision is not maintainable. According to the learned counsel, under Section 2 (2) C.P.C. the decree will include the rejection of a plaint. The rejection of the plaint which is being questioned in this revision petition is construed as a decree, and only an appeal has to be filed and not a revision.

4. Mr. Velusamy the learned counsel appearing for the petitioner submitted that the High Court under the powers vested in it in Section 115, Civil P. C., can always correct the errors committed by the trial court. The learned counsel also submitted that this court having entertained the revision petition, has ample jurisdiction to revise the order made by the trial court. The learned

counsel further contended that no appeal will lie to the High Court and as such there is no bar for this court to entertain the revision petition under Section 115 of the Civil P. C.

5. Number of decisions were cited by both sides for their respective contentions. In *S. S. Khanna v. F. J. Dillon* (AIR 1964 SC 497) the Supreme Court has specifically held that no revision will lie to the High Court. The Supreme Court interpreting Section 115 of the Civil P. C. has held that no revision will lie to the High Court in case where an appeal will lie to the High Court directly or indirectly. This decision was followed by many judgments of our High Court, including myself in *C. R. P. S. R. No. 51709* of 1972 dated 31st October 1974.* As far as the case on hand is concerned, the damages sought to be recovered are more than Rs. 2,000 and as such a second appeal will definitely lie to the High Court.

6. The next contention raised by Mr. Velusamy is that the rejection of the plaint is not for any of the grounds provided under Order 7, Rule 11 of the Civil P. C. If there is any rejection under this Order 7, Rule 11, then only the rejection will be construed as one coming under the definition of the decree contemplated under Section 2 (2) of the Civil P. C. For this proposition, Mr. Velusamy cited *Amba Shankar v. Mt. Seoti* (AIR 1937 All 280). A single Judge of the Allahabad High Court has held that the rejection of the plaint made for the reasons stated under Order 7, Rule 11, C.P.C. only will come under the definition of the decree under S. 2 (2), C.P.C. The other cases cited by Mr. Velusamy such as *C. R. R. Nos. 1853 of 1970 and 2542 of 1970 (Mad)* cannot be taken as an authority since those decisions followed the decision in *Munusamy v. Chengalvaraya* (AIR 1943 Mad 645) which is not an authority for this proposition. AIR 1943 Mad 645 is a case filed against an order refusing to review the judgment passed by the trial court. There is no difficulty in entertaining a civil revision petition against an order refusing to review the judgment of the court below. The present case on hand is not one like that. In *Seshadri v. Krishnaiah* (1936 Mad WN 448), Civil revision petition was entertained by this court, but the question as to whether a Civil revision petition will lie or an appeal will lie against an order rejecting the plaint has not been discussed at all in this case.

*Reported in (1975) 2 Mad LJ 17

In *Vaishnav College for Women v. Mrs. Alleyamma Thommas* (1971-1 Mad LJ 76) Ramanujam, J., has held that a revision is maintainable. That is not a case filed against a rejection of the plaint. Apart from that fact, that is a case in which no appeal will lie either directly or indirectly to the High Court. *Chinna v. Govindaswami* (AIR 1969 Mad 191) is a case arising under Section 9 of the Specific Relief Act, wherein Ramaprasada Rao, J. has stated that in the interest of justice High Courts have ample power to interfere with the orders passed under Section 9 of the Specific Relief Act under Section 115, Civil Procedure Code. Even the decision reported in *K. Virupakshiah v. M. Shivalingaiah* (AIR 1960 Andh Pra 540) is not a case arising out of an order rejecting the plaint. But in any event, it does not support the case of the petitioner herein. Thus it is clear from the abovesaid decisions, except the decision reported in *Amba Shankar v. Mt. Seoti* (AIR 1937 All 280) the question as to whether a revision will lie or an appeal from an order rejecting the plaint has not been discussed at all.

7. Mr. Venkataraman, the counsel appearing for the respondent cited *Satyanarayanachari v. Ramalingam*, 1951-2 Mad LJ 74 = (AIR 1952 Mad 86) (FB) wherein it has been held:

"Where an order directing payment of additional court-fee in a suit is not complied with and it is followed by an order rejecting the plaint, a revision against the later order would not be maintainable and the proper remedy is only by way of an appeal against the decree."

Another case cited by Mr. Venkataraman is *Harihar Bakhsh Singh v. Jagannath Singh* (AIR 1924 Oudh 413). A Bench of the Oudh Court has held:—

"On behalf of the appellant it is contended that the only grounds on which a court is authorised to reject a plaint are those given in Order 7, Rule 11 of the Civil P. C. and that the Subordinate Judge had no jurisdiction to reject this plaint on the grounds taken by him. With this contention we are not disposed to agree. The instances given in the rule referred to cannot be regarded as exhaustive or as limiting the powers of a court under Section 151 of the same Code. We concur in the view taken by the Madras High Court in *Lakshmanam Chetty v. Lakshmanam Chettier*, (1914) 1 Mad LW 875 = 25 Ind Cas 738 = (AIR 1915 Mad 483) that a Court has jurisdiction in a proper

case to dismiss a suit filed by the next friend of a minor on the ground that it is not in the interests of the minor that the suit should be allowed to go on. The cases quoted in that ruling from "*Simpson on the Law of Infants*" (pp. 471 to 473) show that this is also the law in England."

The next case cited by Mr. Venkataraman is *Radhakishen v. Wali Md.* (AIR 1956 Hyd 133), wherein also a Bench of the Hyderabad High Court has held that:—

"The instances given in Order 7, Rule 11 cannot be regarded as exhaustive of all the cases in which a court can reject a plaint or as limiting the inherent powers of the court in respect thereof."

For the proposition that against the rejection of the plaint, only appeal lies, has been made clear in the decision reported in *Lakshmanam v. Lakshmanam* (AIR 1915 Mad 483) and in *Badri Nath v. State of Pepsu* (AIR 1957 Pepsu 14). Even reading Section 2 (2), C.P.C. it does not say the rejection of the plaint under Order 7, Rule 11, C.P.C. on the other hand, it generally states that decree will include rejection of plaint. Thus it is clear both from the section and also the decisions cited above that only appeal will lie against the rejection of the plaint and it is not limited to such cases wherein the plaint was rejected for the reasons stated under Order 7, Rule 11, C.P.C.

8. Thus it is clear that the order in question now is rejection of the plaint even though it cannot be construed as one coming under the reasons stated under Order 7, Rule 11, C.P.C. Nevertheless the remedy, if any, for the petitioner herein can only be by way of an appeal and not by a revision to this Court. When there is a specific remedy provided and no harm will be caused to the petitioner herein by directing him to file an appeal instead of a revision in this court, I am of the view that this revision petition has to be dismissed as not maintainable.

9. Mr. Veluswamy submits that the time will be against him if he goes by way of an appeal against the order rejecting the plaint. He can prefer an appeal with a petition to excuse the delay and I am sure any court will take into account the time taken by the petitioner in litigating the matter before a wrong court, in calculating the period of limitation and excusing the delay occurred.

10. In these circumstances, this Civil Revision Petition is dismissed as

not maintainable. There will be no order as to costs.

Petition dismissed.

AIR 1976 MADRAS 292

RAMAPRASADA RAO, J.

Kamakshi Ammal and others, Petitioners v. Pappathi, Respondent.

C. R. P. Nos. 1008 and 1009 of 1974, D/- 24-1-1975.*

(A) Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (21 of 1972), S. 3 (1) — "All arrears of rent outstanding on 30-6-1971" — Meaning — Amount of the decree for arrears of rent deposited in the Court on its direction, was not an "outstanding rent" and tenant was not entitled to refund of that amount. (Civil P. C. (1908), O. 41, R. 5).

The landlord obtained a decree for recovery of arrears of rent against the tenant. In second appeal by the tenant, he sought stay of execution of decree. The Court directed the tenant appellant to deposit half the amount of the decree, which was deposited by him in the Court. The second appeal was dismissed. Act 21 of 1972 came into force and it was contended by the tenant that he was entitled to the refund of amount deposited in the Court as arrears of rent on the ground that the amount represented "outstanding arrears of rent as on 30-6-71" within the meaning of S. 3 (1).

Held that the amount could not be an 'outstanding arrears of rent' within the meaning of S. 3 (1). Once the appeal had been dismissed and in consequence the decree for money, though for arrears of the rent, had been upheld by the Court, then the money deposited by the tenant lost its character as arrears of rent, and there was automatic vesting of the right in decree-holder to collect that money.

(Para 3)

The plaintiff decree-holder has a lien over the amount deposited in court by the judgment-debtor and the Court holds the said amount in trust for the person who might ultimately succeed in the action. There is only a postponement of the right of the plaintiff to receive the said amount which is necessitated because of the pendency of the second appeal. As soon as the second appeal is disposed of

*(Against order of Dist. Munsif, Tiruvavur in E. A. 577 of 1973.)

against the judgment-debtor eo instanti the decree-holder is the person, who is entitled to the said amount, as on the date when it was deposited it belonged to him and there was only a postponement of the right to collect the money because of the pendency of the civil proceeding. The supervening legislation did not have any effect on the situation. (1878) ILR 4 Cal 6 and AIR 1919 Mad 607 and AIR 1925 Cal 416, Ref. (Paras 7 & 8)

Cases Referred: Chronological Paras

AIR 1925 Cal 416 = ILR 51 Cal 1010	6
AIR 1919 Mad 607 = ILR 41 Mad 1053	5
(1892) 1 QB 94 = 61 LJQB 1	6
(1878) ILR 4 Cal 6	4
1874-9 Ch Ap 379 = 30 LT 620	6

M. Srinivasan, for Petitioners; R. Sitaraman for K. Raman, for Respondent.

ORDER :— The petitioners sought for a refund of a sum of Rs. 979-50, which is in court deposit, pursuant to interim orders made by this court, whilst the respondents equally claim that that amount is payable to them, as the same was deposited by them into court as per orders of court and that the petitioners have no right, title or interest therein. The petitioners' predecessor-in-interest was the landlord and the first respondent was his tenant of agricultural lands in the district of Thanjavur. He filed a suit O. S. No 40 of 1962 on the file of the District Munsif Court, Tiruvavur, for the recovery of arrears of rent by then payable by the first respondent-first defendant. The trial court dismissed the suit. The first plaintiff in that suit took up the matter further in appeal to the District Court, Nagapattinam in A. S. 76 of 1964 and the same was allowed. The tenant-defendant preferred an appeal to this court in S. A. 1061 of 1966, and sought for stay of execution of the decree. This Court directed the defendant to deposit one-half of the decree amount and to give security for the other half. Pursuant to the said orders, the defendant deposited the said sum. The second appeal was, however, dismissed. In the course of this litigation, the first plaintiff died and plaintiffs 2 to 9 are his legal representatives; even so the first defendant died and the second defendant is his legal representative. Plaintiffs 2 to 9 were added as the legal representatives of the deceased first plaintiff and the second defendant as the heir of the first defendant was added as his representative and was recognised as a person entitled to the benefits of the

cultivating tenant under the Tamil Nadu Cultivating Tenants Protection Act. After the passing of the Tamil Nadu Act 21 of 1972, the second defendant deposited the arrears of rent payable for Fasli 1381 and sought for a declaration from the revenue court that the arrears of rent by then payable have been wiped out. She obtained such a declaration. After obtaining the same, she (respondent in the C. R. P.) filed E. A. 577 of 1973 in O. S. 40 of 1962 on the file of the court of the District Munsif, Tiruvavur, seeking for a refund of the sum of Rs. 979-50 paid by the first defendant (her predecessor-in-interest) as if that amount belongs to her and that plaintiffs 2 to 9 have no right, title or interest in it. This was resisted by the legal representatives of the decree-holder (petitioner in the C. R. P.). Their case was that they were entitled to the amount in court deposit in preference to the second defendant as heir of the judgment-debtor. Furthering this aspect plaintiffs 2 to 9, who are the petitioners herein, filed an independent application under Section 151, C.P.C. read with Rule 163 of the Civil Rules of Practice for payment out of the aforesaid sum of Rs. 979-50. According to the petitioners the amount deposited in court has become payable to them and has become their property no sooner the second appeal was dismissed. The respondent (the heir of the judgment-debtor) cannot take advantage of Act 21 of 1972, and seek for a refund of the aforesaid amount on the foot that the said amount represented outstanding arrears of rent as on the 30th June 1971 within the meaning of Section 3 (1) of the said Act. The fact remains that the petitioners did not withdraw the amount soon after the dismissal of the second appeal and before the induction of Act 21 of 1972. The learned District Munsif was of the view that the decree obtained by the first plaintiff in the original suit was a decree towards rent and that, therefore, such a decree for payment of the rent became unenforceable by reason of Act 21 of 1972. He was also of the view that the decree-holder as at present by withdrawing the said amount cannot enter part satisfaction of the decree as on date. In the light of the above reasoning he upheld the contention of the cultivating tenant and was of the view that the legal representatives of the first plaintiff were not entitled to the payment of the money in court deposit. It is as against this, the present civil revision petitions have been filed by the heirs of the landlord.

2. The contention of Mr. M. Srinivasan, learned counsel for the petitioners, is that the learned District Munsif was wrong in having entered into a discussion about the enforceability or otherwise of the decree and as the amount deposited has become the property of the decree-holder, the respondents cannot claim any interest in it, as the judgment-debtor or the legal representatives of the judgment-debtor. On the other hand, it is said that, as long as the decree-holder did not seek for payment out of the amount and as the dismissal of the second appeal cannot have any bearing on the issue, as the amount always belonged to the judgment-debtor, it is claimed that the order of the lower court is correct.

3. In a case like this it is essential to view the subject on a broader perspective, as any other approach to it may lead to inequitable results. When the money was deposited by the judgment-debtor as a condition precedent for the grant of stay at the time when the second appeal was admitted, then such money so deposited into court is in custodia legis and is no longer under the control of either the judgment-debtor or the decree-holder. Once the second appeal has been dismissed, the money so deposited and which is in the custody and control of the court automatically becomes the property of the decree-holder and he has a vested right in him to withdraw the said amount. The mere lapse on his part to take out a petition for withdrawal of the amount soon after the dismissal of the second appeal will not militate against him nor will it adversely affect his vested right. When once the second appeal has been dismissed and in consequence the decree for money, though for arrears of rent, has been upheld by this court, then the money deposited by the judgment-debtor loses its character as arrears of rent. It is simply the country's coin, which the decree-holder is entitled to as a result of the money decree obtained by him. Such a vested right which enables him to withdraw the amount in court deposit would not make that amount an 'outstanding rent' payable by the cultivating tenant-judgment-debtor. The relief granted under Section 3 of the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act 1972 (Act 21 of 1972), is to the effect that all arrears of rent payable by a cultivating tenant to the landlord and outstanding on the 30th June 1971 shall be deemed to be discharged, whe-

ther or not a decree or order has been obtained therefor..... The question is whether that portion of the amount which has been deposited by the cultivating tenant into Court in legal proceedings pursuant to the orders of court as stated above can any longer be impressed with the badge of rent which can be said to be outstanding and payable by the cultivating tenant. A metamorphosis has come in. The cultivating tenant has paid money into court and this money will find its level and way according to the decision in the second appeal and once the second appeal filed by the judgment-debtor has been dismissed, there is an automatic vesting of a right to collect that money in court deposit in the decree-holder and the said amount can no longer be characterised as arrears of rent or rent which was outstanding on the notified date.

4. The above subject has come up, though not under similar circumstances, but in a broader perspective in courts of law. In *Sheo Gholam Sahoo v. Rahut Hussain* (1878) ILR 4 Cal 6 a Division Bench of the Calcutta High Court as early as 1878 took the view that when money is deposited in court, the court holds the deposit in trust for the decree-holder and the court is at liberty to pay it over to the decree-holder based on his success in the legal proceedings.

5. In *Ramaiah Ayyar v. Gopala Iyer*, ILR 41 Mad 1053 = (AIR 1919 Mad 607) the defendant was arrested before judgment and was ordered to be released from custody on depositing into court a sum of money sufficient to meet the plaintiff's claim in the suit. There was subsequently an attachment of the money by the decree-holder and an adjudication of the defendant as an insolvent. Courts Trotter J. as he then was, speaking for the Bench, said that the money paid into the general credit of the action, is charged with a lien in favour of the plaintiff obtaining a decree in his favour and the Official Assignee cannot claim any preference over the title of the plaintiff over the said property.

6. In *Chowthmull v. Calcutta W. and S. Assn.*, AIR 1925 Cal 416 a similar view was taken by the Division Bench of that court. Sanderson C. J. approving of a decision in *Bird v. Barstow*, 1892-1 QB 94, said that the amount paid into court under the circumstances similar to the one under consideration was the money of the plaintiff in the suit subject to his

succeeding in the appeal. The learned Chief Justice also added quoting *Ex parte Banner*, In re *Keyworth*, 1874-9 Ch Ap 379 that the money which was paid into court belonged to the party who might be eventually found entitled to the sum.

7. The ratio of the above decisions makes it clear that the plaintiff decree-holder has a lien over the amount deposited in court by the judgment-debtor and the Court holds the said amount in trust for the person who might ultimately succeed in the action. There is only a postponement of the right of the plaintiff to receive the said amount which is necessitated because of the pendency of the second appeal. As soon as the second appeal is disposed of against the judgment-debtor eo instanti the decree-holder is the person, who is entitled to the said amount, as on the date when it was deposited it belonged to him and there was only a postponement of the right to collect the money because of the pendency of the civil proceeding.

8. The supervening legislation did not have any impact on the situation. The words deployed in Section 3 of Act 21 of 1972 are 'all arrears of rent' and "all outstandings as on 30th June 1971" are wiped out. The question is whether the court deposit which is in the custody of court and which is held by the court in trust for the successful party, can be said to be an outstanding or arrears of rent within the meaning of the expressions used in Section 3 of the Act. When the legislature has designedly used the expression 'outstanding' it means that if the tenant has already paid in full or in part the rent payable he has no right to seek for a recovery of it from the landlord. It is only such part of the rent, which remained as arrears or which was outstanding on the notified date that is wiped out under the beneficial legislation. In the instant case the amount in court deposit cannot be said to be arrears of rent or an outstanding rent. It has lost the impress of rent because of the peculiar situation when the money came to court pursuant to orders of court in an application for stay of the execution of a money decree. Taking all these factors into consideration I am of the view that the petitioners are entitled to the amount in court deposit and not the respondents.

9. The order of the lower court is, therefore, set aside and the civil revi-

sion petitions are allowed, but there will be no order as to costs.

Civil revision petitions allowed.

AIR 1976 MADRAS 295

RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.

P. Somasundaram, Appellant v. K. Rajammal, Respondent.

Appeal No. 522 of 1970, D/- 29-11-1974.*

(A) Succession Act (1925), S. 119 — Will providing for maintenance of P, C and V out of properties left by testator with vested interest in favour of V — Possession of V postponed till death of P and C — Date of vesting in V is date of testator's death.

A testator by his Will expressed his clear and unambiguous intention that his wife P, daughter-in-law C and V, granddaughter born of latter would have to maintain themselves out of the income of the properties during the lifetime of P and C who had no right of alienation. After the lifetime of P and C, V should get the properties absolutely.

Held on a construction of the Will that the words of futurity viz., 'after the lifetime of P and C' used in the will, have to be construed as merely referring to the period of determination of the life interests of the testator's wife and daughter-in-law as there are no other contrary terms in the will showing an intention on the part of the testator postponing the vesting till after the death of the life estate holders. There cannot be a vacuum or interregnum where there is a life estate followed by an absolute estate, because the residue must rest somewhere. In addition to the vesting of property she also acquired a right to enjoy the properties along with P and C. So, under S. 119 of the Succession Act, the vested interest in the suit properties had devolved on V on the death of the testator subject to the charge of maintenance in favour of herself, P and C which charge of maintenance created under the will would not suspend the vesting of the properties in the legatee V: (1911) ILR 33 All 558, Foll. Case law referred. (Para 7)

(B) Succession Act (1925), Ss. 119 and 124 — Vested or contingent bequest — What is.

*(Against decree of Sub-J., Madurai in O. S. No. 187 of 1966.)

CT/DT/A916/76/KSB

An interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain, whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in a property at the testator's death when he acquires a proprietary right in it at that time; but the right of enjoyment is only deferred till a future event happens which is certain to happen. But, a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at the testator's death; but both depend upon future uncertain events. (Para 11)

(C) Evidence Act (1872), S. 101 — Plaintiff assailing execution of document like Will — Burden lies on him to prove vitiating circumstances like undue influences, coercion or fraud. (Para 13)

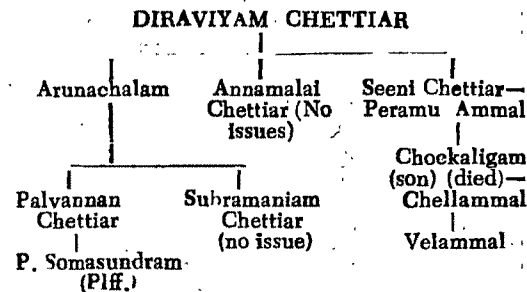
Cases Referred: Chronological Paras
AIR 1973 SC 2114 = 1973 SCD 542 13
AIR 1960 Punj 257 = ILR (1958) Punj 1852 9

AIR 1939 PC 78 = 181 Ind Cas 355 8, 9
AIR 1933 Mad 885 = 66 Mad LJ 170 12
(1911) ILR 33 All 558 = 8 All LJ 577

8, 9
(1911) ILR 38 Cal 468 = 21 Mad LJ 387
(PC) 8

RATNAVEL PANDIAN, J.:— This appeal is preferred in forma pauperis by the unsuccessful plaintiff in O. S. No. 187 of 1966 on the file of the Court of the Subordinate Judge, Madurai. The said suit was filed by him in forma pauperis for possession with past and future mesne profits.

2. This litigation arose out of a will executed by one Velammal under Ex. B-34 dated 23-2-1949 in favour of the respondent-defendant. The plaintiff in the suit questions the right and title of the testatrix to the suit properties. The relationship of the parties and their position can be appreciated from the following genealogical tree—



The suit properties originally belonged to one Seeni Chettiar, son of Diraviyam Chettiar. The said Seeni Chettiar had two brothers, viz., Arunachalam Chettiar (the eldest) and Annamalai Chettiar (the youngest). Annamalai Chettiar died issueless. Arunachalam Chettiar died leaving his two sons Palvannan Chettiar and Subramaniam Chettiar. Subramaniam Chettiar also died issueless. The plaintiff in this suit is the son of the said Palvannan Chettiar. The said Seeni Chettiar, the paternal grandfather of the plaintiff, executed a will Ex. A-1 dated 27-4-1913, bequeathing life interests in favour of his wife, Peramu Ammal and daughter-in-law Chellammal with a specific term that his daughter-in-law Chellammal and his grand-daughter, Velammal were also to reside with his wife Peramu Ammal and maintain themselves out of the income from the properties in common, with no powers of alienation. Velammal was to enjoy the properties in common with Peramu Ammal and Chellammal till their lifetime and thereafter Velammal and her heirs were to get the properties absolutely. There is no dispute on the above said facts. It is the case of the plaintiff that under the will Ex. A-1, Velammal got only a right of maintenance during the lifetime of Peramu Ammal and Chellammal and not any vested interest or remainder in the properties. After the death of the testator of Ex. A-1, Peramu Ammal was in possession and enjoyment of the suit properties as per the terms of the will and Chellammal and Velammal also were maintained by Peramu Ammal out of the income of the bequeathed properties. Velammal the testatrix of Ex. A-34, died issueless on 22-2-1951, after the death of her husband. Subsequently, Peramu Ammal died on 11-2-1951 (sic) and Chellammal died on 20-7-1955. So, the plaintiff's case is that Velammal, the testatrix of Ex. B-34, had absolutely no vested interest, right or title to the property especially during the lifetime of Peramu Ammal and Chellammal, and so the alleged will is void ab initio. The plaintiff's further case is that Ex. B-34 has not been executed while in a sound and disposing state of mind and that the defendant, the legatee under the will, with the able assistance and help of her husband, partisans and friends, had exerted undue influence and coercion on the testatrix, to execute the will and so it is vitiated by fraud, undue influence and coercion. Thus the plaintiff claims that as per Ex. A-1, he has become entitled to succeed to the suit

properties and to be in possession and enjoyment of the same. He challenges the occupation and possession of the suit properties, by the defendants as illegal. He sent a notice under Ex. A-5 dated 4-7-1964, to which the defendants sent a reply under Ex. B-32, dated 11-7-1964. So, the plaintiff filed the suit for a declaration that he is entitled to the suit properties and consequently to recover possession thereafter from the defendant and for past mesne profits of Rs. 3,600 and future mesne profits and costs of suit.

3. The respondent-defendant resisted the claim of the plaintiff, stating that the plaintiff is not a reversioner of the deceased Seeni Chettiar, entitled to succeed to the suit properties, and that Velammal, who had an absolute vested right over the properties on the strength of Ex. A-1, has executed Ex. B-34 in favour of the defendant of her own free will and volition while she was in a sound and disposing state of mind and that the appellant herein knowing fully well of the execution of Ex. B-34, has been keeping quiet from 1949 till December 1965 for a period of over 15 years and then has come forward with this false claim after the death of the defendant's husband. The defendant has further stated in her written statement that the said Velammal lived for two years after the execution of the will under the care and protection of the defendant Rajammal who is no other than her maternal aunt's daughter. Further, the defendant had also taken a plea that the suit is barred by limitation as the plaintiff had not taken any appropriate proceedings to set aside the said will Ex. B-34. The defendant also pleaded that she is paying municipal tax from the year 1951 and attending to all repairs, that the plaintiff is estopped from claiming the suit properties by his own laches, negligence and acquiescence and as such he has no cause of action and that the suit is also bad for non-joinder of parties.

4. On the above pleadings, the following issues were framed by the trial court—

1. What is the nature of interest obtained by Velammal under the will of her grandfather Seeni Chettiar dated 27-4-1913.

2. Whether Velammal got only a right to maintenance under the will.

3. Whether the will dated 23-2-1949 executed by Velammal is true, genuine, valid and binding on the plaintiff.

4. Whether the plaintiff is estopped from impugning the will of Velammal by his own laches, negligence and acquiescence.

5. Whether any and what improvements have been made by the defendant to the suit building.

6. Whether the suit as framed without a declaration regarding Velammal's will is not maintainable.

7. Whether the defendant has in any event acquired prescriptive title to the suit properties.

8. Whether the plaintiff is entitled to any and what mesne profits.

9. Whether the suit is barred by limitation.

10. Whether the suit has been properly valued and proper court-fee paid.

11. To what relief if any is the plaintiff entitled?

Additional issues framed on 28-10-1967:—

1. Whether the plaintiff is the only nearest reversioner to the deceased Seeni Chettiar and if not, whether the suit is maintainable.

2. Whether the suit is bad for non-joinder of Gomathi Ammal and minor Palani alias Ramasubramanian.

5. After considering in great detail the oral and documentary evidence adduced by the plaintiff and the defendant in support of their respective contentions, and finding issues 1 to 8 against the plaintiff, the learned Subordinate Judge held that Velammal had got a full and absolute right over the suit property and not merely a right of maintenance, that Ex. B-34 is a true and genuine document executed by Velammal in a sound and disposing state of mind and it is valid and binding on the plaintiff, that the defendant has also acquired title to the property by adverse possession and that the plaintiff is disentitled to impugn the will, Ex. B-34, by his own laches, negligence and delay. He found issues 9 and 10 and additional issues 1 and 2 against the defendant as the defendant did not press those issues. Ultimately, the learned Judge has dismissed the suit with costs. It is as against this judgment and decree that the plaintiff has come forward with this appeal.

6. Mr. V. S. Subramaniam, learned counsel for the appellant, sought to contend before us, firstly that under the will Ex. A-1, executed by Seeni Chettiar, Velammal, the testatrix of Ex. B-34, had got only a right of maintenance during

the lifetime of Peramu Ammal and Chellammal and not any vested right or remainder in the properties during their lifetime, but only a contingent interest over the properties and that therefore Velammal could not validly execute the will Ex. B-34 and it is void ab initio. Secondly, he would contend that the proponent, the defendant, has not adduced any satisfactory and reliable evidence that at the relevant time of the execution of Ex. B-34, the testatrix Velammal was in a sound and disposing state of mind and she signed the will of her own free will understanding the nature and effect of the disposition. He further contended that the husband of the defendant, who is an interested party, has taken a prominent and leading part in the execution of the will Ex. B-34 which conferred on the defendant a substantial benefit, that the attestors of the will viz. D.Ws. 2 and 3 are the co-employees of the husband of the defendant and D.W. 1 is a friend of the defendant's husband Muthuswami Pillai and that all these circumstances create a legitimate suspicion which is not completely removed by the defendant to enable the court to hold that the document has been executed by the testatrix of her own free will and volition, uninfluenced by any pressure on the part of the defendant.

7. Coming to the first contention that under Ex. A-1, Velammal got only a right of maintenance during the lifetime of Peramu Ammal and Chellammal and not an absolute vested right over the property, that the right she acquired was only a contingent interest, that is to say, she would get a vested interest over the properties only after the lifetime of Peramu Ammal and Chellammal and that since P. Velammal predeceased Peramu Ammal and Chellammal, she had not acquired any absolute interest, right or title over the properties when she executed Ex. B-34, it is not disputed that Velammal predeceased Peramu Ammal and Chellammal. But, the question is whether Velammal got a vested interest under Ex. A-1 even during the lifetime of Peramu Ammal and Chellammal. Section 119 of the Indian Succession Act reads as follows:—

"Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the

testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation: An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that, if a particular event shall happen, the legacy shall go over to another person."

The recitals in Ex. A-1 read as follows:—

*[The original in Malayalam script omitted.]

x x x x x

From the above recitals in Ex. A-1, the intention of the testator is clear and unambiguous that all the three viz., Peramu Ammal, Chellammal and Velammal have to maintain themselves out of the income of the properties during the lifetime of Peramu Ammal and Chellammal. Peramu Ammal and Chellammal had no rights of alienation. After the lifetime of Peramu Ammal and Chellammal, Velammal should get the properties absolutely. So on the construction of the will, the words of futurity viz., 'after the lifetime of Peramu Ammal and Chellammal' used in the will, have to be construed as merely referring to the period of determination of the life interests of the testator's wife and daughter-in-law as there are no other contrary terms in the will showing an intention on the part of the testator postponing the vesting till after the death of the life estate holders. There cannot be a vacuum or interregnum where there is a life estate followed by an absolute estate, because the residue must rest somewhere. In this case, what is deferred is only the possession of the entire properties in favour of Velammal and not the vesting of the properties. Peramu Ammal and Chellammal were given only a life interest, with a right to enjoy the properties as is clear from the recital that they have no right of alienation. In addition to the vesting of property in Velammal, she also acquired a right to enjoy the properties along with Peramu Ammal

and Chellammal. So, under Section 119 of the Indian Succession Act, the vested interest in the suit properties had devolved on Velammal on the death of the testator subject to the charge of maintenance in favour of herself, Peramu Ammal and Chellammal, which charge of maintenance created under the will would not suspend the vesting of the properties in the legatee Velammal.

8. In Bhagabati Barmani v. Kalicharan Singh, (1911) ILR 38 Cal 468 (PC), a Hindu testator, left a will, giving possession of the properties, movable and immovable, to his wife and mother for their lives and on their death to the sons of his sisters who were in existence and also those who might be born thereafter, who should hold the properties in equal shares. The testator died the day following the execution of the will. It was held that the will gave to the sons of the sisters a vested interest in their respective shares at the testator's death, though it postponed their possession and enjoyment until the deaths of the mother and widow. In Bilaso v. Munilal, (1911) ILR 33 All 558, one Sewaram executed a will whereby he gave all his properties, after the death of himself and his wife, Mst. Nandu to his daughter Bilaso and his nephew Dulichand. Dulichand survived the testator, but predeceased Mst. Nandu. A suit was brought by the heirs of Dulichand to recover his share of the properties of Sewaram from Mst. Bilaso. The sole question that was raised in the appellate court was whether Dulichand did not get a vested interest in the properties disposed of by the will, but merely a contingent interest, and he having died before his aunt, Mst. Nandu, whether his sons were not entitled to succeed to the property. Following the decision in Bhagabati v. Kalicharan, (1911) ILR 38 Cal 468 (PC), it was held that the nephew Dulichand took a vested interest in the properties, which was transmissible to his heirs. In Phillip Graham Greenwood v. Phillip Graham Greenwood, AIR 1939 PC 78, a testator, by his will, appointed his wife and nephew as his trustees and executors and gave all his properties to the trustees, upon certain trusts under which the wife was to enjoy the free use and income of his estate during his life. The will further empowered the wife to dispose of, at the time of her death, 1/3 share in the whole estate in favour of any person, and as regards the 2/3rds of the estate remaining undisposed of at the time of the wife's death, the will directed that

the surviving trustees should divide the 2/3 share equally among all the brothers and sisters of the testator alive when the will was made and that should any of them predecease his wife, then the share which the deceased would have received if alive should be given to the child or children of the deceased. In that case, one of the sisters of the testator, who had survived the testator, died unmarried and without issue during the lifetime of the testator's widow. On the death of the widow, the period for the distribution of the 2/3rds of the residuary estate given to the testator's brother and sisters having arrived, the question arose whether the estate of the deceased sister was entitled to a share in the distribution. It was held that the deceased sister's share of the residue vested in her on the death of the testator subject to the divestiture only in the event of her predeceasing the testator's widow, leaving child or children, and such event not having occurred, her representative was entitled to her share. Thus, it is clear that the right to the 2/3rd share of the residuary estate vested in the brother and sisters of the testator upon his death in spite of the fact that the distribution of the said share among them was to take effect only after the death of the testator's widow.

9. In *Hazara v. Banta Singh*, AIR 1960 Punj 257, under a will, a testator bequeathed to A, B and C, equal shares in his estate. It was provided that A and B were not to alienate the properties in any way except for the payment of share of the debt of the testator and were to keep the property only till their lives and for their maintenance. After the death of A and B, their shares also were to go to the share of C. C died during the lifetime of A and B. It was held, following the decision in *Phillip Graham Greenwood's case* AIR 1939 PC 78, and *Bilaso's case* (1911) ILR 33 All 558, that the will gave to A and B nothing more than a life estate and it could not be interpreted to confer an absolute estate on them and that C's interest in the property bequeathed to him was a vested one which devolved on his heir on his death even during the lifetime of A and B.

10. The last mentioned case is directly applicable to the facts of this case. From the principles enunciated in the abovesaid decisions, it is very clear that the provisions of the will in the present case leave no doubt that the testator intended to give only a limited estate in

favour of Peramu Ammal and Chellammal during their lifetime for the purpose of their maintenance, by expressly providing that they were not entitled to alienate the properties in any manner.

11. The learned counsel for the appellant contended that the will must be interpreted as creating a contingent interest in Velammal and that since Velammal died during the lifetime of Peramu Ammal and Chellammal, no interest vested in Velammal and that therefore Ex. A-34 was void ab initio and the property must devolve only to the reversioner, viz. the plaintiff. An interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain, whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in property at the testator's death when he acquires a proprietary right in it at that time; but the right of enjoyment is only deferred till a future event happens which is certain to happen. But, a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at the testator's death; but both depend upon future uncertain events. In this case, since the deaths of Peramu Ammal and Chellammal are certain, Velammal had acquired a vested interest in the properties on the death of the testator Seeni Chettiar. Section 119 of the Indian Succession Act clearly applies. In the absence of any contrary intention, by no stretch of imagination can it be said that Ex. A-1 created only a contingent interest, and the argument advanced by the learned counsel for the appellant is ununderstandable.

12. The distinction between vested and contingent interests has been very clearly made out in a decision rendered by a Division Bench of this court, consisting of Sundaram Chetti and Walsh JJ. in *Sreechand Sowcar v. Kasi Chetti*, AIR 1933 Mad 885, where the testator bequeathed his property to two persons for life and the remainder absolutely in favour of a specified class of persons on the termination of the life estate. It was held by their Lordships, that on the death of the testator the property became vested in that class and that the mere fact that they were not entitled to an immediate possession did not make it a contingent bequest.

13. Learned counsel for the appellant cited a decision of the Supreme Court in *Surapuri Narayanamma v. Kadiyala Venkatasubbiah*, AIR 1973 SC 2114 in support of his contention that the legatee Velammal could not claim the properties when she had predeceased her mother and grandmother. In that case, the instrument which came for interpretation was a gift deed. As per the terms of the gift deed, one Raghavamma and her daughter Venkatasubbamma were to take immediate possession of the property for their maintenance and were to enjoy the income from the properties alone and only after Raghavamma's death, Venkatasubbamma was to get the property absolutely. It was not a case of an immediate conferment of absolute title on Venkatasubbamma. Further, as per the terms of the settlement deed, it was arranged that in case no female or male issue was born to Venkatasubbamma, the property should on her death pass to the settlors or their descendants and not to the heirs of the said Venkatasubbamma. In view of the above peculiar facts and on the interpretation of the various clauses of the gift deed in that case, the Supreme Court held that Venkatasubbamma predeceasing her mother, did not acquire any absolute interest in the property. But, the facts of the present case are very clear and quite different from the facts of the abovesaid Supreme Court case. Moreover, in this case, we are directly concerned with the applicability of the statutory provisions of the Indian Succession Act to the terms of the will wherein the intention of the testator to confer an absolute vested interest on Velammal is clearly made out. So, after giving our best consideration to the facts of the present case in the light of the decisions cited above, we are definitely of opinion that the will Ex. B-34 in the present case conferred only a life estate on Peramu Ammal and Chellammal and the vested interest devolved on Velammal immediately after the death of Seeni Chettiar, the testator of Ex. A-1, though the defendant would acquire the right to possession of the properties only on the death of Peramu Ammal and Chellammal. Coming to the next contention, viz., that Velammal was not in a sound and disposing state of mind at the time of Ex. B-34, that D.Ws. 2 and 3 are the employees and D.W. 1 is a friend of Muthusami Pillai who has taken a leading part in the execution of the will and they are circumstances to show that Velammal has not executed the will of her own free will

and volition and that Muthusami Pillai has exerted coercion and undue influence on Velammal to execute the will, we find from the evidence of D.Ws. 1 to 3 that they are all witnesses of considerable status and integrity. D.W. 1 is a sub-postmaster and he was a head clerk of the post office on the date of attestation. He swears that he was present at the time of the execution of the will Ex. B-34, which was read over to Velammal and that she went through it and then only signed it and all the attestors of the document were present at the time of its execution. Further, he swears that she was fully conscious and in a sound and disposing state of mind and she had never been coerced by any one. Nothing has been elicited from the cross-examination of this witness to discredit his evidence. D.Ws. 2 and 3 are, of course, co-employees of Muthusami Pillai, D.W. 2 was a Junior Officer of the mills during the relevant period. The mere fact that D.Ws. 2 and 3 are co-employees of Muthusami Pillai cannot by itself be a sufficient ground to brush aside the evidence of these two witnesses. These witnesses also speak to the fact that Velammal executed the will of her own free will and volition and that she was in sound and disposing state of mind and was never bedridden. The evidence of D.Ws. 1 to 3 is cogent and trustworthy and nothing has been elicited to disbelieve their evidence. The learned trial Judge, who has seen the witnesses in the box, himself has observed that they impressed him with their evidence as truthful witnesses having regard to their demeanour. The plaintiff has examined only one witness viz. one Muthukrishna Pillai who is an employee in the labour section in the Madurai Mills. P.W. 1 speaks to the fact that the parties to the suit are his relations and Velammal was attacked by paralysis and bedridden for three years. But in the cross-examination he could not say when Velammal got bedridden for the first time and when she died. Above all there is no pleading in the plaint and also no averment in the suit notice dated 3-7-1964 copy of which has been marked as Ex. A-5 issued by the plaintiff's counsel to the defendant, that Velammal was bedridden. Contrary to this D.Ws. 1 and 2 swear that Velammal was not at all bedridden. Even assuming that she was afflicted with paralysis, that by itself will not conclusively prove that she was not in a sound and disposing state of mind. Except the vague pleading in the plaint to the effect that the testatrix was

not in a sound and disposing state of mind there is not even an iota of acceptable evidence on the side of the plaintiff to prove the same; nor is there any evidence to show that the donee with the help of her husband and partisans exerted undue influence, coercion or fraud on the testatrix to execute the will Ex. B-34. When the plaintiff assails the execution of the document the burden of proving the vitiating circumstances lies on his shoulders. Curiously enough, the plaintiff has not even chosen to examine himself to prove his case. The testatrix Velammal has taken pains in registering the will by presenting it in the office of the Joint Sub-Registrar No. IV, Madurai, on 23-2-1949 i.e., on the date of the execution of the will and she had also been identified in the Sub-Registrar's office by D.W. 3. I find from the endorsement of the Sub-Registrar on Ex. B-34 that the testatrix had admitted the execution of the will before him. D.W. 3 states that at the time of the registering of the will, Chellammal, one of the life-estate holders had also come to the Sub-Registrar's office along with others. It is the evidence of the witnesses D.Ws. 1 and 3 that Velammal herself read through the will before the execution, she being a literate. The testatrix was alive for about 2 years even after the execution and registration of the will. If undue influence, coercion or fraud had in fact been exerted on her, she would have cancelled the will during the said period of two years. It is common knowledge that in matters relating to the execution of a will in respect of family properties, only persons who are related and interested in the welfare of the family would participate. There is absolutely no evidence of any surrounding circumstance to infer that Muthusami Pillai, the husband of the defendant, had exerted any undue influence, coercion or fraud in the execution of the will. Similarly, there is nothing wrong in the legatee's husband's friends and co-employees being taken as the attestors and witnesses if their action is not otherwise tainted. As we have already pointed out, the attestors D.Ws. 1 to 3 are respectable witnesses and their evidence is worthy of credence. The testatrix had executed the will in favour of the defendant who is none other than her mother's sister's daughter and the recital in the will also is that the defendant was looking after the welfare of the testatrix and it was only in consideration of all those circum-

stances the will has been executed in favour of the defendant. This fact has not been controverted by the plaintiff by adducing proper evidence.

14. Moreover, Rajammal, the legatee under Ex. B-34, had been paying the house tax under Exs. B-12 to B-22 from 1952 to 1965 as per the demand notices Exs. B-23 to B-31. Ex. B-1 is the certified copy of the house tax demand register in the name of the defendant for the years 1951 to 1960 and it has been transferred to the name of the defendant in the year 1951. It must be noted that Velammal died in the year 1951. The defendant had also made some improvements to the house as per Ex. B-6, the blue print submitted to the municipality and Exs. B-37 to B-40 are the relevant records pertaining to the sanction accorded by the municipality. The plaintiff who was admittedly residing in the same locality, had not raised his objection during those relevant periods. In view of our finding that the defendant, as the legatee under Ex. B-34, has acquired valid title to the suit properties, the question of adverse possession does not arise. However, since the defendant has been in possession of the suit properties for more than the statutory period of 12 years, to the knowledge of the plaintiff before suit, we find that even otherwise the defendant has acquired title to the properties by adverse possession. For the foregoing discussions, we find that the ingredients of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act have been satisfactorily complied with in proving the execution and attestation of the will Ex. B-34.

15. Coming to the brass tacks, Velammal had acquired vested interest in the suit properties on the death of the testator under Ex. A-1, Seeni Chettiar, and there is no evidence, either documentary or oral, on the side of the plaintiff creating any suspicious circumstances so as to invalidate the execution of the will Ex. B-34 by Velammal in favour of the defendant; but contrary to that, there is overwhelming, unassailable and acceptable evidence to show that Velammal has executed the will in a sound and disposing state of mind.

16. In the result, the appeal is dismissed; but, considering the peculiar circumstances and the relationship of parties, we make no order as to costs in

this appeal. The appellant will pay the court-fee due to Government.

Appeal dismissed.

AIR 1976 MADRAS 302

PAUL, J.

Murthi Gounder, Petitioner v. Karuppanna Gounder, Respondent.

C. R. P. No. 2147 of 1974, D/- 1-10-1975.*

(A) Civil P. C. (1908), O. 6, R. 7, O. 8, R. 9 — Permission to file additional written statement — Original written statement stating that new road was laid only five months before while additional written statement making out a case of easementary right of pathway extending over 12 years on basis of information acquired from Panchayat record — Permission sought after examination of witnesses by defendant — Held permission was rightly refused. AIR 1930 Mad 814 and AIR 1949 Mad 541, Referred. (Para 9)

Cases Referred: Chronological Paras
AIR 1961 Bom 136 = 62 Bom LR 338 7
AIR 1949 Mad 541 = (1948) 1 Mad LJ 576 8

AIR 1930 Mad 814 = 32 Mad LW 61 8

V. V. Sridharan, for Petitioner; A. S. Venkatachalamurthi, for Respondent.

ORDER:— This revision petition is against the order of the learned District Munsif, Sankari, refusing to allow an application filed by the revision petitioner—first defendant under Order 8, Rule 9 and Section 151, C.P.C. to receive the additional written statement.

2. The suit filed by the respondent was for declaration of his title to the suit property which comprises of wet lands and for a permanent injunction restraining the defendants from interfering with his possession and enjoyment of the same.

3. The suit was resisted by the defendants, of whom the 5th defendant filed a written statement which was adopted by defendants 1 to 4. In that written statement, it is categorically admitted in paragraph 3 that the suit property belongs to the plaintiff and Muthuswami and they are in enjoyment of the same. But later on, it is stated that about seven months prior to the filing of the written

statement, the entire villagers of Thammuthiyur village in Kurumbapatti Panchayat headed by a particular M.L.A. convened a meeting at the request of the villagers and decided to put up a pucca road from Idappadi Kanganapuram Main Road passing through several patta lands including that of the plaintiff, the defendants and certain others and it was decided that the entire villagers should contribute for the formation of the road, except those pattadars in whose lands the new road has to be formed, and all the pattadars including the plaintiff agreed to that, and the new road was laid five months prior to the filing of the written statement, and it is being used by the entire villagers and the Panchayat had agreed to maintain this road.

4. Issues were then framed and the trial was commenced. It appears from the order of the learned District Munsif that after the examination of two witnesses on behalf of the defendants, the application under Order 8, Rule 9, C. P. C. was filed for leave to file an additional written statement.

5. By the additional written statement, it is sought to be contended that actually, the suit pathway was a customary pathway and it has been in existence for well over 100 years and it was used by the villagers as of right and without any interruption and at the beginning of 1972, the villagers of Thana Moorthipalayam applied to the Kurumbapatti village Panchayat for the laying of a pucca road and the Panchayat passed a resolution unanimously for laying the road and for maintaining the same and since some more lands of the pattadars were required for laying the pucca road sufficiently wide enough to admit hand carts, lorries and other vehicles, the local M.L.A. and the Panchayat President approached the plaintiff, the defendant and some other pattadars to give portions of their lands for a public purpose and they consented to do so and after obtaining their consent, the Panchayat laid the road and as such the defendants have 'acquired' easement right by prescription by user of the suit cart track for well over 12 years and the plaintiff is estopped from disputing the defendants' right to use the suit pathway and further the suit is bad for non-joinder of the Karumbapatti Panchayat Board.

6. It may be noted that while in the original written statement, it is merely stated that the new road was laid only five months prior to the filing of the writ-

*(To revise order of Dist. Munsif, Sankari at Salem, in I. A. No. 537 of 1974.)

ten statement and there was no whisper of the existence of any pathway, or cart track at that place, it is now sought to be made out by the additional written statement that actually there was a cart track over the plaintiff's lands and that of others which was being used by the villagers for over 12 years as an easement and that the cart track was widened after the plaintiff and the other pattadars had given their consent to give portions of their land to the Panchayat for laying the road.

7. In these circumstances, the learned District Munsif found that by the additional written statement, the first defendant was trying to set up an entirely new case, after the examination of the witnesses on the side of the defendants. He has referred to the decision in *Shri Ram Sardarmal v. Gourishankar*, AIR 1961 Bom 136, wherein it has been observed:

"In the case of an amendment of the written statement, an amendment should not be entertained if it would convert the defence into another by a different inconsistent character."

The learned District Munsif further observed that the petition was highly belated and hence he refused to permit the first defendant to file an additional written statement.

8. Undoubtedly, a defendant is entitled to file a written statement containing inconsistent pleas. This has been made clear by the decision in *Vava Bowther v. Suleiman Rowther*, 32 Mad LW 61 = (AIR 1930 Mad 814). But certain other considerations would have to be taken into account when a petition is filed for permission to receive an additional written statement containing pleas, some of which are inconsistent with the pleas taken in the original written statement. As observed by Rajagopalan J. in *Md. Ibrahim v. Ahmed Maricar*, AIR 1949 Mad 541, where an apparently inconsistent plea is put forward in an additional written statement, it has to be considered whether it is expedient with reference to the circumstances of the case to permit such a plea being put forward at that stage. In that case, the suit had not come up for trial and hence, Rajagopalan J. observed "I am unable to see how the proposed additional plea, though inconsistent, would embarrass the trial of the suit."

9. It is stated in the affidavit filed in support of the petition to receive the additional written statement that by in-

advertence, some important pleas were omitted to be stated. It is stated by the learned counsel for the revision petitioner that from the Panchayat records, his client came to know that there was a cart track in existence in the place where the present pucca road has been put up by the Panchayat. This is not a case where by mere inadvertence, certain pleas were not put forward. This is a case where nearly two years after having filed his written statement, the first defendant had acquired some further information and wanted to set up a case which is different from the case which he had originally set up in his written statement. Considering the stage at which such an application has been filed, undoubtedly, prejudice would be caused to the plaintiff who will now be forced to file a reply statement and as a consequence thereof, fresh and different issues will have to be framed and the trial would have to begin once over again. Taking these circumstances into consideration, I am of the view that the learned District Munsif rightly refused to permit the revision petitioner to file the additional written statement. I see no ground to interfere. The petition is, therefore, dismissed.

Revision dismissed.

AIR 1976 MADRAS 303

VEERASWAMI, C. J. AND

NATARAJAN, J.

Subramania Pillai, Appellant v. Masterly, Respondent.

L. P. A. No. 29 of 1973, D/- 24-9-1975.*

(A) Civil P. C. (1908), S. 2 (11) — Legal representative — Substantial representation.

It is not always a legal requisite that, inevitably, only the heirs, all of them or any of them, should figure as legal representatives. The procedural law requiring representation will stand satisfied if there is substantial representation in the sense that all that could be done was done by someone interested in the issue in the suit.

(Para 3)

VEERASWAMI, C. J.:— This appeal under the Letters Patent by the plaintiff turns on whether there was a substantial representation in the court proceedings

*(Against order of Raghavan J., in S. A. No. 1094 of 1968.)

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resulting in a sale in execution of a mortgage decree obtained against Champakaraman Pillai. For the purpose of this appeal, it is enough to say that the property in question was subject to a usufructuary mortgage executed on 9-4-1100 M. E. and this was followed by a simple mortgage executed by the owner on 3-10-1101 M.E. The second mortgage was enforced through court, but, before the decree was executed, the mortgagor had died. One Lakshmi was impleaded as his legal representative in the execution proceedings. Eventually, there was a sale in favour of the assignee-decree-holder, who got a sale certificate for himself. The present appeal arises out of a suit for redemption of the usufructuary mortgage brought by the purchaser of the equity of redemption from the heirs of the original mortgagor. Raghavan, J. who heard the second appeal arising out of the suit, allowed it and dismissed the suit on the ground that the appellant no longer owned the equity of redemption. He was of opinion that Lakshmi, as a legal representative, substantially represented the widow or widows of Champakaraman Pillai and that therefore the court sale was good. But he granted leave.

2. We are of the same opinion, A perusal of the finding, which Raghavan J. called for and looked into, convinces us that the inclination of the finding Judge was to hold Lakshmi not to be a stranger, but closely associated with the family of Champakaraman Pillai. This inclination is to be found from the circumstance that Lakshmi's address was given as the house of late Champakaraman, where his widow or widows lived. Lakshmi was the widow of his brother. Even the evidence on the appellant's side accepted a custom in the community permitting a brother to remarry his brother's widow. But when the evidence was sought to be made clear as to the existence of the widows of Champakaraman Pillai, the deponent for the appellant stated that he forgot the names of the widows, though Champakaraman Pillai was his relation and he himself performed the obsequies. On these circumstances, the Subordinate Judge who rendered the finding was inclined to think that she was closely, as we said, bound up in relationship with Champakaraman Pillai. But he stopped short of finding the exact relationship. That we can appreciate and he was not called upon to state conclusively in the context.

3. All that is necessary to see is whether in the execution sale proceedings

there was proper representation by the judgment-debtor or his legal representatives. It is not always a legal requisite that, inevitably, only the heirs, all of them or any of them, should figure as legal representatives. The procedural law requiring representation will stand satisfied if there is substantial representation in the sense that all that could be done in defence was done by someone interested in the issue in the suit. Lakshmi in obedience to the summons entered appearance through an advocate and took time. That shows that she participated in the sale proceedings. Raghavan J. accepted the finding of the Subordinate Judge that Lakshmi substantially represented the widow or widows of Champakaraman Pillai, who were his heirs. That being so, we hardly find any cogent reason to differ from the view of Raghavan, J.

4. The appeal is dismissed. No costs. The cross-objections are not pressed. Dismissed. No costs.

Appeal dismissed.

AIR 1976 MADRAS 304

RAMANUJAM, J.

V. C. Kadhivelu, Petitioner v. Sub-Collector, Karur, Respondent.

W. P. No. 6069 of 1975, D/- 19-9-1975.

(A) Tamil Nadu Panchayats Act (35 of 1958), S. 153 (2) and (3) — Withdrawal of consent by some members subsequent to initiation of proceeding under S. 153 (3) — Effect.

The mere fact that subsequent to the initiation of the proceedings under Section 153 (3) of the Act, some of the members have withdrawn their consent, will not take away the jurisdiction of the Sub-Collector which he has chosen to exercise properly on the presentation of a notice of motion under S. 153 (2) by the requisite number of members. (Para 4)

(B) Tamil Nadu Panchayats Act (35 of 1958), S. 153 (2) — Actual no confidence motion to be moved need not be served.

Apart from the copy of the notice of intention moved by the requisite number of members under Sec. 153 (2) of the Act, the actual no-confidence motion to be moved at the meeting is not required to be served. (Para 4)

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demand. Ultimately by Section 4 of Central Act 56 of 1972, Section 9 of the parent Act was amended to give the true interpretation of the statutory provision in the parent Act. Section 4 of the Amending Act runs thus:—

"4. In Section 9 of the principal Act,—

(i) in sub-sections (1) and (2), for the words 'mineral removed by him', wherever they occur, the words 'mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee' shall be substituted;

(ii) after sub-section (2), the following sub-section shall be inserted, namely:—

'(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.'

(iii)

Section 9 of the parent Act created liability for royalty in respect of mineral removed by the holder of a mining lease from the leased area. In Part V of the 'Model Form of Mining Lease' prescribed under the Mineral Concession Rules, the following provision has been made relating to royalties:—

"(3) Rate and mode of payment of royalty.— Subject to the provision of Cl. (1) of this Part, the lessee/lessees shall during the subsistence of this lease pay to the State Government at such times and in such manner as the State Government may prescribe royalty in respect of any mineral/minerals removed by him/them from the leased area at the rate for the time being specified in the Second Schedule to the Mines and Minerals (Regulation and Development) Act, 1957." Under Clauses (1) and (2) of Part VI of the said Form, it has been further provided thus:—

"(1) Rent and royalties to be free from deduction, etc.— The rent, water rate and royalties mentioned in Part V of this Schedule shall be paid free from any deductions to the State Government at... ..and in such manner as the State Government may prescribe: Provided always and it is hereby agreed that Rs..... the balance standing to the credit of the lessee/lessees on account of the deposit

made by 'him/them as a licensee/licensees over an area which included the said land shall be retained and accepted by the State Government in satisfaction of the rents and royalties mentioned in Part V until they reach that amount.

(2) Mode of computation of royalty.— For the purposes of computing the said royalties the lessee/lessees shall keep a correct account of the mineral/minerals produced and despatched. The accounts as well as the weight of the mineral/minerals in stock or in the process of export may be checked by an officer authorised by the Central or State Government.

(Here specify the mode of arriving at sale price/prices at pit's mouth of mineral/minerals)."

Under Clause 3 of Part VI, upon failure to pay royalties, the arrear royalty is recoverable in the same manner as an arrear of land revenue.

4. Mr. Mohanty for the petitioner claims that liability for royalty accrues only when coal is raised and despatched from the mining area. In other words, unless the extracted coal is sent outside the mining area, liability for royalty does not arise at all. Learned Additional Government Advocate, on the other hand, contends that liability for royalty under the statute and the scheme contained in the Mineral Concession Rules arises when coal is extracted and reaches the pit's mouth. Emphasis is laid by him on the provisions of Clause 2 of Part VI of the Model Form referred to above. It is claimed that the basis of computing royalty is the sale price at pit's mouth of the mineral.

5. The Calcutta High Court decision relied upon by Mr. Mohanty for the petitioner was dealing with provisions of Coal Mines (Conservation and Safety) Act. Section 8 of that Act makes provision for imposition of excise duty and liability for excise duty arises when coal is raised and despatched. Interpreting this provision of the statute, Chakravarti, C. J. spoke for the Court thus:—

"..... But the section does not impose the duty on 'coal raised' but imposes it on coal raised and despatched. The added requirement of despatch is not, on the one hand, an essential pre-requisite for the imposition of an excise duty, nor does it, on the other hand, make the duty any the less a duty of excise. It only marks the point of time to which the legislature has chosen to defer the collection of the

duty, though the effect is that on coal raised from the collieries in India but not despatched therefrom, the duty imposed by the section is not to be levied. As to the constitutional validity of duty, its nature being that it is a levy imposed as a contribution to the revenues of the country and not a licence or other fee intended to regulate coal-mining, the law imposing it cannot be said to be legislation under Item 54 of the Union list, but it is good legislation under Item 84 of the same list, since coal raised from mines can well be said to be goods produced.

But the scope of the law is a further question. Under it even in the case of coal moved from the collieries, it must be despatched in order that the duty may be attracted. Assuming, one can despatch goods to oneself and even assuming that, in theory, goods sent by a producer to himself can be the subject of a duty of excise, it is clear from the common language of Sections 8 (1) (a) and 8 (1) (b), as elucidated by Section 8 (2) of the present Act, that Section 8 (1) (a) only contemplates coal despatched from a colliery to a person other than the owner. In any event, goods merely moved from one part of an establishment to another by way of domestic appropriation cannot be said to be despatched and, therefore, in the present case, where the colliery, the powerhouse and the factory are all situated within the same compound and constitute together a single industrial unit belonging to the appellant, coal taken from the colliery to the appellant, coal taken from the colliery to the power house about a furlong away for use there, in the generation of electricity for the manufacture of aluminium by the factory cannot be said to be despatched within the meaning of Section 8 (1) (a) and cannot be charged to the duty prescribed thereby."

Though Mr. Mohanty relied upon this decision to support his proposition, when learned Additional Government Advocate claimed that the decision should not be followed and gave the illustration that where within the mining area, the lessee would put up a factory which would consume the entire coal extracted by him, on the ratio of the Calcutta decision, no royalty would at all be payable, Mr. Mohanty conceded that the ratio indicated by the decision may not at all be applicable in case of royalty. The State Government is the owner of the mine and royalty is an incidence payable on the basis of extraction and

appropriation. The incidence of royalty under the general tenor of the scheme arises when coal is severed from the seam in its natural state within the mine and removed outside. Up to this extent, there does not seem to be much of dispute between the parties, but according to Mr. Mohanty, the liability arises when there is 'despatch' while according to counsel for the State, the word 'despatch' in the Model Form may not be given undue importance, because under Section 9 of the Act liability is intended to accrue when coal is removed from the leased area. Mr. Mohanty contends that the word 'despatch' in the Model Form is on the footing of the concept of removal from the leased area. We are not impressed with this contention. Removal from the seam in the mine and extracting the same through the pit's mouth to the surface satisfy the requirement of Section 9 in order to give rise to liability for royalty. When royalty is more akin to rent or compensation payable to an owner by the lessee for exploitation of the mineral wealth, we do not think Section 9 would admit of an interpretation as canvassed by Mr. Mohanty. The requirement in Clause 2 of Part VI of the Model form of mining lease that the mineral in stock is to be taken note of for the mode of computation of royalty is a feature against Mr. Mohanty's contention. In Section 9, no provision for despatch having been made we are not inclined to attach importance to the use of the word in Clause 2 of Part VI of the Model Form of Mining Lease nor do we think the decision of the Calcutta High Court is of any assistance to Mr. Mohanty's contention.

6. Mr. Mohanty next relies upon the provisions of the Amending Act in support of his contention. He claims that as from the working of the statutory provision, it transpired that the true intention of the statute as contained in Section 9 of the parent Act was not being followed, Parliament stepped in to bring in the amendment for giving effect to its true intention in Section 9 of the parent Act. On the other hand, learned Additional Government Advocate contends that when a deficiency in the statute was experienced, Parliament thought it appropriate to make legislative provision for the first time allowing an exemption. Undoubtedly, an amendment of statute becomes necessary in either contingency. As we find, in the facts of the case, the contention of learned Additional Govern-

ment Advocate is appropriate. A declaratory provision was not made to pronounce the intention of the legislation in the parent Act. On the other hand, a new sub-section was added to confer for the first time a benefit. The manner in which sub-section (2-A) of the Amending Act has been couched comes to support the contention advanced on behalf of the State that the benefit was intended to be conferred for the first time. A limit of one-third of a tonne per month per workman has been fixed. Prior to the amendment, according to Mr. Mohanty, there was no such restriction. That would mean that Parliament wanted to reduce the benefit conferred and enjoyed until the Amending Act. There does not seem to be any rationale for taking such a view. We are inclined to agree with learned Additional Government Advocate that for the first time, a statutory benefit has been conferred and the parent provision did not admit of the interpretation advanced by Mr. Mohanty. The lacuna having been realised, the Legislature has stepped in to improve upon the law.

7. No material has been placed before us to hold that the practice claimed by the petitioner was traditional, conventional or customary and it had come to be recognised in industrial disputes. It is true that some legal opinion obtained by the Government of India supported petitioner's contention, but such opinion cannot stand against an appropriate interpretation of the statute.

8. We would accordingly negative the contention raised by Mr. Mohanty for the petitioner and dismiss this application. In the facts of this case, it is appropriate that parties are directed to bear their own costs.

DAS, J.:— I agree.

Petition dismissed.

AIR 1976 ORISSA 163

R. N. MISRA AND N. K. DAS JJ.

Bishnu Priya Dei and another, Appellants v. Brusabhanu Mohapatra and others, Respondents.

A. H. O. 1 of 1974, D/- 10-12-1975.*

(A) Civil P. C. (1908), O. 6 R. 4 — Party pleading undue influence — Duty to set forth full particulars.

*(From decision of B. K. Ray J. in F. A. No. 108 of 1966, D/- 22-11-1973).

CT/DT/A769/76/GDR

A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up. (AIR 1963 SC 1279 Followed.)

(Para 8)

(B) Civil P. C. (1908), O. 6 R. 4 — Alienation challenged as being induced by undue influence — Evidence and proof. (Contract Act (1872), S. 16 (3).)

In a suit for cancellation of the sale deed on the ground that it was obtained by undue influence, the circumstances, such as long silence of the plaintiffs, indebtedness of the transferor, or failure to examine competent witnesses clearly go against the plea that the alienation was the outcome of exercise of undue influence. (Paras 10, 11)

(C) Hindu Law — Impartible estate — Holder of an impartible estate acquiring new assets — In absence of any material to the contrary such acquisition also would be impartible.

In the absence of any other material to the contrary and relying on the facts that the vacant site was held by C and the building was raised out of the estate funds in the early years of N succeeding to the estate and the general treatment of the property, it could be held that the

property was a part of the estate and was not a separate property in which the members of the joint family could have right, title and interest. The property was alienated before vesting of the estate and the holder of the impartible estate as the owner of the property for the time being was entitled to make a valid alienation and the members of the joint family had no right to dispute such an alienation. (Para 16)

(D) Limitation Act (1908), S. 91 — Suit challenging sale-deed on ground of undue influence — Suit instituted on the last day of the 12 year period from the date of transaction — Is plainly out of time. (Para 16)

(E) Letters Patent (Pat), Cl. 10 — Appeal under — Does not suffer from limitations of appeal under S. 100, Civil P. C. — High Court can examine entire case on facts and in law. AIR 1974 SC 2048. Followed. (Para 6)

Cases Referred: Chronological Paras

AIR 1974 SC 2048 = (1975) 1 SCR 611	6
AIR 1967 SC 878 = (1967) 1 SCR 331	8
AIR 1963 SC 1279 = (1964) 1 SCR 270	8
AIR 1961 Madh Pra 176 = 1961 Jab LJ 138	16
AIR 1955 SC 363 = 1955 SCR 1035	11
AIR 1951 SC 280 = 1951 SCR 548	8
AIR 1945 All 367 = 1945 All LJ 196	15
AIR 1937 PC 146 = 64 Ind App 143	8
AIR 1932 PC 216 = 59 Ind App 331	14
AIR 1917 PC 6 = 44 Ind App 98	10
(1868) 1 P & D 481 = 18 LT 152	11

S. Chatterjee, R. N. Sinha and S. N. Sinha, for Appellants R. C. Misra and Mrs. A. K. Padhi, for Respondents.

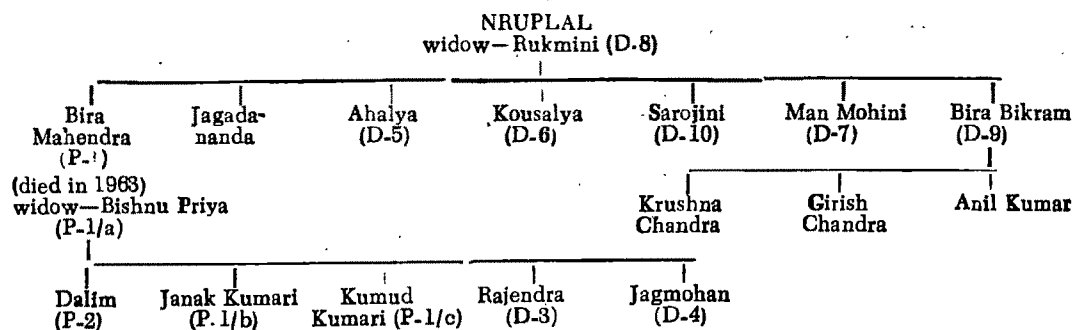
R. N. MISRA, J.:— Not far away from the Town of Sambalpur and within that district lay the impartible estate of Kolabira until it was abolished by the Orissa Estates Abolition Act, 1951, in November, 1952. Succession to this estate was governed by the rule of primogeniture. At the close of the Nineteenth Century one Chintamani Singh was the proprietor of this estate. He died on 21-12-1903 leaving behind a son, Nruplal Singh who was then aged about 17, a daughter and two brothers. The estate was taken over by the Court of Wards for management and was released to Nruplal on 15th of January, 1910. During the period the Court was in management, Nruplal had been given some schooling as also training in estate administration.

2. Sometime in the year 1939, Brusabhanu (defendant no. 1), a young man of the locality, came into employ-

ment of the ex-proprietor. It is stated that he first served as a cleaner and soon became the proprietor's driver and was very much in his confidence. Nruplal was suffering from partial paralysis of the body and required constant assistance. Defendant no. 1 apart from rendering service as a driver was also giving various other services to Nruplal. He had even been meddling in the domestic life of the ex-proprietor. Defendant No. 1 was thus in a position to dominate the will of Nruplal. By exercise of undue influence Brusabhanu prevailed upon Nruplal to execute an agreement (Ext. M/2) to sell the only house of the family at Sambalpur and about fifteen months after the agreement obtained a sale deed of this property purporting to be for a consideration of Rs. 7,500/- (Ext. B). The proper valuation of the house would have been more than Rs. 30,000/- at the time of the sale. Nruplal had plenty of money and was never in need of it. There was no occasion for him to sell the property to raise funds for any necessity. It is stated that he was in affluent circumstances having a decent income from land revenue, forests and various other sources. A suit was filed on 26th of March, 1962, by Bira Mahendra, the eldest son of Nruplal and his son Dalim for cancellation of the sale deed (Ext. B) dated 23-6-1951 and for a declaration that the plaintiffs along with defendants 3 to 7 were entitled to the said property and they should be put into possession thereof on eviction of defendants 1 and 2. In October, 1965, the relief prayed for in the suit was amended and it was also claimed that there be a declaration that Ext. B does not bind the plaintiffs and defendants 3 to 7. During the pendency of the suit, Bira Mahendra died and his heirs were substituted. The genealogy given in the plaint is extracted below for convenience:—

(For genealogy see page 165)

3. The disputed property is 28 decimals of land and a house standing thereon. The first defendant had alienated 9 decimals out of it under a registered sale deed dated 19-12-1960 (Ext. J) in favour of the second defendant. These two defendants filed separate written statements. Brusabhanu claimed that Nruplal was a person of extravagant habits and was always in need of money. He had borrowed from him a sum of Rs. 2,000/- on 17-7-1949, Rs. 2,000/- on 3-9-1949, Rs. 2,000/- on 31-12-1949 and Rs. 1,500/- on 24-3-1950 in all Rs. 7,500/- under Ext. L series. He was unable to



satisfy the loans under these promissory notes and ultimately agreed to sell the property in dispute and entered into an agreement on 26th of March, 1950 (Ext. M/2) and in due course executed the sale deed (Ext. B). He claimed that he was only a driver and denied all the allegations of undue influence. He alleged that the suit was barred by limitation and the plaintiffs had no cause of action.

The second defendant supported the sale under Ext. B and laid claim to a part of the property purchased by him under Ext. J.

4. At the trial, plaintiffs examined eleven witnesses while on behalf of the defendants fifteen witnesses in all were examined. Both parties produced several documents. The learned Trial Judge came to the following findings:—

(i) The disputed property was not a joint family asset but was separate property in the hands of Nruplal and he was the exclusive owner thereof;

(ii) Parties were governed by Hindu Law;

(iii) The alienation under Ext. B was not vitiated by undue influence;

(iv) Ext. B was for consideration of Rs. 7,500/- and the said amount represented the true value of the property at the time of alienation;

(v) Plaintiffs have no right, title or interest in the property. Besides, they have also acquiesced in the impugned transaction;

(vi) Even if the property be held to have belonged to the joint family of which Nruplal was the karta, the alienation is justified by antecedent debts of the karta and the debts being not immoral, the alienation is binding on his children and grand children;

(vii) Defendant no. 1 is a bona fide purchaser and

(viii) The suit is barred by limitation. On these findings, the learned Trial Judge dismissed the suit.

5. Plaintiffs appealed to this Court and the first appeal was heard and disposed of by our learned brother B. K. Ray, J. Before the learned Single Judge, for the appellants, it was claimed that the disputed property was not the separate property of Nruplal and belonged to the joint family; the sale deed was not supported by consideration and, therefore, did not convey any title; the consideration of Rs. 7,500/- was grossly inadequate and, therefore, it must be held that the sale was not valid; there was no legal necessity and the sale was vitiated by undue influence exercised by defendant no. 1 over the transferor and the finding that the suit was barred by limitation was not sustainable.

Appellants filed two separate petitions under Order 41, Rule 27 of the Code of Civil Procedure for acceptance of additional evidence. The learned Single Judge dealt with these two applications in his judgment and directed some of the documents to be received in evidence while he rejected the claim in respect of some others.

On the basis of the evidence already on record and the new material received as additional evidence, the learned Single Judge came to hold that plaintiffs had signally failed to make out a case of undue influence. Dealing with the question of passing of consideration, the learned Single Judge held that the sale deed was for a consideration of Rs. 7,500/- and the same had passed. A further finding was recorded that Rs. 7,500/- as consideration for the disputed house was not grossly inadequate. On the question of limitation, the learned Single Judge agreed with the Trial Court that the suit was barred by time. Dealing with the question as to whether the property was joint family asset or separate property of Nruplal which came to be dealt with in paragraph 10 of the learned Single Judge's judgment, it was held that the disputed property belonged exclusively to Nruplal and even if it did not, by application of

the doctrine of pious obligation, the children of Nruplal were bound by the alienation. On these findings, the appeal was dismissed.

6. Counsel for both sides agreed, on the authority of the recent decision in the case of Asha Devi v. Dukhi Sao (1975) 1 SCR 611 = (AIR 1974 SC 2048) of the Supreme Court that a Letters Patent Appeal does not suffer from the limitations of an appeal under S. 100 of the Code of Civil Procedure and we are, therefore, to examine the entire case on facts and in law

7. In view of the pleadings, the decisions of the two courts and the arguments advanced at the Bar, we are of the view that the following aspects have to be considered for disposal of this appeal:—

(1) Is the alienation under Ext. B vitiated by undue influence?

(2) Is the alienation supported by consideration and in case it is, is the consideration of Rs. 7,500/- grossly inadequate so as to vitiate the transaction?

(3) Did the house in dispute belong to Nruplal exclusively or was it an asset of the family?

(4) Is the suit barred by limitation?

We may now deal with each of these points seriatim.

Point No. 1

8. Counsel for respondent No. 1 has contended before us that there is no adequate averment to sustain the plea of undue influence and, therefore, plaintiffs should not have been permitted to lead evidence at the trial for making out a case of undue influence. The entire plea of undue influence has to be found in paragraphs 4, 7, 7 (a) and 13 of the plaint. We think it worthwhile to extract these allegations in their original form:—

"4. That the defendant No. 1 being resident of Kolabira and a cultivator of few acres of lands was first appointed as a cleaner in 1936 and then as a driver about 6 years after, and served in those capacities for a pretty long time i. e. till the year 1953. Though appointed as a cleaner and driver he rendered all sorts of services to plaintiff No. 1's ailing father who had crossed the age of 60 and thus made himself indispensable to his master, i. e. father of the plaintiff No. 1. In short, he had considerable influence on plaintiff No. 1's father and he was in a position to dominate the will of plaintiff's father so much so that he was the cause of the differences of opinion be-

tween the plaintiff No. 1 and his father in many domestic matters in which the defendant No. 1 intermeddled at times to serve his purposes.

7. That because of the influence and dominating position defendant No. 1 had on plaintiff no. 1's father, the defendant No. 1 managed to get a sale deed executed without the knowledge of the plaintiff and other members of the family in the year 1951 by the plaintiff No. 1's father. The sale deed contains many false recitals such as, the self-acquisition of the property and exclusive possession thereof, the advancement of the sale price of Rs. 7,500/- on 26-3-50 for house hold expenses and income-tax purpose and the like.

7(a). It appears from the recitals of the sale deed that defendant no. 1 has also taken some documents from plaintiff no. 1's father on or about 26-3-50 by exerting his influence without the knowledge of the plaintiff No. 1 and other members of the family and without any consideration to gain an undue advantage to himself.

13. That the sale deed dated 27-6-51 having been executed without consideration and under influence of defendant no. 1, and for inadequate consideration even if sale price as per recital is proved to have been paid, the sale is vitiated on account of undue influence and inadequacy of consideration as defendant no. 1 thereby has gained an undue advantage by getting a property worth Rs. 30,000/- (Rupees thirty thousand) for either no sum or a nominal sum of Rs. 7,500/- in view of his influence and dominating position."

It is claimed that these averments do not satisfy the requirement of Order 6, Rule 4 of the Code of Civil Procedure. That Rule runs thus:—

"In all cases in which the party pleading relies on any misrepresentation fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and item if necessary) shall be stated in the pleading."

"Undue influence" has been defined in Section 16 (1) of the Indian Contract Act thus:—

"A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses

that position to obtain an unfair advantage over the other."

Sub-section (2) is illustrative and provides:—

"In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress."

Sub-section (3) deals with rule of evidence and provides:—

"Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

In the case of *Bishundeo v. Seogeni Rai*, AIR 1951 SC 280, Bose, J. pointed out:—

"It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

In the case of *Ladli Parshad v. Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279, Shah, J (as the learned Judge then was) spoke for the Court thus:—

"Order 6, Rule 4, Civil P. C. provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix, particulars (with dates and items if necessary) shall be

stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up. (underlining is ours)"

The following observation made in the case of *Bharat Dharma Syndicate v. Harish Chandra*, AIR 1937 PC 146, was quoted with approval:—

"Their Lordships desire to call attention to the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case, the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove. Such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who

are interested in disproving the accusations."

This position was reiterated by the Supreme Court in the case of Subhas Chandra v. Ganga Prasad, AIR 1967 SC 878. Mitter, J, spoke for the Court thus:—

"Before, however, a court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as in the case of fraud. See Order 6, Rule 4 of the Code of Civil Procedure. This aspect of the pleading was also given great stress in the case of Ladli Prasad Jaiswal (AIR 1963 SC 1279) above referred to."

The pleadings in this case do not satisfy these requirements and in fact the plaintiffs have not pleaded anything more than saying that the two documents — the agreement (Ext. M/2) and the sale deed (Ext. B) — were taken from Nruplal by exercise of undue influence and the defendant no. 1 Nruplal's driver, was very much in confidence of the master and was rendering varieties of services to him over and above being his driver and was dominating his will. These, in our view, are no particulars as required by law to sustain a charge of undue influence.

The evidence led to support the plea of undue influence is equally unsatisfactory. As already pointed out, the oral evidence in support of the story of undue influence comes from P. Ws. 4, 5, 6 and 7. P. W. 4 claims to be a priest. He has nowhere stated anything more than these:—

"I know defendant no. 1. After he discontinued studies served as a motor cleaner under Zamindar for three years. At that time P. W. 2 was the driver. Afterwards he worked as driver for 6 to 7 years. When the Zamindar fell ill, he used to nurse him and attend to sundry errands like calling doctors. I have seen him casually giving him medicine and helping the Zamindar to wear dress and also casually applying medicine on the head. These works he used to do when the servants were absent."

This evidence does not support the case of the plaintiffs to any extent.

P. W. 5, a witness aged about 80 years, claims to have been a teacher in the employment of the District Board of Sambalpur. He has stated that defendant no. 1 was a cleaner for three or four

years and a driver for ten or eleven years in the employment of Nruplal and was nursing him. This again is no evidence to support the plea of undue influence.

P. W. 6 is another priest. He has stated:—

".....I know defendant no. 1 who was for 3 years a cleaner under Zamindar Nruplal Singh. At that time, P. W. 2 was the driver. After that, he worked as a driver for 8 or 9 years. Subsequently when Nruplal fell ill due to rheumatism, he worked as a Piada. He used to call doctor and bring medicine and make arrangements for his food. Besides he helped Nruplal to wear dress and get up from bed when required. He used to work in that manner under Nruplal from 7 A. M. to 8 P. M., but having intervals for food and tiffin Nruplal used to rely on defendant no. 1. I know this because once during Zamindar's illness, I approached him for help in connection with a marriage ceremony and on that occasion defendant no. 1 gave me Rs. 25/-."

This evidence also does not support a plea of undue influence. P. W. 7 is the remaining witness. He is the third defendant in the suit and during the relevant time must have been a young boy because in 1965, when he gave evidence in court, he stated his age to be 29. That apart, according to his own evidence for six years prior to 1952, he was in the Raikumar College at Raipur as a student. Therefore, at the material time he was not at Kolabira. Apart from his incompetency to depose on the point in issue, his evidence is also not worthy enough to be noticed on the question of undue influence. The oral evidence of undue influence, therefore, is meagre—nay, worth nothing.

Another aspect of the oral evidence to support the plea of undue influence is that Nruplal was ill for some years prior to execution of the agreement as also the sale deed. Though it was not clearly pleaded that Nruplal was of weak mind and there was not much of evidence to support such an aspect, arguments had been advanced on such basis. Nruplal appears to have been ill with an attack of paralysis of a part of his body. With such ailment, he was capable of moving about and as the evidence shows, he had even undertaken a pilgrimage around the period when the impugned transaction took place. P. W. 4 has stated in his cross-examination:—

".....Nruplal died six or seven years back. Nruplal had been to pilgrimage to Allahabad side 7 or 8 years before his death in 1958. He had been ill 7 or 8 years before his pilgrimage due to paralysis. He was doing all the zemindary work till 2 years before his death." D. W. 14 was a Revenue Mohurrir of the estate. He has stated that Nruplal was in the management of the sherista personally. In cross-examination, this witness further stated:—

"There were about 40 or 45 employees of the zemindary sherista in all departments and 5 or 7 of us were always in the office — such as authorised agent, forester, manager, 2 clerks. The treasury and cash chest were inside the residential premises of the zamindar and not in the office building. The accounts were in the office. All collections were entered in the accounts and signature of the zamindar was taken against entries." Defendant no. 1 as D. W. 16 has stated that the zamindar was not bed-ridden though he suffered from paralysis of his left side. His limbs were affected, but he was able to move about. He could move his left hand and was able to dress himself. In this view of the evidence, the plea of illness for yielding scope for exercise of undue influence has no basis.

9. As regards documentary evidence, great reliance has been placed on the fact that defendant No. 1 was keeping the diary of Nruplal. In support of this plea, entries in Exts. 5 series and 6 series have been relied on. It is claimed that unless Brusabhanu was in a very conspicuous position, he could not have access to the personal diary of the Zamindar. As we find, the diary of 1949 (entries under Ext. 5 series) and the diary of 1950 (entries under Ext. 6 series) are indeed no diaries at all in the true sense of the term. On the other hand, they contain notings of movements of Nruplal and in various pages thereof accounts of daily expenses appear to have been maintained. There is evidence to show that defendant no. 1 was required to make purchases on behalf of the proprietor and there is nothing unusual if he rendered accounts by making entries in these books labelled as diaries. It is pertinent to notice that several other persons have also made entries in these diary books. Exts. 5 and 6 cannot be given the status of private and personal diaries of Nruplal which would not be available to any other person and, therefore, no importance can be attached

to the fact that defendant no. 1 was making entries in these books though he was a mere driver.

10. There are certain circumstances which clearly go against the plea that the alienation was the outcome of exercise of undue influence and we may briefly note them here:—

(i) The agreement is of March, 1950 (Ext. M/2). The sale deed is of June, 1951 (Ext. B). The original plaintiff (Bira Mahendra) was contemporaneously aware of the fact that Nruplal had executed the sale deed (Ext. B). This is evident from the notice (Ext. O) which he issued to defendant no. 1 on the same day as Ext. B was executed and registered at Sambalpur. His notice was also issued from Sambalpur. Defendant no. 1 sent a reply on 2nd July, 1951 (Ext. O-1), denying all the allegations and claimed that he had made a genuine purchase. He in fact clearly indicated that Bira Mahendra had no right to challenge the sale deed. Nruplal lived until 1958, i. e. for seven more years. The plaintiffs did not take any steps for setting aside the sale deed during the lifetime of Nruplal, for they were always apprehensive that Nruplal would stand by his transaction because it was a genuine one. Otherwise, the long silence of the plaintiffs has no other explanation.

(ii) Under the agreement (Ext. M/2) possession of the house was said to have been made over. In the last paragraph of the said document, it has been stated that as the house was under requisition by Government, the requisitioning authority would be informed of the alienation. As we find, Nruplal did inform the Deputy Commissioner of Sambalpur about the transaction. On 4th April, 1950, under Ext. V, the Deputy Commissioner required the house to be repaired as it was in a dilapidated condition. On 18th of April, 1950, under Ext. V/10, Nruplal informed the Deputy Commissioner that the house has since been sold to defendant no. 1. There is clear evidence that defendant no. 1 applied for derequisitioning the house. As Ext. V/5 shows, on 22-8-1950, he was informed by the Deputy Collector in charge of the Collectorate of Sambalpur that it is not possible to vacate the premises immediately. Defendant no. 1 wanted payment of the rent and the evidence on record clearly shows that he received the rent on the basis of being the owner of the house. When the rent was being taken away by defendant

no. 1, if plaintiffs had really any grievance to make, they would certainly have come forward to resist the drawal of rent by defendant no. 1. There is evidence to show that the original plaintiff was participating in the estate's management. He must have been aware of the true situation at that point of time. If he or his other relations were interested in disputing the transactions, even without coming to court, they could have raised dispute before the requisitioning authorities regarding entitlement of rent. That also was not done.

(iii) There is overwhelming evidence that Nruplal was very much indebted. As a matter of fact, it is not Nruplal alone, but several of his relations who appear to have been equally indebted. Defendant no. 1 has clearly pleaded that Nruplal found no other way to satisfy his debts borrowed from him and decided to alienate the property. Ext. L series are the promissory notes totalling Rs. 7,500/-. These promissory notes have been admitted to be in the hand of Nruplal by P. W. 7. Indebtedness of Nruplal probabilises the alienation to have been a voluntary transaction and not an outcome of undue influence. The plaintiffs attempted to give a picture that Nruplal was rolling in plenty and was never in need. As it appears, the position was very much otherwise. In fact, when Nruplal was to succeed to the estate and the Court took over, the financial position was very bad. When the estate vested and Nruplal lost it, the estate was in arrears of considerable amounts even in regard to public dues, as would appear from the compensation papers and the evidence of D. W. 1. P. W. 7's evidence clearly indicates that both Nruplal as also several members of the family had run into debts and now and then they were raising loans.

(iv) Contemporaneous conduct of defendant no. 1 evidenced by documents indicates against his domineering position. For instance, Ext. 7 is a letter from defendant no. 1 to Nruplal and is dated 6-12-1949. When translated into English, it reads thus:—

"Respected Sriman Zamindar Saheb, Master,

I beg to pray that I require a sum of Rs. 2,000/- in respect of handnote account; if I do not lift the yarn quota, the licence would be cancelled. I, therefore, sincerely pray that a cheque of Rs. 1,500/- which is with Hazoor and cash of

Rs. 500/- be given; otherwise, I will suffer immensely. On account of urgency, I have been forced to approach. Hazoor is Malik and protector."

Below it is an endorsement that the cheque of Rs. 1,500/- and cash of Rs. 500/- totalling Rs. 2,000/- were paid by Nruplal on that date. This letter with the endorsement thereon has been proved by the plaintiffs and its genuineness is not in dispute. If defendant no. 1 was indeed dominating in the manner alleged, there would be no occasion for a letter of this type; much less, the language of the letter be what it is. On the other hand, the tone of the letter indicates the distance between defendant no. 1 and the proprietor. The dignity maintained in the prayerful approach of defendant no. 1 is indicative of defendant no. 1 being aware at the time of writing the letter of his own status and that of the person he was seeking to approach. This certainly speaks very much against the plea of domination. There are certain other documents to support this conclusion. It is unnecessary, however, to make any detailed reference to them.

(v) It appears to be the common case of parties that defendant no. 1 had not been paid his salary from the very beginning. Defendant no. 1 was not a very needy person. As evidence shows, he was a man with some property. They had also business. There was also money-lending. He was not anxious to receive salary forthwith because he was not required to depend upon salary income. He was looking for some property from the beginning. In fact on one or two occasions he had taken leases of immovable properties from the ex-proprietor. It is quite possible that defendant no. 1 was anxious to have a house in Sambalpur. His desire to acquire property and Nruplal's (debtor's) failure to satisfy the existing loans from defendant no. 1 went together to culminate in the alienation.

(vi) If undue influence had to be established, more competent witnesses to speak about it should have come. Undoubtedly, the ladies, for instance, Nruplal's widow who is still alive and was impleaded in the litigation as defendant no. 8, Bira Mahendra's widow (plaintiff no. 1/a) and some of the other relation-defendants would have been more competent than P. W. 7. As the records of the trial court show, steps at one stage were taken to get these ladies examined on commission. The matter was not pursued. Bira Bikram, the 9th defendant

was present in court; when P. W. 7 was being examined (as would appear from his evidence in cross-examination). P. W. 7 has also stated that he had several witnesses who knew about defendant no. 1 nursing and taking care of Nruplal during his illness. Yet, more competent witnesses though available have been withheld from the court. The Judicial Committee of the Privy Council in the case of *Murugesam Pillai v. Gnana Sambandha*, AIR 1917 PC 6, pointed out that it is not open to parties to keep away the best evidence from the court and when that is done, adverse inference has to be also drawn.

11. There is yet another aspect which is relevant to the question of undue influence. Lord Penzance in *Hall v. Hall*, (1868) 1 P & D. 481 in an inimitable language stated:—

"But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet or of escaping from distress of mind or social discomfort — these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

This passage has been quoted with approval by the Supreme Court in the case of *Naresh Charan v. Paresh Charan*, AIR 1955 SC 363 and *Venkatarama Ayyar*, J. summarized the position by saying:—

"It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as 'undue'. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion—it has often been observed that undue influence may in the

last analysis be brought under one or the other of these two categories — the will cannot be attacked on the ground of undue influence."

What has been stated for a will equally applies for any disposition. Keeping the circumstances of the case, the position of the parties, the relationship indicated, the serviceability of defendant no. 1 to Nruplal and the like in view, it would not need any amount of conjecture to accept the contention of Mr. Misra for respondent no. 1 that at the best defendant no. 1 had been able to entreat and persuade Nruplal to sell the property in question in his favour. If Nruplal made a sale deed voluntarily, where was the occasion for undue influence?

We think, the story of undue influence has been rightly discarded by the two courts. Though Mr. Somnath Chatterjee for the appellants tried to make the best out of a bad case, we do not think, we can take a different view.

Point No. 2.

12. The alienation purports to be for a sum of Rs. 7,500/-. The agreement (Ext. M/2) shows that on that day the entire amount was received in cash. Ext. B is the sale deed. Therein it is stated that on 26th of March, 1950, the entire consideration of Rs. 7,500/- had already been received. In paragraph 4 (d) of the written statement, defendant no. 1 pleaded:—

"Nruplal had borrowed from this defendant Rs. 2,000/- on 17-7-49, Rs. 2,000/- on 3-9-49, Rs. 2,000/- on 31-12-49 and Rs. 1,500/- on 24-3-50, all for justifying necessities and all on execution of hand-notes. He was in further need of money even thereafter but this defendant was unwilling to advance further and wanted back the money. Hence, Nruplal being unable to pay up the amount, contracted to sell the house to this defendant for the total pronote dues of Rs. 7,500/- as indicated above, and executed an unregistered agreement dated 26-3-50 in favour of the defendant no. 1 acknowledging receipt of the sum of Rs. 7,500/- in cash, and delivering possession of the house to this defendant in pursuance thereof promising to execute and register a regular sale deed on this behalf later." It is contended on behalf of the appellants that the loans evidenced by the promissory notes under Ext. L series were paper transactions under which no loan had been advanced. Even if it is found that the promissory notes were for consideration, in view of the clear state-

ment in Ext. M/2 that payment was made in cash, the loan amounts under the promissory notes could not constitute consideration for the alienation. It is also claimed that the change in the stand relating to passing of consideration and its form from time to time should be given due weight and on that footing the claim of defendant no. 1 that the alienation was for consideration should be discarded. Mr. Chatterjee has further argued that for the first time defendant no. 1 gave out in his written statement that the consideration for the alienation was the loans evidenced by the four promissory notes under Ext. L series though the contemporaneous documents showed that the consideration had been paid in cash. He also emphasises upon the fact that Nruplal being in urgent need of money for specific pressing necessities, repayment of loans of the defendant no. 1 could not have satisfied the necessities and, therefore, he wants us to hold that in fact no consideration had passed under the document and it was all a myth.

P. W. 7 who is no other than the third defendant himself in his evidence has accepted Exts. L to L/3 (the four promissory notes in question) to be handnotes executed by Nruplal. He has also admitted that these promissory notes contain endorsements made and signed by him. These endorsements show that the loan under the promissory note was taken into consideration for the agreement (Ext. M/2).

Once the plea of undue influence is rejected and it is held that Nruplal was a prudent person, action according to his own will and volition, these promissory notes must be taken to have been executed for loans. The fact that Nruplal or for the matter of that, some of the members of his family were taking loans from defendant no. 1 goes beyond dispute. Apart from the evidence of P. W. 7 accepting the position, Ext. 7 itself is also a proof that Nruplal was taking loans on execution of promissory notes from defendant no. 1. Mr. Misra for the respondent no. 1 contends that it is quite possible that Nruplal being the proprietor of a fairly good-sized estate was not prepared to take loans openly from outsiders and had found it convenient to make borrowings according to necessity from defendant no. 1. In Ext. 5, the diary, there is an entry on 7-12-1949 showing payment of Rs. 2,000/- to defendant no. 1 also towards a promissory note. P. W. 7 has also admitted execution of several other promissory notes by

Nruplal in favour of defendant no. 1. We must hold, in agreement with the two courts, that these promissory notes were for consideration. Nruplal's own endorsements on these documents establish the relationship between these promissory notes and the agreement (Ext. M/2) and it must be held that the loan amounts under these promissory notes constituted the consideration under Ext. M/2. It is true, as Mr. Chatterjee, has rightly pointed out, that the legal necessity indicated therein could not have been satisfied by satisfying the existing loans but it is very probable, as Mr. Misra for the other side contends, that the legal necessity justifying the loans has been reiterated as legal necessity in these documents because the promissory notes were taken as equal to cash. Since Nruplal, a prudent Zamindar as he admittedly was, has not disputed the alienation even after defendant no. 1 left service though he lived for about seven years after the transaction was completed, the claim of the plaintiffs that the alienation was without legal necessity cannot readily be accepted. The courts below have discussed the evidence regarding legal necessity at length and we do not feel like reiterating the discussion here. We would accordingly hold that the sale deed (Ext. B) was for legal necessity and consideration thereunder was Rs. 7,500/-.

13. The next question for examination is, was the consideration of Rs. 7,500/- grossly low so as to vitiate the transaction? Plaintiffs have claimed that the true valuation of the house sold under Ext. B was Rs. 30,000/-. We have already stated that the total area of the property was 28 decimals. The house in question was raised during the time of the Court of Wards and, therefore, prior to 1910. The construction expenses did not exceed three to four thousand rupees as can be gathered from the report submitted by the Deputy Commissioner of Sambalpur to the Commissioner of Orissa Division dated 18th April, 1912, printed at page 179 of the paper book.

By 1950, the house was already 40 years' old. The condition of the house by then was very dilapidated. In a letter dated 4th April, 1950, sent to Nruplal, the Deputy Collector-in-charge had complained that the roof was leaking, bamboo mats should be fitted to the ceiling and the out-houses and the motor garage should be fitted with roofing and other minor repairs to the doors, windows as also walls should be immediately undertaken. When Nruplal informed the Deputy

Commissioner that the house had already been transferred to defendant no. 1, on 29-4-1950, defendant no. 1 was asked to make such repairs. At the foot of the letter, a copy was enclosed to Nrupal with the following endorsement:—

".....I am directed to say that the Kolabira House which is under requisition is in a very dilapidated condition and requires immediate extensive repairs." (vide Ext. V/2)

In this view of the matter, apart from normal depreciation for a 40-year old house, it must also be found as a fact that the house was in a bad state of repairs. Added to these features is the evidence of P. W. 7. As it appears, he had started purchasing the shares of the heirs of Nrupal. In his evidence he has stated:—

"Rukmini, the widow of Nrupal, had 1/7th share in the suit house. I purchased her share for Rs. 500/- as per Ext. 4. On 13-1-62 under Ext. 4/a, I purchased 1/7th share of Sundari Sarojini for Rs. 500/-. Nrupal had 2 sons. I have purchased the share of Bira Bikram and his sons for Rs. 1,000/- as per Ext. 4/b."

On the basis indicated, the total value of the house was not exceeding Rs. 3,500/-. Mr. Chatterjee explained away the position by saying that property was in litigation or a litigation was imminent. Title was in dispute. Relations were buying the property. Therefore, a low valuation had been indicated. Conceding that Rs. 3,500/- was not the true value, there is no material to hold that Rs. 7,500/- for which the sale was made was inadequate consideration. On this basis, we must hold that the sale was for consideration and the consideration was not grossly inadequate so as to vitiate the transaction.

Point No. 3.

14. Parties have not placed any document of title in respect of the disputed property for assisting the Court to determine whether the house belonged to Nrupal or was an asset of the joint family. The learned Trial Judge after discussing the evidence on record came to hold that the house was not a joint family property in the hands of Nrupal and that it was an accretion to the impartible estate of Kolabira of which he was the owner. The learned Single Judge has dealt with this aspect in paragraph 10 of his judgment. Our learned brother took into consideration Ext. A, the Dewar Settlement Record-of-Rights, which is said to be of the year 1909. The addi-

tional evidence admitted by the learned Single Judge goes to show that the land was already in existence and one Basu Mistry had supplied bricks for raising of a compound wall around the land during the lifetime of Chintamani Singh. Having read the evidence placed before us and having examined also the judgments of the two courts, we are of the view that it must be held that the vacant site was held by Chintamani and the construction upon it has been raised during the time the estate was under the management of the Court. In fact, paragraph 8 (a) of the report of the Deputy Commissioner, already referred to, shows:—

"During the 6 years a big pucca building at Kolabira, a comfortable house for the wards at Sambalpur were constructed at a total cost of Rs. 6,784/-...." The asset statement as on 30th September, 1905, shows that during that year Rs. 953/- had been spent for the construction of the house at Sambalpur (vide page 175 of the paper book). The evidence of D. W. 11, a retired Deputy Collector, supports the stand that during 1902 to 1904, there was no house or boundary wall on the disputed site. There is nothing to discard the statement of this witness. We would accordingly accept the position that the property was held by Chintamani and upon his death it came to Nrupal. The building was constructed by spending estate funds during the time the Court was in management of the estate. There is absolutely no material on record to hold that this property was treated as different from, and independent of, the impartible estate itself. Law is settled that the holder of an impartible estate can acquire new assets and add to the estate and such acquisition would be impressed also with impartible character. In the absence of any other material to the contrary and relying on the facts as gathered from the evidence, namely that the vacant site was held by Chintamani and the building was raised out of the estate funds in the early years of Nrupal's succeeding to the estate and the general treatment of the property, we would hold that this property was a part of the estate and was not a separate property in which the members of the joint family could have right, title and interest. Plaintiffs and heirs of Nrupal by their own conduct have also supported this position. We have already pointed out how after Nrupal's death, the property has been taken to be his and each

of the heirs has claimed 1/7th share. If it was a property of the Hindu Undivided Family and not the separate property of Nrupal or a part of the impartible estate, the heirs could not have claimed 1/7th share for each of them. There has been some confusion in the findings of the learned Trial Judge as also the learned Single Judge on this issue. But on the analysis indicated above, it would be appropriate to hold that the disputed house in Sambalpur was a part of the impartible estate. It is not necessary that the property must have been located within the estate so as to be impressed with impartible character. The property was alienated before vesting of the estate and the holder of the impartible estate as the owner of the property for the time being was entitled to make a valid alienation and the members of the joint family have no right to dispute such an alienation. (See Shiba Prasad v. Prayag Kumari, AIR 1932 P. C. 216). In this view of the matter, the plaintiffs have no locus standi to dispute the alienation and, therefore, had no cause of action for the suit.

Even if the property be held to be belonging to the joint family, as the learned Single Judge indicated, we would agree with him that the alienation was for necessity and for satisfying antecedent debts of their father Nrupal. It being not the case that the debts were tainted with immorality or were of Avayaharika character, by the doctrine of pious obligation, plaintiffs should be estopped from challenging the alienation. In any view of the matter, the alienation is not open to challenge.

Point No. 4.

15. The agreement (Ext. M/2) is dated 26th of March, 1950, under which possession was delivered to the defendant no. 1. The suit has been instituted on 26th of March, 1962, i. e. on the last day of a 12-year period from that date. In paragraph 13 of the written statement, defendant no. 1 pleaded:—

"That the plaintiffs are not entitled to challenge the sale or claim ejectment as alleged in para 14 of the plaint. They had never any right or title nor were any of them in possession within 12 years of suit."

Though a specific plea regarding limitation was not raised, the question was examined in the suit, because several issues framed in the suit could accommodate the plea of limitation. In paragraph 33 of his judgment, the learned Trial Judge dealt

with it. In paragraph 9 of his judgment, the learned Single Judge dealt with the question of limitation and has stated:—

"On the question of limitation, the learned Subordinate Judge has held that under Art. 91 of the Indian Limitation Act, 1908, the suit for setting aside the sale deed (Ext. B) on the ground of undue influence should have been instituted within a period of three years either from the date of the sale deed or from the date of knowledge of the plaintiffs about the sale deed. In the present case the plaintiffs served a notice on defendant no. 1 in June, 1951, which was received by defendant no. 1 on 30-6-51. In the said notice, the plaintiffs challenged the sale deed on the ground of undue influence. It is thus clear that the fact that the sale deed (Ext. B) was tainted with undue influence was known to the plaintiffs in 1951. Therefore, they should have instituted the suit within three years from the date of their knowledge, if not, from the date of the sale deed. The suit not having been brought within the prescribed period, the trial court is right in holding that the plaintiffs' cause of action to challenge the sale deed on the ground of undue influence was barred by limitation by the time the present suit was instituted. Mr. Sinha challenges this finding by saying that plaintiffs' right to the suit property has to be decided independently of the impugned sale deed. Such a suit, according to him, need not be instituted within a period of three years from the date of the sale deed. For this position, he relies upon a decision reported in, AIR 1945 All 367 (Aisha Begam v. Kundan Jan). A reading of the plaint as well as of Ext. O/1, the reply of defendant no. 1 to the plaintiffs' notice dated 27-6-1951, clearly goes to show that the plaintiffs are challenging the sale deed on the ground of undue influence. That being the position, the plaintiffs' suit for setting aside Ext. B is bound to fail, the same not having been instituted within the prescribed period of limitation....." Article 91 of the First Schedule of the Limitation Act of 1908 reads thus:—

"To cancel or set aside an instrument not otherwise provided for.	Three years.	When the facts entitle the plaintiff to have the instrument cancelled or set aside become known to him."
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The learned Single Judge is absolutely correct in holding that to the suit as framed, Article 91 of the old Limitation Act is applicable. The limitation actually ran either from the date of the

transaction or from the date of knowledge which in this case is contemporaneous.

The Allahabad decision referred to by the learned Single Judge has taken the view that for a suit for declaration that a deed was null and void, Article 120 of the Limitation Act was applicable. Even taking that view, the period under Article 120 being six years, the suit was also barred by limitation.

16. Before us, Mr. Misra for respondent no. 1 has relied upon a Bench decision of the Madhya Pradesh High Court (*Sukaloo v. Punau*, AIR 1961 Madh. Pra 176) where it has been held that the right of a vendor to challenge a sale deed for want of consideration arises on execution of the deed and it can only be done within three years from the date of its execution under Article 91 of the Limitation Act. Whether Article 91 or Article 120 applied to a suit of this type, the suit instituted on the last day of the 12-year period from the date when the cause of action arose is plainly out of time and it must be concluded that the cause of action, if any, had become barred by limitation. We would, therefore, uphold the finding of bar of limitation as well.

17. In the result, we would accordingly uphold the decision of the learned single Judge and dismiss this appeal with costs throughout. We place on record our appreciation for the able assistance rendered by learned counsel for both the parties.

DAS, J.:— I agree.

Appeal dismissed.

AIR 1976 ORISSA 175

FULL BENCH

R. N. MISRA, B. K. RAY AND
N. K. DAS JJ.

National Insurance Co. Appellant
v. Magikhaia Das (After him) Mst.
Laxmi Dibya and others, Respondents.

Misc. Appeal No. 196 of 1974, D/-
30-4-1976*

(A) Motor Vehicles Act (1939), Sections 110-D and 96 (2) — Appeal — Insurer not entitled to prefer appeal on a

*(From decision passed by M. J. Rao 2nd Motor Accidents Claims Tribunal, Puri in Misc. Case No. 30 of 1973 (91 of 1972), D/- 12-7-1974).

GT/GT/C32/76/LGC

ground not mentioned in S. 96 (2) — Car accident — Owner of car contested claim proceedings — Compensation awarded against insurer — Appeal by insurer challenging quantum of compensation is not maintainable even though a clause in policy bond authorised the insurer to defend in the name of insured. AIR 1968 Mad 436, Dissented from. (Ibid, S. 110-C (2-A)).

In an appeal under Section 110-D against the award of a Tribunal, the insurer is entitled to raise only pleas which could be raised by it before the Tribunal and the appeal would not be maintainable on grounds which could not be raised before the Tribunal by the insurer. The statutory provision is clear that an insurer who has been made a party to a proceeding for recovery of compensation can resist the claim only on those grounds mentioned in sub-section (2) of Section 96 and it is not open to it to raise any other plea. (Para 2)

The power under Section 110-C (2-A) can be exercised even when the insured has entered contest and, while giving an appearance of contest is actually colluding with the claimant. (Para 4)

Where the insured had entered contest and there is no reason to hold in the absence of any allegation and something more, that the insured had been colluding with the claimant, and the insured and insurer simultaneously wanted to defend, insured defending in his own name and the insurer in its own name, the clause in the policy bond authorising the insurer to defend in the name of the insured cannot provide shelter to the insurer. The restriction under Section 96 (2) applies to the insurer and he could not travel beyond the restriction imposed by the Statute either before the Tribunal or in appeal before the High Court. Where none of the grounds in the memorandum of appeal appertains to a defence raised within Section 96 (2) and what is being mainly challenged is the quantum and liability on a ground not covered by Section 96 (2), the insurer is not entitled to contest the claim nor the award on these grounds. AIR 1968 Mad 436 Dissented from. (Case law discussed). (Paras 2, 6)

Cases Referred: Chronological Paras
1976 ACJ 21 (Orissa) 1, 5

1972 ACJ 261 = 38. Cut LT 374 1

AIR 1972 Tripura 9 = 1972 ACJ 453 2

1971 ACJ 219 = 1971 Ker LJ 407 2

AIR 1971 Mys 207 = (1971) 1 Mys LJ 300 2

1970 ACJ 245 (All) 2

AIR 1968 Mad 436 = (1969) 1 Mad LJ 49 3

AIR 1959 SC 1331 = 1960 SCJ 44 1, 2, 3

AIR 1959 Punj 297 = 61 Pun LR 683 2, 3

AIR 1955 Bom 39 = 56 Bom LR 1016 3

AIR 1953 Bom 109 = 54 Bom LR 557 2

Ajoy Kumar Mohanty, for Appellant;
R. C. Patnaik and P. K. Misra, for Respondents.

R. N. MISRA, J.:— Jagannath Narula, respondent no. 2, was the owner of car No. O. R. P. 2848. Around 8. p. m. on 19-8-1972 this car was proceeding from Puri towards Bhubaneswar on the State Highway. Near village Talapati between Sakhigopal and Gopabandhu Sevasangha, the claimant, original respondent no. 1, was running his own cycle rickshaw on the said road at a slow speed. The car came from the opposite direction and dashed against the rickshaw. As a result of the accident, the claimant received serious injuries over several parts of his body and remained as an indoor patient at Sakhigopal Hospital. It was found that his left leg and the right collar bone were fractured. He alleged that he became invalid and members of his family have been deprived of his earnings as a rickshaw puller. Claim of Rs. 22,000/- as compensation was laid before the Motor Accidents Claims Tribunal at Puri.

The owner of the car, respondent no. 2, entered contest, filed a written statement, cross-examined the witnesses for claimant and adduced defence evidence by examining the driver of his car who was still employed under him.

This vehicle was insured with the National Insurance Company Ltd. who was impleaded as opposite party no. 2 before the Tribunal. It filed a written statement admitting that it was the insurer of the vehicle but denied each and every allegation made in the claim petition and specifically disputed the quantum. The Tribunal awarded compensation of Rs. 17,000/- with interest and consolidated cost and directed the Insurance Company to pay the same. This appeal under Section 110-D of the Motor Vehicles Act (hereinafter referred to as the 'Act') has been filed by the insurer.

When the appeal came up for hearing before a learned single Judge, on behalf of the claimant it was contended that the appeal did not lie at the instance of the insurer in view of the provision of Section 96 (2) of the Act which restricts the

grounds upon which a claim is open to challenge. On behalf of the insurer it was contended that it was a term in policy of insurance that the insurer could take any defence available to the insured in the name of the insured and the insured having not preferred any appeal and the entire liability for payment of compensation awarded by the Tribunal having come on the shoulders of the insurer, the insurer must be held eligible to challenge the quantum of compensation as also its basis.

Before the learned single Judge the decision of the Supreme Court in the case of British India General Insurance Co. v. Itbar Singh, AIR 1959 SC 1331, and a Bench decision of this Court in the case of the Oriental Fire & General Insurance Co. v. Vanita Kalyani 1972 ACJ 261 (Orissa) and a decision of a learned single Judge in the case of The Orissa Co-operative Insurance Society v. Ranjan Kumar Garabaru, 1976 ACJ 21 (Orissa) were placed. The learned single Judge was of the view that the contention made on behalf of the appellant was correct but in view of the observations made by this Court in the two decisions referred to above he was not in a position to dispose of the matter by overruling the respondents' contention and asked the matter to be referred to a Full Bench for disposal.

2. As already indicated the appeal has been filed under Section 110-D of the Act. In such an appeal against the award of a Tribunal, the insurer is entitled to raise only those pleas which could be raised by it before the Tribunal and the appeal would not be maintainable on grounds which could not be raised before the Tribunal by the insurer. The view expressed by Mysore High Court in the case of I. M. G. Ins. Society v. Helen, AIR 1971 Mys 207, in our view, is correct. It may be stated here that even Counsel for the appellant does not dispute this position. Section 96 (2) of the Act provides :—

"No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a

obedience to those provisions by the authorities. (Paras 9 and 34)

The infraction of Section 8 and Rule 8 however, does not per se invalidate subsequent actions validly taken by the authorities nor does it invalidate the publication of draft statement under Section 10 (1) of the Act. Objection if any, raised to the draft statement has to be disposed of in accordance with law.

(Paras 13 and 34)

(C) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), Ss. 2 (f) and 4 (d) — 'Homestead and Pasturage' come within the definition of 'land' — They too must be taken into consideration while determining whether a land-holder has surplus land.

(Paras 26, 34)

(D) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), Ss. 2 (ee) and 5 — Hindu family — Effect of partition.

The unit for the purpose of ceiling law is 'family' as defined in Section 2 (ee). All major members of Hindu family, who are entitled to be treated as land-holder within the meaning of the Act, have to be treated as a separate unit for the determination of the surplus land under the Act, irrespective of the fact whether or not there has been a partition in the family.

(Paras 23, 34)

Notice should ordinarily be issued to all such persons who are entitled to be treated as a separate unit for the purpose of the Act, although they may be members of a joint family. The consequence of non-issue of notice will depend on the facts of each case.

(Paras 23, 34)

(E) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), S. 4 — Religious or charitable endowments or trusts have to be treated as separate units for the purpose of the Act.

(Paras 27, 34)

(F) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), S. 5 (iii) — Applicability.

Section 5 (iii) of the Act does not apply to transfers made on or before 22nd day of October, 1959 nor does it apply to bona fide transfers. It is only applicable to where transfer is (a) benami or farzi, (b) made with the intention of defeating the provisions of the Act and (c) in contravention of the provisions of the Act. Such transfers can only be ignored after they have been annulled in accordance

with the provisions of Section 5 (iii) of the Act. Even where a transfer is annulled, or for that matter any partition or family arrangement is legally ignored, being benami or farzi or made with the intention of defeating the provisions of the Act, the land covered by such transfer etc., has to be treated as land of the members of the Hindu family, who are to be treated as land-holder within the meaning of the Act. (Paras 29 and 34)

(G) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), Ss. 6 and 8 — Fresh proceeding after amendment of parent Act — Effect of pending proceeding.

The fact that a proceeding prior to amendment introduced by Act 1 of 1973 is pending does not bar the initiation of fresh proceeding after the amendment. If such a proceeding is started it has to be disposed of in accordance with the provision of the Act as it stands after the amendment.

(Paras 33 and 34)

(H) Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (1961) (12 of 1962), S. 2 (f) — 'Land' — Permanent building excluded.

Lands on which permanent buildings, other than homestead as defined in the Act stand, are not covered within the definition of 'Land' and have, therefore, to be excluded from consideration in determining the surplus area under the Act.

(Paras 28 and 34)

Cases Referred: Chronological Paras

1975 BBCJ 667 12

AIR 1973 SC 1461 = (1973) Supp SCR 1 8

AIR 1973 Pat 47 = 1973 BLJR 160 19

AIR 1964 SC 1300 = (1965) 6 SCR 1001 18

AIR 1960 SC 845 = (1960) 3 SCR 250 7, 8

B. C. Ghose, S. K. Ghose and Yogendra Misra (in CWJC 74/74) and Kailash Roy, B. K. Roy, D. C. Sinha and Ram Kishun Sinha (in C.W.J.C. 1460/74), for Petitioners; T. K. Jha (Govt. Advocate) and S. N. Jha, for Respondents in both the cases.

S. SARWAR ALI, J. — These two applications have been heard one after the other. Since several points raised in these applications are common, they are being disposed of by a common judgment. I propose, after giving necessary facts of each case, to deal with the constitutional and legal points raised first, before examining their impact on the two cases. In dealing with those questions I shall notice the arguments of the learned counsel ap-

pearing in both the writ applications.

Facts of C. W. J. C. No. 74 of 1974:

2. Petitioner No. 1 in this case is father of petitioners Nos. 3 and 4, petitioner No. 3 being major and petitioner No. 4 being minor. Petitioner No. 2 is the wife of petitioner No. 1. According to the petitioners petitioner No. 1 was the Karta of the joint Mitakshara family consisting of himself, his wife and his two children. For the sake of convenience and management of the joint family properties petitioners separated from each other and each of them got 1/4th share in the joint properties. In the year 1967 a return was filed by petitioner No. 1 under the provisions of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961 (the 'Act'). This was registered as case No. 34 of 1967-68. This proceeding, it is asserted, is still pending. The Act was amended by Bihar Act 1 of 1973 and Bihar Act 9 of 1973. Various amendments have been introduced by these Acts in the parent Act. The main effect of these amendments is the lowering of ceiling prescribed under the parent Act and introduction of the concept of family (as defined in the Act), as a unit for the purpose of determining the ceiling. After the amendment the petitioner filed a fresh return. According to the petitioners, without complying with the provisions of Section 8 and Rule 8 of Bihar Land Reforms (Fixation of Ceiling Area & Acquisition of Surplus Land) Rules (the 'Rules'), Draft publication (Annexure-2) has been made under Section 10 (1) of the Act. Subsequently, there was a final publication of the draft statement (Annexure-3). The validity of Section 2 (i) of the Bihar Act, 1 of 1973 and the various actions taken by the authorities including Annexures 1, 2 and 3 are under challenge.

Facts of C. W. J. C. No. 1460/74:—

3. In this writ application there are five petitioners. Petitioner No. 1 is the father of petitioner No. 3. Petitioner Nos. 2 and 3 are the wives of petitioner Nos. 1 and 3 respectively. Petitioner No. 5 is an idol, Sri Ram Jankiji Maharaj. According to the petitioner the family of Petitioner Nos. 1 to 4 was a joint Hindu family governed by Mithakshara School of Hindu Law. Rai Bahadur Bachu Prasad Singh father of petitioner No. 1, was head and karta of the family till his death in the year 1957. In the year 1962 after the death of Sri Bachu Prasad Singh a private partition took place among the members of the joint family by which

the properties were divided by metes and bounds, petitioner Nos. 1 to 4 having been allotted 1/4th share each. These petitioners are claiming to be in possession of lands allotted to the share of each of them in their own right. The petitioners further aver that by common agreement and with consent of all concerned there was a dedication of about 39.69 acres of land on 25-3-1956 by a registered deed of Samarpnama to Sri Ram Janki Ji Maharaj, the family deity. Petitioner No. 5 is the Shebait of the deity. The deity, it is said is in possession of the dedicated lands. Some portions of the land belonging to the petitioners and the buildings thereon constitute the home-stead of the petitioners. On a portion of the land there is a cold storage. Petitioner No. 1 filed a return in pursuance of the provisions of the Act on 4-7-1973. On 15-3-1974 the Additional Collector Patna, (respondent No. 2) passed an order holding, on the basis of verification report of the revenue staff, that petitioner Nos. 1 and 2 were entitled to possess 25 acres of land and that petitioner Nos. 3 and 4 were entitled to hold another 25 acres. Since according to the order option under Section 9 of the Act had not been exercised by the land-holders certain lands as described in Schedules A and B were permitted to be retained by them and the lands mentioned in Schedule C, it was observed, may be declared as surplus land. A draft statement under Section 10 of the Ceiling Act was directed to be prepared and published according to the rules. A copy of the notice in pursuance of this order is Annexure-9. This Annexure does not indicate that any notice was to be served on Petitioner No. 3, the notice being addressed only to petitioner No. 1. Apart from the question of constitutional validity of Section 2 (1) of Act 1 of 1973, learned counsel for the petitioners challenged the legality of the various actions taken on several grounds which shall be noticed hereinafter.

Validity of amending Act 1 of 1973.

4. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, being Bihar Act 12 of 1962, having received the President's assent was published in Bihar Gazette Extra-ordinary on 19-4-1962. The Act was, as the preamble indicates, and so do its provisions, to provide for fixation of ceiling and acquisition of surplus land by the State. Land-holder was defined to mean a person "who holds land as a raiyat and under raiyat

and includes the mortgagee of land in possession". The section, definition and explanation to this definition is as follows:—

"2 (g) 'Land-holder' means a person who holds land as a raiyat or as an under-raiyat and includes a mortgagee of land with possession;

Explanation: (i) A member of an undivided Hindu family having or being entitled to a share in land shall be deemed to be a land-holder for the purposes of this Act as if there had been partition in the family immediately before the commencement of this Act.

(ii) In this clause, the word 'person' includes any company, institution, trust, association or body of individuals whether incorporated or not."

To give a corresponding benefit to persons not being members of Hindu undivided family a provision was made in their cases permitting transfer of land held by a land-holder to certain specified relations. The effect of this provision was to put land-holders belonging to Dayabhag School of Hindu Law, Muslims, Christians etc., at par with members of Hindu undivided family in relation to the ceiling law.

5. Act 1 of 1973 introduced Section 2 (ee) defining family which is as follows:—

"Family means and includes a person, his or her spouse and minor children.

Explanation: In this clause the word 'person' includes any Company, Institution, Trust, Association or body of individuals whether incorporated or not".

Section 4 fixes the ceiling area of land for one family consisting of not more than five persons. Section 5 (1) of the Act after amendment is as follows:—

"It shall not be lawful for any person or family to hold, except as otherwise provided under this Act, land in excess of the ceiling area.

Explanation: All lands owned or held individually by the members of family or jointly by some or all of the members of such family shall be deemed to be owned and held by the family."

6. Learned Counsel for the petitioners contended that the concept of the family as known to the Mithakshara School of Hindu Law has been destroyed by the artificial definition introduced by Act 1 of 1973. It thus results in discrimination. Although attack on the ground of violation of Art. 14 is not permissible, the

Court can and should strike down the provision, the same being contrary to the principles of equality as contained and enjoined in the preamble to the Constitution. The argument, in my view, is clearly misconceived and is indeed contrary to what has been settled by the Supreme Court. I shall only refer to two of the Supreme Court cases in this context.

7. In re, Berubari Union and Exchange of Enclaves (Special reference of 1 of 1959) the Supreme Court in its advisory opinion, speaking through Gajendragadkar, C. J., observed as follows: (AIR 1960 SC 845 at 856):

"28. There is no doubt that the declaration made by the people of India in exercise of their sovereign will in the preamble to the Constitution is, in the words of Story, 'a key to open the mind of the makers' which may show the general purposes for which they made the several provisions in the Constitution; but nevertheless the preamble is not a part of the Constitution, and, as Willoughby has observed about the preamble, to the American Constitution, 'it has never been regarded as the source of any substantive power conferred on the Government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.'"

29. What is true about the powers is equally true about the prohibitions and limitations."

8. In the Kesavananda Bharati Sripadagalvaru v. State of Kerala, (AIR 1973 SC 1461) the correct role of the preamble has been considered in a number of judgments. The view expressed in Berubari's case (AIR 1960 SC 845) has been substantially accepted in this decision except that the observation in that judgment that preamble is not a part of the Constitution has not been accepted. Ray, J. (as he then was) after noticing the Berubari's case and other cases came to this conclusion:

"The Preamble is properly resorted to where doubts or ambiguities arise upon the words of the enacting part. If the enacting words are clear and unambiguous there is little room for interpretation, except the cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble. This is the view of Story. The preamble can never be resorted to, to enlarge the powers confided to the general government. The preamble can expound

the nature, extent and application of the powers actually conferred by the Constitution and not substantively create them."

Justice Palekar held:—

"Moreover the preamble, it is now well settled, can neither increase nor decrease the power granted in plain and clear words in enacting part of the Statutes."

Dealing with the same aspect of the matter and after holding that preamble is part of the Constitution Khanna, J., observed:—

"As observed by Story on Constitution, the preamble can never be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature, and extent, and application of the power as actually conferred by the Constitution, and not substantively to create them".

The observations already extracted from Berubari's case have been approvingly quoted by the learned Judge in Paragraph 1485. Mathew, J., also in Paragraph 1633 speaking of the role of the preamble subscribed to the same view. I have found nothing in the judgment of the other learned Judges which would indicate that they have taken a view contrary to what has been stated by Gajendragadkar, C. J., in Berubari's case.

9. It is thus clear that the preamble cannot be regarded as a source of substantive power nor can it put limitations on the power that is legitimately exercisable by a legislature. Tested in this light it is not possible to hold that the concept of equality as expressed in the preamble having been allegedly violated, the provision of Act 1 of 1973 is unconstitutional or ultra vires on that ground.

10. The next contention raised on behalf of the petitioners is that the definition of the family does not advance the principles of Article 39 (a) and (b) of the Constitution. Consequently the amending legislation must be held to be not covered by the Directive Principles of the State Policy. In this context the learned counsel contended that widowed grand-mother and widowed daughter-in-law were, as a

result of this provision, even deprived of maintenance and mere subsistence which they were entitled to before the amending law.

11. Before considering the argument whether the Directive Principles of State Policy are fulfilled by the amending legislation, or the legislation as stands after amendment, it would be sufficient to observe that the argument that those who are entitled to maintenance under the Hindu law will be deprived of the same because of the lowering of the ceiling is not correct. The ceiling law does not either directly or indirectly purport to extinguish any such rights. The only effect may be that the property against which the said right was enforceable may decrease in area. Thus, in my view, it is a misconception of the correct legal position to say that the rights of maintenance holders (whoever they may be) under the Hindu law has been extinguished as a result of the introduction of the concept of family by the amending Act or by lowering the ceiling.

12. Coming to the main contention, I would reiterate what has already been held by this Court in Mahanth Daya Ram v. State of Bihar, (1975 BBJ 667). It has been clearly held there that the Act has been enacted to give effect to the Directive Principles of State Policy. Learned counsel did not contend that the Parent Act was not in pursuance of the Directive Principles. He contended that the Court must look at the amending provision alone and hold that the amending provision did not fulfil the Directive Principles of State Policy. Thus the learned counsel wants this Court to look at the amending provision in isolation. This, in my view, is not a correct approach. What must be seen is whether even after the amendment the Act continues to conform to the Directive Principles. If it does the principles contained in Article 39 are fulfilled. The amending provision may be compared to a piece in jigsaw puzzle. It is only when the piece is fitted in its proper place that the true picture can be discerned. It is, therefore, not possible, in my view, to look at the definition in isolation. That would not be a correct legal approach.

13. In my opinion, however, whether the amending provision is looked at in isolation, or the amended Act is examined as a whole, the result is the same. The purpose of the relevant provisions of the parent Act was to fix a ceiling on the area of land which could be held by

a land-holder. The excess area was to be acquired by the State for the purpose of disposal as envisaged in the Act. Section 27 deals with the disposal of the surplus land. The original Section 27 has been amended by Section 10 of Bihar Act 1 of 1973. The section as stands today need not be quoted, but it is quite clear that the section contemplates settlement of surplus land to the members of scheduled caste, scheduled tribe, backward class and other poorer sections of the community, as well as those who have or have been prepared to lay down their lives for the country, having been either killed in action or having served in the armed force. It is thus clear that the acquisition of surplus land and disposal thereof to the class of persons as noted above subserves the policy laid down in Directive Principles of the State-Policy. The introduction of the definition of family only result in lowering down the ceiling and thereby enabling the State to be in a position to acquire more lands under the provisions of the amended Act. Any provision which aims at and secures land, for the purpose of distribution among the poorer, weaker, and deserving section of the community cannot but be held to be in pursuance of Directive Principles of State Policy.

14. As an additional reason for upholding the validity of the impugned provisions reference may be made to Article 31-B of the Constitution. It states:—

"31-B. Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent legislature to repeal or amend it, continue in force."

It is accepted by both sides that the two amending Acts have been included in the ninth Schedule. It is, therefore, clear that neither the parent Act nor the amended Act can be challenged on the ground of violation of fundamental rights or because they are inconsistent with Articles 14, 19 or 31 of the Consti-

tution. Learned counsel appearing in one of the applications contended that Article 31-B of the Constitution would only apply to such laws as were enacted. In pursuance of the Directive Principles aforesaid, I do not find merit in this contention. First, I have already held that the amending law does fulfil the Directive Principles of State Policy. Moreover, as a matter of construction of Article 31-B it would be wrong to say that although a law has been included in the 9th Schedule it is open to the Court to examine whether it fulfils the requirement of that provision of Directive Principles of State Policy. The language of Article 31-B is clear and the meaning is plain. It says that no Act etc., shall be deemed to be void or ever become void on the ground that such Act etc., is inconsistent with or takes away or abridges any of the rights conferred by Part III or any provision of the said Part. To read the limitation as was suggested is not justifiable on any well-recognised principle of construction.

Legislative Competence:—

15. Sri Kailash Roy learned counsel for the petitioners in C. W. J. C. No. 1460 of 1974 contended that since the definition of family, in various ways, conflicts with the concept under the Hindu law the State Legislature was not empowered to so legislate as to destroy that concept. The argument really means that there was no legislative competence in the State Legislature to enact the law.

16. This argument also, in my opinion, is misconceived. The legislation is covered by Item 18 of List II of the Seventh Schedule which is "Land that is to say right in and over land ...". It is also covered by Item 42 of the List III which is "Acquisition and requisition of property". The impugned legislation being clearly covered by the entries aforesaid the question of lack of legislative competence does not arise. There is no encroachment, not even incidental, on any Item of List I. Item 5 of List III is as follows:—

"Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this constitution subject to their personal law." Even if the legislation could be said to be one under this Item of the List (which it is not) and further assuming that it is repugnant to the provisions of Hindu

Law, the assent of the President having been obtained in respect of the parent Act as also the amending Acts, the legislation cannot be said to suffer from any infirmity in view of the clear provisions of Article 254 clause (2) of the Constitution.

Section 8 of the Act and Rule 8 of the Rules:

17. Section 8 (1) of the Act is as follows:—

"8 (1) Whether it comes to the notice of the Collector that any land-holder holds land in excess of the ceiling area or has not submitted the return within the period specified in the notice, or the extended period, under Section 6, or has submitted a return containing incorrect particulars, the Collector shall cause a notice to be served on the land-holder or his guardian, if he is a minor or person of unsound mind, directing him to submit the return with the necessary or correct particulars within sixty days of the service of such notice."

The contention raised on behalf of the petitioner is that Section 8 (1) requires that even if the Collector is of the view that a land-holder has submitted a return containing incorrect particulars he has to issue notice directing him to submit return with necessary or correct particulars. The provision, it is said, is mandatory. If the Collector does not follow the provision it invalidates all subsequent steps taken by him including the preparation and publication of the draft statement under Section 10 of the Act. In relation to Rule 8 it is contended that verification has to be made not only with reference to any reports submitted to the Collector but also with reference to upto-date rent receipts and other relevant revenue records including the record of right maintained by the Collector. At this stage also the Collector has to hear the land-holder concerned. The failure to comply with the requirement of Rule 8 invalidates all subsequent actions taken by the Collector.

18. The question whether the subsequent actions taken by the Collector is invalid or not does not depend merely on the directory or mandatory character of these provisions. One thing, however, is clear whether the section and the rule be directory or mandatory they have to be complied with. Even directory provisions are meant to be followed and not to be ignored. The crucial question, however, is as to the effect of the failure to comply with these provisions.

It is not the non-compliance of every provision which renders the action taken in contravention thereof a nullity. The nature, scope and object of the power and its effect on the rights of the person concerned is relevant. One of the tests is that if the provision is based on grounds of public policy and cannot be waived, its contravention renders the action taken a nullity. Not so if it is capable of waiver. (See *Dhirendra Nath Gosai v. Sudhir Chandra Ghosh*, AIR 1964 SC 1300). In the instant case the aforesaid provisions are only for the purpose of determining whether, prima facie, the land-holder possesses land in excess of the ceiling area. Any order passed under Section 8 or enquiry held under Rule 8 does not finally determine the rights of the parties. Section 10 contemplates publication of draft statement. After the publication and the service of the same on the land-holder he has a right to file objection. That objection, as laid down in Section 10 (3), has to be disposed of not only after giving an opportunity to the land-holder of being heard but also after affording him an opportunity of adducing evidence. It is the order passed after complying with the provisions of Section 10 (3) which finally determines the rights of land-holder so far as the Collector is concerned. The order passed under Section 10 (3) is itself subject to appeal and revision. It is thus clear that a land-holder does not suffer any irreparable injury if the provisions of Section 8 and Rule 8 are not complied with. The prima facie determination by the Collector, even without following the above provisions does not, therefore, in my view, invalidate the action taken by the Collector under Section 10 (1) of the Act. I am also of the opinion that the failure to comply with the provisions aforesaid is capable of waiver by the land-holder and for the reason also the effect of non-compliance of Section 8 or Rule 8 will not render subsequent proceedings under Section 10 of the Act nullity in the eye of law.

19. Reference was made by learned counsel for the petitioners to paragraph 16 of the judgment of a Bench of this Court in *Motilal Padampat Sugar Co. v. State of Bihar*, (AIR 1973 Pat 47). What has been stated in that paragraph only emphasises that the provision of Rule 8 is meant to be followed. It does not decide as to what is the effect of non-compliance thereof. The view that I have taken is, therefore, not in any way in conflict with the aforesaid decision.

20. One further observation is called for in this context. Rule 8 requires the Collector to check and verify with reference to the rent receipts and other relevant revenue records. It has come to our notice that in several cases the documents aforesaid show that more than one person is land-holder, yet notice is given only to one of them on the assumption that the land which constitutes separate jamabandi is really the land of the land-holder to whom notice has been given. Even if it be open to the Collector to proceed on the prima facie assumption that such is the correct position, it appears to me that it would be expedient even at that stage to give notice of the draft publication to all those who stand recorded in the records of the Collector. I say so because if no such notice is given and a determination is made only in the presence of the person to whom notice is given, the other persons in whose name the revenue records stand may be entitled to file claim under Section 15 (3) of the Act. In actual practice there would be very few cases where such claims are not made. The issue of notice as suggested would in many cases practically eliminate the second round of litigation which is likely to result if no such notice is given. I feel that what I have stated shall lead to early implementation of the ceiling law.

21. There is one other reason why notice should be given, even in the case of Hindu joint family to adult members of the joint family who have present interest in the property. It is conceivable that they may possess some lands which is not joint family land. If separate receipts are issued in respect thereof, non-issue of notice to such adult members will only result in delaying the implementation of the law, as it is obvious that such members will file objection under Section 15 (3) of the Act.

Effect of partition:

22. Learned counsel for the petitioners said that since according to their cases, there has been partition, for the purpose of ceiling law, irrespective of the fact whether a person is major or minor he has to be treated as a separate unit. In my view the contention does not appear to be correct. Family has been defined to include a person, his or her spouse, and minor children. Section 5 creates family as a unit for the purpose of the ceiling law. Explanation to Section 5 makes it clear that the lands held by the family either individually or jointly shall

be deemed to be owned and held by the family. It is thus clear that partition amongst the members of the family cannot do away with the effect of definition of the family as already noticed. It is thus clear that whether there is a partition or not the lands held by a person, his or her spouse and minor children will have to be treated as one unit for the purpose of determining whether any land is held by the family, as defined, in excess of the ceiling area.

23. The position, however, is different so far as major members of a joint family are concerned. If in a joint family, as understood in the Hindu law, there are major members having present interest in the property, they have to be treated as a separate unit for the purpose of the ceiling law. To illustrate if in a joint Hindu family there is a father, his two minor sons and two major sons and the family holds, say, 45 acres of class I land, the position would be that for the purpose the ceiling law the father and the two minor sons constitute a family and are to be treated as one separate unit entitled to 15 acres. The two major sons would be entitled to 15 acres each. Thus in the instant case the joint family would not be holding land in excess of the ceiling area.

24. Sri Kailash Roy contended that unless minor children and spouse are treated as separate units after partition, the Act would not be workable. Who could, he said, be given notice? How will the surplus be determined and as to which portion of the land of various persons, who were separate in status, would be declared surplus are all matters on which the law is silent. It is true that there would be some practical difficulties in such a situation, but I do not think that the Act is unworkable. If there were clear provisions it would have been better. But in the absence of clear provision on equitable principle the surplus land will have to be declared in proportion to the land held by the individuals concerned. Their right to exercise option will also be in the same proportion. Here also one further observation may be made. Where the revenue records do indicate that the minors are assessed to and paying separate rent it would save a lot of complication if notice in the first instance is given to all such persons.

Homestead and pasturage:

25. Sri Kailash Roy contended that for the purpose of determining the

ceiling area homestead and pasturage has to be excluded from consideration. He contended that in Section 4 of the Act while orchard is mentioned homestead and pasturage are not mentioned. Further according to him there is no provision for compensation for homestead in the Schedule Part I of the Act.

26. Land has been defined in Section 2 (f) as follows:—

"(2) (f) — 'land' means land which is used or capable of being used for agriculture or horticulture and includes land which is an orchard, Kharhar or pasturage or the homestead of a land-holder. Explanation: 'Homestead' means a dwelling house for the purpose of living or for the purpose of letting out on rent together with any court-yard, compound attached, garden, orchard and out-building and includes any out-building for the purpose connected with agriculture or horticulture and any tank, library and place of worship appertaining to such dwelling house."

A mere reading of the definition is in my view, conclusive in the matter. The definition clearly says that land includes the homestead of land-holder (as defined in the explanation). When the definition specifically says that homestead is indicated within the expression 'land', it is impossible to hold that it is not. I am also not prepared to accept the contention that homestead does not come within one of the clauses mentioned in Section 4. Section 4 (d) is as follows:—

"4 (d) thirty acres equivalent to 12.141 hectares of land, other than those referred to in clauses (a), (b), (c), (e) and (f) or land which is an orchard or used for any other horticultural purpose (hereinafter referred to as class IV land)."

It is, therefore, clear that all those lands which are not covered by clauses (a), (b), (c), (e) and (f) of Section 4 are included in clause (d). The mere fact that there is a specific mention of orchard or land used for any other horticulture purpose in Section 4 (d) does not lead to the conclusion that other lands are excluded from this clause. From this conclusion it necessarily follows that the schedule does prescribe compensation for homestead, the same being class IV land.

Endowments and trusts:—

27. Sri Kailash Roy said that in his case petitioner No. 5 is a deity and, therefore, has to be treated as a separate unit. There can be no doubt that if there is a religious or charitable trust or en-

dowment the same has to be treated as a separate unit. The lands belonging to such endowment and trust cannot be tagged on to the land of either the dedicant, the manager, Shebait, trustee or the mutawalli. This conclusion follows from Section 4 which creates family as a unit. For the purpose of Section 4 such trust or endowments must be held to be a separate and distinct person. The question, however, remains whether in the instant case there was really a trust. This is a question that has to be determined in the pending proceeding and cannot be decided in this writ application. If the existence of a valid endowment is found by the Collector, the said endowment will have to be treated as a separate unit for the purpose of the Act.

Industrial and Commercial buildings:

28. Sri Kailash Roy contended that the portion of land on which the cold storage is situate cannot be taken into consideration in determining the surplus land of the petitioner. The contention appears to be correct. "Land", as defined, means land which is used or capable of being used for agriculture or horticulture purpose. Lands on which permanent structures or buildings stand (except homestead) are not lands which are used for agricultural or horticultural purpose, nor are they capable of being so used. Capable of use in this context does not mean that it is capable of use after removal of permanent structures. Of course, this would not apply to temporary or flimsy structure or lands which are waste or where shrubs etc., are presently growing.

Annulment of transfer:—

29. Learned counsel for the petitioner contended that there were some transfers which were being illegally ignored. It is, therefore, necessary to examine the relevant provision being Section 5 (iii) of the Act (as amended). Section 5 (iii) is as follows:—

"5 (iii). The Collector shall have power to make enquiries in respect of any transfer of land by a land-holder whether made by a registered instrument or otherwise, made after the 22nd day of October, 1959, and if he is satisfied that such transfer was made, with the object of defeating, or in contravention of the provisions of this Act or for retaining, benami or farzi, land in excess of the ceiling area, the Collector may after giving reasonable notice to the parties concerned to appear and be heard, annul such transfer and thereupon the land

shall be deemed to be held by the transferor for the purposes of determining the ceiling area he may hold under this section."

A mere reading of the section which is clear and unambiguous leads to the following conclusions:—

(a) That transfers made prior to 22nd day of October, 1959 cannot be annulled under this provision. It is only transfers made after that date that are capable of annulment under the aforesaid provision.

(b) Annulment is possible only on existence of certain specified circumstances. They are—

(i) Where the transfer is benami or Farzi;

(ii) Where the transfer has been made with the intention of defeating the provision of the Act. Such intention must be present on the date of transfer;

(iii) Where the transfer is such as defeats the purposes of the Act.

It is only on existence of the conditions aforesaid that annulment is permissible under the Act.

30. Where the Collector is of the opinion that certain transfer should be annulled under Section 5 (iii) he has to issue notice to the transferee and such other person or persons who he may think should be given notice of the annulment proceeding. The parties in the annulment proceeding are entitled to have a reasonable opportunity of being heard.

31. I would, however, like to make it clear that for the purpose of annulling a transfer it is not always necessary that the proceeding should first be started and concluded before a transfer is annulled. In my view, when a proceeding under the Act is pending against a land-holder it would be permissible to issue notice to the transferee and other persons concerned and in that very proceeding decide the question whether such transfer comes within the mischief of Section 5 (iii) of the Act.

32. It is proper to state as to what would be the effect of annulment. In my opinion, when a transfer is annulled, or for that matter a family arrangement or partition is ignored, holding it to be benami or farzi or made with the intention of defeating the provisions of the Act, land covered by such transfer or family arrangement, has to be treated as land of the members of Hindu family, who can be treated as land-holder within the meaning of the Act.

Fresh proceeding after amendment of the parent Act:—

33. Sri B. C. Ghose contended that so far as his case is concerned there could not be a second proceeding after the amending Act came into force, as the previous proceeding was pending. I do not think the contention is correct. When the ceiling has been lowered the Collector is entitled under the provisions of Sections 6 and 8 to require the return to be filed and thereafter to determine, in accordance with the provisions of the Act, whether the land-holder concerned has surplus land. The pendency of the previous proceeding will not affect the jurisdiction of the Collector to proceed in accordance with the provisions of the amended Act. His jurisdiction is not ousted on account of the pendency of an earlier proceeding.

Conclusion:—

34. I think it would be convenient to summarise my conclusions on the constitutional and legal aspects. They are:—

(a) The Preamble to the Constitution is not a source of substantive power, nor can the power legitimately exercisable by a competent legislature be held to be invalid and unconstitutional on the ground that in the exercise of power it has transgressed the principles laid down in the Preamble.

(b) The legislature had legislative competence to enact the impugned law.

(c) The impugned provision has been enacted to give effect to the Directive Principles of State Policy engrafted in the constitution:

(d) The Act, both before and after the amendment, is immune from challenge for violation of provisions of Part III of the Constitution in view of Article 31-B of the Constitution and in view of the fact that both the parent Act as also the amending Acts have been included in the ninth Schedule to the Constitution.

(e) Bihar Act 1 of 1973 is a valid piece of legislation and suffers from no constitutional infirmity.

(f) Section 8 of the Act & Rule 8 of the Rules, as at present enacted and framed, are meant to be obeyed, the violation of either of them, if raised at appropriate stage, and in appropriate cases, may entitle the court to interfere and require obedience to those provisions by the authorities.

(g) The infraction of Section 8 and Rule 8, aforesaid, however, does not per se invalidate subsequent actions validly,

taken by the authorities nor does it invalidate the publication of draft statement u/s 16 (1) of the Act. Objection if any, raised to the draft statement has to be disposed of in accordance with law.

(h) 'Homestead' & 'Pasturage' come within the definition of "land". They too must be taken into consideration while determining whether a land-holder has surplus land.

(i) The unit for the purpose of ceiling law is "family" as defined in Section 2 (ee). All major members of Hindu family, who are entitled to be treated as land-holder within the meaning of the Act, have to be treated as a separate unit for the determination of the surplus land under the Act, irrespective of the fact whether or not there has been a partition in the family.

(j) Notice should ordinarily be issued to all such persons who are entitled to be treated as a separate unit for the purpose of the Act, although they may be members of the joint family. The consequence of non-issue of notice will depend on the facts of each case.

(k) Religious or charitable endowments or trusts have to be treated as separate units for the purpose of the Act.

(l) Section 5 (iii) of the Act does not apply to transfers made on or before 22nd day of October, 1959, nor does it apply to bona fide transfers. It is only applicable where transfer is (a) benami or farzi, (b) made with the intention of defeating the provisions of the Act and (c) in contravention of the provisions of the Act. Such transfers can only be ignored after they have been annulled in accordance with the provisions of Section 5 (iii) of the Act.

(m) Even where a transfer is annulled, or for that matter any partition or family arrangement is legally ignored, being benami or farzi or made with the intention of defeating the provisions of the Act, the land covered by such transfer etc., has to be treated as land of the members of the Hindu family, who are to be treated as land-holder within the meaning of the Act.

(n) The fact that a proceeding prior to amendment introduced by Act 1 of 1973 is pending does not bar the initiation of fresh proceeding after the amendment. If such a proceeding is started it has to be disposed of in accordance with the provision of the Act as it stands after the amendment.

(o) Lands on which permanent buildings, other than homestead as defin-

ed in the Act, stand are not covered within the definition of 'Land' and have, therefore, to be excluded from consideration in determining the surplus area under the Act.

35. Having given in brief my conclusion regarding the legal aspect I may point out what we have noticed a somewhat anomalous position under the Act. The right to exercise option has been given under Section 9 of the Act. This has to be exercised within 3 months of the publication of notice under Section 6 of the Act. It appears to me that the proper stage to permit option to be exercised is after the rights of the land holder have been determined by the Collector. It is, however, a matter which requires the consideration of the legislature and the Government,
C. W. J. C. No. 74 of 1974.

36. I have already dealt with the legal and constitutional objections raised by Sri B. C. Ghose on behalf of the petitioners, and have not found merit in any one of them. The original records of the case were also available and we have perused the order (which order was not made Annexure to the writ application) by which the Ceiling area has been determined. The order indicates that the two major members in the joint family have been treated as separate units. This is in conformity with the view that I have taken. There is thus no legal error in the order. In the writ application it is asserted that the lands of the petitioners are not Class I lands and have wrongly been so treated. At the time of argument the learned counsel did not raise this question presumably because it was a contentious question of fact and this Court, in the circumstances, would not have been inclined to go into factual aspects. I, therefore, do not express any opinion on the factual aspects. Subject to the observations made above, this application is fit to be dismissed.

C. W. J. C. 1460 of 1974:—

37. So far as this writ application is concerned I have found that there is no merit in the contentions raised except on two points, namely, (i) that a religious endowment has to be treated as a separate unit, and (ii) that lands on which there are buildings other than homestead are not covered within the definition of "Land". The contention of the petitioners is that there is in existence a valid religious endowment, and further that on a portion of the lands of the peti-

tioners there are buildings which are not covered by the expression "Land". Since these are questions of facts I do not propose to determine them, particularly in view of the fact that the petitioners have right of objection under Section 10 (3) of the Act. Objection, if filed, will have to be determined in the light of the enunciation of law as laid down in this judgment. Subject to these observations this application is also fit to be dismissed.

38. Before finally concluding I may observe that I have summarised at one place not only the Constitutional aspect but also those relating to interpretation of various sections of the Act—aspects which arose during the course of argument in the firm hope and belief that a correct appraisal of the various provisions will help the authorities to so administer the law as would lead to speedy implementation of the ceiling law. It is needless to emphasise that it is only a correct implementation of the law which advances the will of the legislature, prevents avoidable litigation, and accelerate the distribution of land to the poor and deserving section of the community.

39. In the result, subject to the observations made, both the writ applications are dismissed, but in the circumstances without costs.

NAGENDRA PRASAD SINGH, J.:—
I agree.

Applications dismissed.

AIR 1976 PATNA 267

B. D. SINGH, J.

Kapildeo Narayan Singh, Petitioner v. The State of Bihar and another, Opposite Parties.

Civil Writ Jurisdiction Case No. 1118 of 1973, D/- 23-2-1976.

(A) Constitution of India, Article 311 (2) — Reduction in rank — Headmaster reverted as Assistant teacher without notice — No appointment order was issued — He was temporarily holding that post being a seniormost teacher — Held, in the absence of appointment letter it could not be said that he was holding a substantive post — Reversion to substantive post could not be said to be bad and Article 311 (2) held not attracted. AIR 1976 Pat 53 and AIR 1972 SC 2170, Distinguished; AIR 1972 SC 1329, Followed.

(Para 5)

ET/FT/B656/76/PNK/LGC

(B) Constitution of India, Article 226 — Proceedings under — Question of fact — Petitioner challenged his reversion from Headmaster to the post of Assistant teacher by School authorities — Appointment as Headmaster was controverted — Held the appointment as a Headmaster being a disputed question of fact, the Court could not investigate it in its writ jurisdiction. (Para 5)

(C) Constitution of India, Article 226 — Writ petition — Suppression of material facts — Petition held not maintainable.

Where the petitioner who preferred writ petition against his reversion did not disclose the fact that he had filed a title suit in a Civil Court against the show cause notice and that he had obtained a temporary injunction and at last he had withdrawn the said suit,

Held that the petition was not maintainable on this ground of suppression of material facts. The petitioner was bound to disclose that fact in his petition.

(Para 6)

(D) Constitution of India, Article 226 — Parties to writ proceeding — Non-joinder of necessary party — Held petition was not maintainable. (Civil P. C. (1908), Order 1, Rule 9).

Where, the petitioner who was interim Headmaster filed a writ petition against his reversion, but failed to implead the Headmaster who was asked to take charge from the petitioner it was held that the petition was not maintainable in absence of the present Headmaster who was a necessary party and who would have materially suffered by issue of writ.

(Para 6)

Cases Referred: Chronological Paras

AIR 1976 Pat 53 = 1975 BLJR 809 5

AIR 1972 SC 1329 = 1972 Lab IC 665 5

AIR 1972 SC 2170 = 1972 Serv LR 795 = 1972 Lab IC 1280 5

Sanat Kumar Chattopadhyaya and D. R. Pandey, for Petitioner; K. N. Singh Standing Counsel No. 4 with Madan Mohan Pd. Singh J. C. to Standing Counsel No. 4, for Opposite Parties.

ORDER:— This application by Kapildeo Narain Singh under Articles 226 and 227 of the Constitution of India is directed against the order dated the 9th March, 1973 (Annexure-4) to the Writ application passed by the District Superintendent of Education, Gaya, respondent No. 2, whereby according to the petitioner he was demoted from the post of the Head Master to the post of the

assistant teacher of Middle School, Bandhua, P. S. Mufassil in the District of Gaya. The petitioner has therefore prayed for quashing the said order contained in Annexure '4' and for a direction that the petitioner be deemed to have been working as Head Master in the said school against a permanent vacancy and for further direction to respondents 1 and 2 to settle the pay and allowance of the petitioner, as Head Master of the School.

2. In order to appreciate the point involved in this application it will be necessary to state briefly the facts as stated by the petitioner in his application and as stated on behalf of respondent No. 1 in the counter-affidavit. The petitioner has stated in his application that he passed the Intermediate Examination from the Bihar University in the year 1960. Subsequently he took a teacher's training course and passed the same from the Teachers Training School, Kodarma, Government of Bihar. The petitioner was appointed as an Assistant Teacher of the said School by the District Superintendent of Education, Gaya, respondent No. 2, under Rule 45 of the Bihar Primary and Middle Education Rules 1961 on the 21st of November, 1966 and accordingly he joined his post on the 30th of November, 1966. The Service condition of the petitioner is governed by Bihar and Orissa Local Self Government Act, the Bihar Education Code, 1961 and also various circulars issued from time to time by the Education Department, Government of Bihar. The petitioner got the scale of I. A. trained since the date of appointment in accordance with the circular dated the 29th of July, 1966, from the Education Department of the Government of Bihar. The circular specifically prescribed that only Head Master with I. A. trained qualification or B. A. trained qualification and only one of the Assistant teachers having I. A. trained qualification are eligible for scale as prescribed by the Government of Bihar. The petitioner as per practice being the senior-most in qualification and fit for the post of Head Master under the Circular dated the 29th July, 1966, of the Education Department was appointed against the substantive vacancy in the post of Head Master on the 13th October, 1967. The petitioner from time to time was representing before the authorities to allow him to enjoy the headship allowance of Rupees 5/- which was due since the date of his appointment as Head Master. But he was always assured that the matter was

under consideration, and he was also told that his service book had not been made ready; as long as it was not decided whether he had been officiating or working against the permanent vacancy the same could not be settled. The petitioner has annexed copy of his representation dated the 28th June, 1968, as Annexure '1' to the writ petition. Finally, in the year 1970, the matter in question was decided by the authority and accordingly the petitioner was supplied with a service book. The service book bore as many as 15 columns, and the same contained full particulars in regard to his appointment, scale and other related matters. In column 2 of the service book the appointment of the petitioner to the post of Head Master was described as substantive and temporary. In column 4 the petitioner was given his pay in the substantive post. The said service book was duly signed by the Deputy Inspector of Schools from the year 1970 as prescribed in column 9. According to the petitioner the service book confirmed that the petitioner was appointed as Head Master against substantive, and temporary vacancy from 1st April, 1967. The petitioner was and is given the pay in substantive post. The petitioner was not appointed against the officiating vacancy and he was not given additional pay for officiating. The petitioner had been given scale and pay as revised by the Government of Bihar from time to time as in the substantive post. The petitioner passed his graduation examination in the year 1971 from the Magadh University and on his representation he was allowed the scale of B. A. trained from 1st January, 1972, as per letter dated 24-2-1972 from the District Superintendent of Education, a copy of which is made Annexure '2' to the application. The petitioner enjoyed headship allowance from July, 1970 and so far his claim prior to that he has received a letter dated the 13th July, 1972, from respondent No. 2, whereby he had directed the appropriate authorities to produce claim of the petitioner before him to consider on the question of payment of his dues vide his letter dated the 13th July, 1972, (Annexure '3'). Thereafter the petitioner received the impugned order dated the 9th March, 1972 (Annexure '4'). Aggrieved by the said order the petitioner moved to the Deputy Director of Education, who was pleased to pass his order dated the 17th March, 1973, directing the District Education Officer not to deduct his salary

arbitrarily and allow the petitioner to enjoy the previous scale as granted before. He also observed that it was essential to give opportunity to the petitioner to show cause. The petitioner also represented the matter to the District Superintendent of Education namely respondent No. 2 on the 29th of June, 1973. A copy of the said representation is marked as Annexure '5' to the writ petition but it bore no result. On these allegations the petitioner has come to this court. He filed his application on 3rd of September, 1973, which was admitted on the 5th September, 1973. However, this court had ordered that the prayer for stay of the operation of the impugned order would be considered after the appearance of the respondent.

3. On the 2nd of May, 1974, a counter-affidavit was filed on behalf of the State of Bihar respondent No. 1. It will be relevant to quote paragraphs 5 and 6 of the counter-affidavit in extenso.

"5. That in regard to the contents of paragraph 7 of the petition I have to state that the plaintiff was never appointed as Head Master of any Middle School. As per instructions issued by the Department from time to time a person is appointed by the District Superintendent of Education as Head Master of a Middle School. Regular appointment is issued to the person concerned after he is promoted and posted as Head Master of a school. The plaintiff was appointed as an Assistant Teacher in I. A. Trained scale. He was later posted in the Middle School, Bandhua (Manpur) where Sri Lakhmeshwar Pd. was the Head Master. The Head Master was transferred under orders of D. P. I. to Monghyr District vide Memo No. 4231 dated 30-9-1967 and was directed to hand over charge to the seniormost Teacher Sri Kapildeo Narain Singh. Later on Sri Raj Kumar Singh was deputed as Head Master in that School vide D. S. E's. Memo No. 1489 dated 13-6-1968 but the plaintiff did not hand over charges. Later on a show cause was issued to the petitioner for this reason but he filed a suit in the Court of Munsif, Gaya from where a temporary injunction was issued on 23-8-1968 which was later on vacated on 20-8-1969 after hearing the facts (copy enclosed). At a later stage the case was withdrawn by the petitioner.

6. That it is not a fact that the petitioner was appointed as Head Master at any time but continued to hold charge of the school in the absence of a permanent

Head Master. A copy of the relevant order is annexed and marked as Annexure 'A'."

4. Subsequently the petitioner filed a rejoinder on the 24th of July, 1974, to the counter-affidavit filed on behalf of respondent No. 1, wherein it was admitted that Title Suit No. 145 of 1968 was filed, and therein it was also mentioned the circumstances, under which the suit was withdrawn. In this connection the petitioner has also filed a copy of the application filed in the court below and the same is marked as Annexure '6'. The order of the Munsif allowing the petitioner to withdraw the suit on 12th January, 1970, is contained in Annexure '7'.

5. Learned counsel for the petitioner has assailed the impugned order and raised the following point for consideration by this Court.

The petitioner having been appointed to a substantive post as Head Master of the school was reverted to the post of an assistant teacher without giving an opportunity to the petitioner is violation of the principles of natural justice. In order to find support to his submission he has relied on the case of Mahendra Narain v. Sub-Divisional Education Officer-cum-Municipal Education Officer, (AIR 1976 Pat 53) where it was observed that where a Head Master was reverted to the post of Assistant Teacher without giving him an opportunity to show cause it violated the principle of natural justice, and he was entitled to notice as it amounted to reducing in rank of the petitioners without giving them any notice to place their case. Learned counsel appearing on behalf of respondent no. 1 submitted that the observation of his Lordship in that case is not applicable to the instant case. According to him in that case his Lordship was not considering the case of a head master, who was holding the post only on the basis of the stop-gap arrangement. In the present case, he submitted, that the petitioner was not substantively appointed, as head master of the school, as it would be apparent from Annexure 'A' of the counter-affidavit. He also submitted that soon after the petitioner took charge being a seniormost teacher in place of the out-going head master, one Raj Kumar Singh was deputed by the authority to take charge as the head master of the school under letter dated the 13th of June, 1968, but the petitioner did not allow him to take charge thereof. Since the petitioner had filed a title suit the authority did not force the

petitioner to hand over the charge to Raj Kumar Singh. On the other hand learned counsel for the petitioner submitted that various entries contained in various columns of the service book clearly indicated that the petitioner was holding a substantive post of the head master. He also in this connection drew my attention to the statement made by the petitioner in paragraph 18 of the application, wherein it was stated that the Deputy Director of Education under his order dated the 17th March, 1973 has directed the District Education Officer not to deduct his salary arbitrarily. That according to him also indicated that the relevant authority was also treating the petitioner as head master of the school.

In my opinion, in the absence of any appointment letter, it would be difficult to hold that the petitioner was holding a substantive post or he was appointed as head master of the school. Annexure 'A' clearly indicates that the out-going head master was directed to hand over charge to the seniormost teacher. At the relevant time the petitioner being the seniormost teacher of the school charge was handed over to him by the outgoing head master. From the statement made in the counter-affidavit in paragraph 5 it is also clear that Raj Kumar Singh was deputed as head master of the school by the order of the District Superintendent of Education under his letter dated the 13th June, 1968 to take charge from the petitioner but due to the filing of the title suit the petitioner took advantage and did not obey the order of the District Superintendent of Education. Since in the counter-affidavit the fact that the petitioner was holding a substantive post is controverted, it becomes a disputed question of facts, which cannot be investigated in a writ jurisdiction by this Court. Learned counsel for the petitioner has also referred to the case of *State of Mysore v. R. R. Kulkarni* (1972 Serv LR 795) = (AIR 1972 SC 2170), where it was observed that the orders were quashed for violation of principle of natural justice even in case of persons holding officiating post. In my opinion the facts of that case were entirely different from that of the present case. In paragraph 7 of the judgment in that case it was mentioned that the reversion orders might have sprung from an oblique motive and the power of reversion was used for collateral or extraneous purpose. In the instant case nothing has been shown that the impugned order was passed for extraneous

purpose. Reference may also be made to the case of *Union of India v. Gajinder Singh*, (AIR 1972 SC 1329) where it was observed that appointment to a post on officiating basis was from the nature of employment itself of a transitory character and in the absence of any contract or specific rule regulating the conditions of service to the contrary, the implied term of such an appointment was that it was terminable at any time and in that view of the matter reversion to substantive post cannot be said to be bad and Article 311, clause (2) was not attracted.

6. Apart from the merit of the case, I find that the application filed by the petitioner is not maintainable as I find there is suppression of material facts. In the main application the petitioner has not stated anything with regard to the title suit which he had filed, and which he had withdrawn. Those facts saw light only after the counter-affidavit was filed on behalf of respondent No. 1. If no counter-affidavit would have been filed then in that case these facts would not have been stated by the petitioner. After the counter-affidavit, the petitioner in the rejoinder admitted that such suit was really filed by the petitioner. No doubt in the rejoinder he has given the circumstances under which the withdrawal petition was filed by the petitioner in that suit. But in my opinion it is not enough. It was his bounden duty to state those facts in the main application itself. It is well settled that due to the suppression of the material facts by the petitioner in the main application the application under the writ jurisdiction is not maintainable and that by itself may be a ground for dismissing the application filed by the petitioner. Besides, in the present case, according to me he ought to have also impleaded Ram Kumar Singh who was asked by the relevant department to take charge from the petitioner as the head master of the school. He was a necessary party. It may be seen that in the title suit, he was impleaded as one of the defendants, but while filing the writ application for the reasons best known to him, he left him out completely. According to me if the application of the petitioner would have been allowed he would have materially suffered. Therefore, the application of the petitioner was also not maintainable in the absence of Raj Kumar Singh.

7. In the result, after careful consideration, I dismiss the application and affirm the impugned order contained in

Annexure '4'. In the circumstances of the case however there will be no order as to costs.

Petition dismissed.

AIR 1976 PATNA 271

MADAN MOHAN PRASAD, J.

(On difference of opinion between S. P. Singh and Ali Ahmad, JJ.)

Subrat Shankar Bhaduri and others
Petitioners v. The Bihar State Sunni
Waqf Board and others, Respondents.

Civil Writ Jurisdiction Case No. 1578
of 1973, D/- 7-1-1976.

(A) Waqf Act (1954), Section 36-B (1) — Interpretation of — Jurisdiction of Board to issue requisition under Section 36-B can be exercised only in respect of property mentioned in register of waqfs under Section 26 and transferred in contravention of Section 36-A.

Per Madan Mohan Prasad, J.: (agreeing with S. P. Singh, J. and dissenting from Ahmad, J., on difference between them).

The words entered as such in Section 36-B qualify the words "immovable property" and not the word "waqf". It follows that the property in respect of which the requisition may be issued by the Board must be a property entered in the register maintained under Section 26 and in the absence thereof the board has no jurisdiction to issue a requisition under Section 36-B. The requirement of Section 36-B is that the property and not the name of the waqf should be mentioned in the Register of wakfs. Section 26 itself shows that the Register of Waqfs is not required to contain any name of the waqf, but the class of the waqf, name of the Mutawalli, rule of succession, particulars of waqf property and title deeds, particulars of scheme of administration, or such other particulars as may be prescribed. Therefore, the mere mention of the name of a waqf is not the requirement of Section 26 and would be meaningless unless the other particulars are also entered in the register, most important of them being the particulars of the waqf properties. (Paras 12, 13)

Held (i) that in the present case the land given in exchange to the petitioners not having been entered in the Register of Waqfs which had to be maintained under Section 33 of the Bihar Waqfs Act,

1947 which was in force at the relevant time prior to the application of the Waqf Act, 1954 in April 1973, to the State of Bihar, the powers of the Board under Section 36-B of the Act could not be exercised and the order passed by the Board must be held to be without jurisdiction. (Para 15)

(ii) that the Board has to make an enquiry as prescribed by Rules framed under Section 36-B which came into force on the date of its publication on 2-11-1974. The rules not having been framed or come into force when the impugned order was passed, obviously there was no enquiry by the Board as required under Section 36-B. On this ground alone apart from any other, the order of the Board has got to be quashed. (Para 16)

(B) Waqf Act (1954), Section 36-B — Enquiry by Board while exercising powers under Section 36-B — Compliance with elementary principles of natural justice essential — Effect of non-compliance.

When the Board was deciding the question as to whether the property belonged to a Waqf and had been illegally transferred, it could not but be exercising a quasi-judicial function. The minimum necessity therefore was to give notice to the petitioners and to give them a proper hearing before exercising the power of requisition. The order under Section 36-B was, therefore, in clear violation of the elementary principles of natural justice. (Para 17)

Cases Referred: Chronological Paras
AIR 1973 Mys 189 = (1973) 1 Mys LJ 103 18

AIR 1967 Raj 1 = 1966 Raj LW 582 18

J. C. Sinha and A. C. Sinha, for Petitioners; S. S. Asghar Hussain, M. A. Shahabuddin, Abdus Salam and G. P. Sanyal, for Respondents.

ORDER:— This application has been placed before me on a difference having arisen between two learned Judges of this Court in respect of the relief claimed by the petitioners by way of quashing an order passed by the Bihar State Sunni Waqf Board (hereinafter referred to as 'the Board') under Section 36-B of the Waqf Act of 1954 (hereinafter referred to as 'the Act').

2. It is not necessary to state at any length the facts giving rise to the present application, for, they have been set out in the judgment of my learned brother, Ali Ahmad, J. It will be sufficient to state that the petitioners claim

certain lands to have been transferred to them by exchange in the year 1965 by some persons, viz., Ghaznafar Raza Choudhary, Qaiser Raza Choudhary and their mother. These lands are said to have been originally settled with those persons by way of raiyati settlement between the years 1923 and 1927. These lands are alleged to have been the bakasht lands comprised in the tauzi of which the grandfather of the aforesaid Ghazanafar and Quaiser, was the proprietor and in respect of which he had created a Waqf. The Board treating the property as a waqf property and treating it as one transferred to the petitioners in violation of the provisions of Section 36-A of the Act, asked the Collector in accordance with Section 36-B to get possession of the property delivered to it (Annexure '7'). Accordingly the Sub-Divisional Officer issued an order to that effect (Annexure '8').

3. It appears that both the learned Judges who heard this application, namely, Mr. Justice Shambhu Prasad Singh and Mr. Justice S. Ali Ahmad, were agreed on the point that the Sub-Divisional Officer had no jurisdiction to issue the order aforesaid and as such they directed issuance of a writ quashing that order. In respect of the order of the Board (Annexure-7), however, the two learned Judges, as stated earlier, came to different conclusions. Ahmad, J., rejected the prayer for quashing this, whereas S. P. Singh, J., allowed the prayer.

4. I will do well to state first the findings, which are relevant now, arrived at by the learned two judges. The point urged firstly was that Section 36-B had no application to cases where the property is in the hands of strangers. Ahmad, J., repelled this argument on the ground that the petitioners being transferees from the Mutawallis could not be said to be 'strangers'. The next question agitated was whether these lands were waqf properties. Ahmad, J., held that it was not possible to decide this issue of fact in this writ proceeding. It was next contended before the learned Judges that the Civil court in a suit filed by the Board in respect of this very property, during the hearing of a receivership application, had held that the lands were not Waqf Properties at all and, therefore, the matter should have been referred under Section 27 (as amended by the schedule to the Act) to the Civil Court. This argument was also repelled by Ahmad, J. He further held that it was

open to the Board to make an enquiry under Section 36-B and in the present case the Board, seemed to be satisfied after making enquiry in the prescribed manner that the properties were waqf properties and as such action under Section 36-B of the Act was not bad on that account. Shambhu Prasad Singh, J., did not give any specific findings on these points.

5. The contention in respect of which there was a clear difference of opinion between the two learned Judges was that unless a property was entered as a waqf property in the Register of Waqfs maintained under Section 26 of the Act, an order could not be passed under Section 36-B of the Act in respect of it. Ahmad, J., repelled this argument whereas Shambhu Prasad Singh, J., accepted it. The learned Judges, however, proceeded on the footing that in the present case the lands in question were not specifically entered in the register as required under Section 26 of the Act. Ahmad, J., held that if the waqf is registered as such, it should be enough to attract the operation of Section 36-B. The reasons which he has given for coming to that conclusion are as follows. Firstly, that the intention of the Legislature being to preserve the properties of a waqf and to make its recovery easy without going through the complicated process of civil suits, the wordings of Section 36-B must be so interpreted as to mean that the requirement thereof was only the registration of the waqf in the register under Section 26 and not the entry therein, of the property as waqf property. Secondly, he has said that the registration of waqf is mandatory and final, but not so thereof the entries in that register which can be amended in view of the provisions of Section 28.

6. Shambhu Prasad Singh, J., however, came to the conclusion that the wordings of Section 36-B clearly pointed that the property must be mentioned as waqf property in the Register of Waqfs maintained under Section 26 and a mere registration of the waqf would not be enough to attract the operation of Section 36-B of the Act. He relied on the wordings of Section 26 requiring the particulars of waqf properties and Section 27 (1) (as in the schedule to the Act), for coming to this conclusion. He further found that Section 28 of the Act could not be relied on for coming to the conclusion to which brother Ahmad came. In his opinion further there being no provision for

any appeal against the order of the Board under Section 36-B the Legislature could not have intended to allow this order to go unchallenged, which would be the result if the interpretation put by Ahmed, J., on Section 36-B were to be accepted. He held that once there is a dispute in respect of the question whether the property is a waqf property and it is not entered as waqf property in the register under Section 26 of the Act, the Board has no jurisdiction to issue a requisition to the Collector under Section 36-B of the Act.

7. It is not necessary for me to quote the relevant sections, for, they have all been reproduced in the judgment of brother Shambhu Prasad Singh. In order, however, to find out, the correct interpretation of Section 36-B I would like to begin with the definition of "waqf" which is to be found in Section 3 (1) of the Act, according to which "waqf" means "the permanent dedication by a person professing Islam of any moveable or immoveable property for any purpose recognised by the Muslim law as pious, religious or charitable....." It is thus to be borne in mind that the true meaning of the word "waqf" is 'dedication of property'. It is not to be confused with an organisation or institution bearing the name of "waqf". The conception of "waqf" is, therefore, inextricably allied with a property. There is thus no waqf without a property. Next we find that the Act according to its preamble is an Act to provide for the better administration and supervision of waqf. Obviously it can mean nothing other than the better administration and supervision of properties which are the subject-matter of permanent dedication. I will now do well to examine the scheme of the Act. The definition of a Mutawalli given in Section 3 (f) includes any person or committee for the time being Managing or administering any waqf property as such. Next we find that in Chapter II of the Act, relating to survey of Waqfs, Section 4 provides for "a survey of waqf properties existing in the State". Sub-section (3) of this section requires the Commissioner to submit a report amongst other things in respect of the gross income of the property comprised in each waqf (clause C) and the amount of land revenue, cesses, rates and taxes payable in respect of such property (clause d). The next section, Section 5 provides for a publication of list of waqfs existing in the State "containing such particulars

as may be prescribed". Section 6 provides for a case where there is dispute regarding waqf. It lays down that "if any question arises whether a particular property specified as waqf property in a list of waqfs published under sub-section (2) of Section 5 is a waqf property or not or whether a waqf specified in such list is a Shia Waqf or Sunni Waqf, the Board or the Mutwalli of the Waqf or any person interested therein may institute a suit in a civil Court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final" A reading of Sections 5 and 6 together would show that the list of waqfs published under sub-section (2) of Section 5 should contain a list of the properties of the waqfs and if any dispute arises as to whether a particular property specified therein is a waqf property or not, the question has to be decided by a civil court.

8. We may now turn to Chap. III. According to Section 9 (1-A) if the Shia Waqfs in any State constitute in number more than 15% of all the waqfs in the State or "if the income of the properties of the Shia Waqfs in the State constitutes more than 15% of the total income of the properties of all the waqfs in the State, the State Government may establish a Board of Waqfs, each for Sunni Waqfs and for Shia Waqfs and in such a case the provisions of the Act shall have effect as if the amendments specified in the schedule have been made". The amendment in the schedule includes a substituted Section 27. I will now come to the provisions which deal with establishment of Boards and their functions. The functions of the Board which are enumerated in Section 15 of the Act include "to ensure that the income and other property of waqfs are applied to the objects and for the purpose for which such waqf was created (Cl. (b) of sub-section (2)), to take measures for the recovery of lost properties of any waqf (cl. (h) of sub-section (2)), to sanction in accordance with the Muslim law any transfer of immovable property of a Waqf (clause (j)), to call for returns etc., with respect to the waqf property (clause (l)) and to inspect or cause inspection of waqf properties (clause (n))."

9. We now turn to Chapter IV dealing with registration of waqfs. Section 25 requires registration of waqf at the office of the Board. Sub-section (2)

thereof provides for application to be made by the Mutwalli and other persons mentioned therein. Sub-section (3) provides that an application shall contain certain particulars including (a) the description of the waqf properties sufficient for the identification thereof and the gross annual income from such properties (clause (b)). Sub-section (7) provides that the Board may make enquiries regarding the genuineness and validity of the application and the correctness of the particulars. Then comes Section 26 which says that the Board shall maintain a Register of Waqfs which shall contain amongst other things particulars of all waqf properties and all title deeds and documents relating thereto (clause (d)). Reading these two sections it is obvious that the result of an application made under Section 25 and the registration of a waqf thereunder leads to the result that a Register of Waqfs is prepared which must contain, in view of clause (d), the particulars of all waqf properties. Next, Section 27 (unamended) provides that the Board may itself collect information regarding any property which it has reason to believe to be waqf property and if any question arises whether a particular property is a waqf property or not or whether a waqf is a Sunni Waqf or a Shia Waqf, it may after making such enquiries as it may deem fit, decide the question and the decision of the Board on such a question would be final unless revoked or modified by a civil court. Section 28 next provides that the "Board" may direct the Mutawalli to apply for the registration of a waqf or to supply any information regarding a waqf or may itself cause the waqf to be registered or may at any time amend the Register of Waqfs. Again, reading Sections 25 to 28 together it is further obvious that apart from the informations given by the Mutwalli or other persons regarding properties of a Waqf the Board can itself collect information regarding such properties and if there is a dispute whether such a property is a waqf property, it can decide the matter subject to the decision of the Civil Court. In the State of Bihar, however, it is the amended Section 27 which has application. According to that section which is to be found in the schedule of the Act, if such a dispute arises the Board has to refer the question to a civil court of a competent jurisdiction. In other words, the Board has no jurisdiction to decide the matter which it would have had the amended Section 27 not

been applicable to this state. According to Section 28 again, the Board may direct a Mutwalli of Waqf to apply for registration. As I have said earlier, registration of a waqf includes, in view of Section 26, the registration of properties of a waqf. Thus, when Section 28 allows the Board to amend the Register of Waqfs the amendment may be either in respect of the nature of the waqf whether it is Shia or Sunni, it may be in respect of the name of the waqf, for instance, whether it is an Idgah or a Khanquah or a mosque or it may be in respect of the properties of the waqf.

10. Chapter V of the Act deals with Mutwallis and Waqf accounts. Section 36-A provides that no transfer of any immoveable property of a waqf by way of sale, gift, mortgage or exchange or lease for a period exceeding three years in the case of agricultural land or for a period exceeding one year in the case of non-agricultural land or building shall be valid without the previous sanction of the Board. Then comes Section 36-B. Without going into the question at the present moment whether it requires the property to be included in the register or not, it may be said that it provides that if the Board is satisfied after making any enquiry in such manner as may be prescribed that any immoveable property of a waqf has been transferred without the previous sanction of the Board in contravention of the provisions of Section 36-A, it may send a requisition to the Collector to obtain and deliver possession of the property to it. The Collector has then to pass an order directing the person in possession of the property to deliver the property to the Board. Under sub-section (4) the persons aggrieved by the order of the Collector may prefer an appeal.

11. It will thus appear from the provisions of the Act apart from what I have said in respect of the definition of the term "Waqf", that the Legislature has at all relevant points of time required the specification of the property of a waqf. This is required at the time of preliminary survey of waqfs under Section 4, publication of the waqf under Section 5, the establishment of a Board under Section 9, application for registration of a waqf under Section 25, the preparation of the Register of Waqfs under Section 26 and the decision of the dispute relating to a property under Section 27. In this background Section 36-B has to be interpreted.

12. Before I do so it will be relevant to point out the wordings of Section 36-A. This section invalidates transfer "of any immoveable property of a waqf" (underlining (here into quotation) mine). Section 36-B also relates to "any immoveable property of a waqf". These words are, however, followed by the words "entered as such in the Register of Waqfs maintained under Section 26". The point of difference between the two learned Judges is on the interpretation of the words "entered as such" and whether these words qualify the words "immoveable property" or the word "waqf". In my view, the question can best be answered by finding out what has to be maintained under Section 26, because the words "entered as such" are further qualified by the words "in the register of waqfs maintained under Section 26". Therefore, the pertinent question is to ask one as to what is the nature of the register maintained under Section 26. As I have said earlier, the answer is obvious. Section 26 provides a Register of Waqfs which contains particulars of the properties of the waqfs. To my mind "Register of Waqfs", in view of the definition of the word "waqf", can only mean a register of properties permanently dedicated for religious or charitable purpose. As I have said earlier, a waqf is not an organisation nor is it an institution. It is a dedication of property for pious and charitable purposes. Can one imagine mentioning a 'waqf' without mentioning the property which itself is the subject-matter of dedication? Can one speak of dedication without speaking of the property which is the subject-matter of dedication? The Register of Waqfs maintained under Section 26 is as explicitly required must contain the particulars of all waqf properties. I regret that I am unable to agree with brother Ahmad that the requirement of Section 36-B is that the name of the waqf should be mentioned in the register and not the property. With great respect, as I have pointed out, the words "entered as such" are qualified by the words "Register of Waqfs maintained under Section 26." The Register maintained, under Section 26, therefore, is not to contain the name of the waqf but the property of the waqf. If Section 36-B were to be construed in this background it would be apparent that the immoveable property of the waqf must be entered as such and not that the waqf should be entered as such.

I find myself in respectful agreement with brother Shambhu Prasad Singh that there would be no point in the Legislature saying that the waqf should be "entered as such". The register under Section 26 is the Register of waqfs. It will not contain any thing other than waqfs. Therefore, there is no question of any thing being entered therein except as a waqf. Therefore, the words "entered as such" could not qualify the word "waqf". They could only qualify the words "immoveable property" and this interpretation is meaningful. The other interpretation, with very great respect, will not give meaning to the provision of Section 36-B. Surely, the Board does not have to requisition any property other than a waqf property under Section 36-B, because that must be a property of the waqf which has been transferred in violation of Section 36-A. That is the requirement of both Sections 36-A and 36-B. Therefore, the Board could act only if it found that such an immoveable property was entered as such in the Register of Waqfs. If the property is not entered as such, then there would be no guarantee that the Board was asking for a delivery of a property belonging to the waqf. A summary method of recovery of property has been provided for. The Legislature must be deemed to have taken due caution in granting this power. Could it be that the Legislature intended that the Board could requisition delivery of any property about which it may have a suspicion that it might be a property of the waqf? If that were so, there would be no provision like Section 27. It seems to me that where the properties are not enumerated as properties of the waqf under Section 26 the Board has been given the right to collect information under Section 27 and to come to a decision and if it comes to the decision that it is waqf property it has power to amend the register under Section 28. It will be only after this stage is reached, in other words, when the property is mentioned as a waqf property in the register after the amendment under Section 28, that the Board may exercise the power given under Section 36-B and not till then. If the amended Section 27 applies, as it does in this state, once the Board collects information and if there is a dispute with regard to the property being a waqf property, it has got to refer it to the civil court and not until the decision is given by the civil court, can it be treated to be a property of the waqf and, therefore, the provision of Section 36-B

cannot be utilised by the Board till then. It seems to me, therefore, clear that the words "entered as such" qualify the words immovable property and not the word "waqf". I would, therefore, come to the conclusion that the property in respect of which the requisition may be issued by the Board must be a property entered in the register maintained under Section 26 and in the absence thereof the Board has no jurisdiction to issue a requisition under Section 36-B.

13. With very great respect I am unable to agree with the two reasons given by brother Ahmad for coming to his conclusion. As I have pointed out, firstly he has said that the register under Section 26 is final with respect of the "Waqf" but not in respect of other entries, namely, the properties which can be amended under Section 28 of the Act. In my view, Section 28 not merely enables the Board to make an amendment in respect of properties alone but it gives the Board the Power to amend it in respect of any other particular. It may be in respect of the nature of the waqf, the name of the waqf or in respect of the property of the waqf. The words of Section 28 are too general and, inter alia, it lays down that the Board may direct a Mutwalli to supply any information regarding a waqf and may at any time amend the Register of Waqfs. Therefore, there is nothing sacrosanct about "the waqf". In fact, it will appear from Section 26 itself that the Register of Waqfs is not required to contain any name of the waqf, but the class of the waqf, name of the Mutawalli, rule of succession, particulars of waqf property and title deeds, particulars of scheme of administration, or such other particulars as may be prescribed. Therefore, the mere mention of the name of a waqf is not the requirement of Section 26 and would be meaningless unless the other particulars are also entered in the register, most important of them being the particulars of the waqf properties. I am, therefore, unable to find anything in Section 28 which would lend support to the interpretation put upon Section 36-B by brother Ahmad.

14. In view of what I have said it is not necessary for me to go into the question as brother Shambhu Prasad Singh has done, whether or not the appeal provided for under sub-section (4) of Section 36-B is against the order of the Collector with a limited scope or not.

15. In view of the aforesaid, so far as the present case is concerned, it has to be decided on the footing that the lands in question were not entered as such in any Register of Waqfs maintained under Section 26 of the Act. In fact, the present Act came to be applied to this State of Bihar in April, 1973. Before that, there was in force the Bihar Waqfs Act, 1947. A Register of Waqfs had to be maintained even under Section 33 of the said Act. Under Section 57 of that Act the Mutwalli was required to furnish particulars of Waqf in a prescribed form. The Bihar Waqf Rules, 1956, framed under the rule-making power of the State Government under Section 79 of that Act provide in Rule 11 that the particulars to be given shall be contained in Form 1 (which is to be found as a schedule to the rules). This form also requires 'details of property held by waqf'. It will thus appear that the details of the present disputed property must be deemed not to have been given even under the law as it obtained in this State at the relevant time. Thus, the powers of the Board under Section 36-B could not be exercised in respect of the lands in dispute in the present case. The order of the Board must, therefore, be held to be without jurisdiction.

16. I would, however, like to add a few more reasons for coming to this conclusion. The first one is that Section 36-B requires the Board to make an enquiry in such manner as may be prescribed. It is well known that "prescribed" means prescribed by rules and the word is so defined in Section 3 (1) of the Act. It appears that the Rules framed under Section 36-B were themselves published in the gazette on the 2nd November, 1974. These Rules were to come into force with effect from the date of their publication in the Bihar Gazette. Thus, they would be deemed to have come in force on the 2nd of November, 1974. It appears, however, that the impugned order (Annexure '7') was passed on the 23rd of August, 1973, obviously, much before the coming into force of the Rules prescribing the manner of enquiry under Section 36-B. It is obvious that the enquiry is a condition precedent to the satisfaction of the Board with regard to the property having been transferred in contravention of Section 36-A. By no stretch of imagination can it be argued that without holding such an enquiry the Board could have exercised the power under Section 36-B nor can it be urged

that there could have been an enquiry as envisaged under Section 36-B unless it were in accordance with the rules. The rules not having been framed or come into force at the relevant date, obviously there was no enquiry by the Board as required under Section 36-B. It seems that this aspect of the matter was not drawn attention to. On this ground alone apart from any other, the order of the Board contained in Annexure 7 has got to be quashed.

17. There is another aspect of the matter, viz., whether there has been any enquiry worth the name in this case before the Board purported to exercise its power under Section 36-B. Admittedly no notice was issued to the petitioners even though the fact was known to the Board that they had raised a dispute to the effect that the lands in question were not waqf properties. This fact had come to light when the petitioners had raised the point during the pendency of the title suit and the civil court had in the interlocutory proceeding regarding receivership, held it to be a property not belonging to the waqf. There is no escape from the conclusion thus that the petitioners were not given a chance of hearing, deliberately, even though they had laid their claim to the property in question. It appears from the order itself that enquiries were made from all and sundry and not from the person who claims an interest in the property in his own right. Even though the rules in respect of enquiry under Section 36-B came to be in force subsequently, it can be looked into for the purpose of finding out whether the rule-making authority could have desired an arbitrary exercise of the powers under Section 36-B by the Board. Rule 19 of the Rules which came into force on the 2nd. November, 1974 requires notice to the person concerned, enquiry, evidence and report to the Board. Apart from the requirement of these Rules, when any Tribunal is exercising judicial or quasi-judicial functions it has to conform to the elementary rules of natural justice. When the Board was deciding the question as to whether the property belongs to a waqf and has been illegally transferred, it could not but be exercising a quasi-judicial function. The minimum necessity therefor was to give notice to the petitioners and to give them a proper hearing before exercising the power of requisition. The order under Section 36-B is, therefore, in clear violation of the elementary principles of

natural justice. No authority is needed for the proposition that these principles have an application in the domain of quasi-judicial functions. Recent decisions of the Supreme Court have extended their application even to the domain of administrative orders. In the present case, therefore, it is crystal clear that the impugned order was passed in violation of the rules of natural justice and on that ground also it has to be quashed.

18. It is not necessary for me in view of what I have said above to go into the various other questions raised by Mr. J. C. Sinha appearing for the petitioners. In fairness to him, however, I would do well to mention them. Firstly, he laid great stress on the point that Sections 36-A and 36-B of the Act came to be applied to Bihar in April, 1973, but in the present case the transfer at the initial stage had been made by the Mutwalli in favour of the original settlees, the vendors of the petitioners, and subsequently to the petitioners in the year 1965 when Section 36-A was not on the statute book. It has been said that this provision creates an absolute bar to the right of transfer without the permission of the Board and the law obtaining in the year 1965 was the Bihar Waqf Act of 1947, Section 43 of which enabled a transfer by the Mutwallis without previous sanction in case the waqf deed itself granted an express power of such transfer. It has been urged by him that in the present case the right to settle bakasht and waste lands with the tenant is expressly given by the document creating the waqf which is to be found in Annexure '1'. He relied on the decision in the case of Radhakishan v. State of Rajasthan, (AIR 1967 Raj 1) for the proposition that the provision is not retrospective. Secondly, he urged that once the property had come into the hands of the stranger to the waqf, Section 36-B would have no application because the Act can control only the persons who are parties to the waqf or interested therein. For this proposition also he relied on the decision in AIR 1967 Raj 1 (supra) and the Corporation of the City of Bangalore v. Mysore State Board of Waqfs, (AIR 1973 Mys 189). Thirdly, he urged that the vendors of these petitioners were not in fact Mutawallis at the relevant time.

19. In the result, I find myself in respectful agreement with the view of brother Shambhu Prasad Singh that the

order of the Board in Annexure '7' has got to be quashed. I would order accordingly. Let a writ be issued quashing the order aforesaid.

Order quashed.

AIR 1976 PATNA 278

B. D. SINGH, J.

Ramvijoy Singh and another, Appellants v. Saudagar Singh and others, Respondents.

A. F. A. D. No. 815 of 1973, D/- 31-1-1976.*

(A) Civil P. C. (1908), Sections 100 and 101 — Finding of fact and finding of law — Dispute regarding identity and location of land — Finding of Appellate Court that location of lands sold was at a place marked yellow in map — Finding based on reference to boundary given in sale deed, as well as khatian and on evidence of witnesses — Finding is one of fact. AIR 1934 PC 5 and AIR 1934 PC 112 and AIR 1934 PC 127 and AIR 1959 SC 57 and AIR 1963 SC 302 and AIR 1963 SC 1633, Ref. (Para 7)

Cases Referred: Chronological Paras

AIR 1963 SC 302 = (1963) 3 SCR 604	8
AIR 1963 SC 1633 = (1964) 2 SCR 673	8
AIR 1959 SC 57 = 1958 Andh LT 834	8
AIR 1934 PC 5 = 61 Ind App 93	8
AIR 1934 PC 112 = 61 Ind App 163	8
AIR 1934 PC 127 = 36 Pun LR 45	8
AIR 1930 PC 91 = ILR 11 Lah 199	8

J. C. Sinha and Shivanand Pd. Sinha, for Appellants; Kaushal Kishore Sinha and Awadh Kishore Prasad, for Respondents.

JUDGMENT:— This appeal by the defendants has been preferred against the judgment and decree of the Lower Appellate Court affirming those of the trial Court.

2. In order to appreciate the points involved in this appeal, it will be necessary to state some material facts. The plaintiffs-respondents' case in the trial court in title suit No. 180 of 1965 in brief was that one Md. Rauf Khan was the 16 Annas proprietor of village Lautar (Tauzi No. 12730) and survey plot No. 1 measuring 42 bighas 1 kathas was recorded during the survey as gairmazrua

*(Against decision of Aditya Narayan Chaturvedi, 4th Addl. Sub. J., Gaya, D/- 20-9-1973.)

FT/FT/B715/76/GGM

malik land. The said 16 Annas proprietary interest of Md. Rauf Khan was in mokarrari of Md. Bibi by virtue of a registered deed executed by her husband Md. Rauf Khan. The name of Md. Bibi was recorded in the survey Khaitian as Mokarraridar. Subsequent to the survey, Md. Bibi brought the entire Survey Plot No. 1 into cultivation and converted the same into her Bakastha land. Thereafter, she sold the Bakastha land of Plot No. 1 to several persons including the defendants. Entire Tauzi No. 12730 was sold for arrears of Government revenue on the 28th March, 1947, and was purchased by one Sheo Narayan Lal. After purchase, Sheo Narayan Lal sold his entire 16 Annas share to the plaintiffs and a few others including Syed Ahmad Khan. Md. Bibi and other Mokarraridars whose mokarrari interest was annulled, resisted possession of the plaintiffs and Syed Ahmad Khan and so they brought Title Suit No. 22 of 1951 in the court of Munsif, 1st Court, Gaya, for declaration that the lands of Plot No. 1 of village Lautar were Bakastha lands of the plaintiffs and Syed Ahmad Khan and they also prayed for possession. The said suit was transferred to the Court of Munsif, 3rd Court, Gaya, where it was numbered as Title Suit No. 9 of 1954 and was decreed on the 10th of July, 1954. The judgment and decree was upheld in Title Appeal No. 53 of 1955. The plaintiffs and Syed Ahmad Khan obtained delivery of possession on the 19th of October, 1955, and since then they were continuing in possession. Subsequently, the plaintiffs and Syed Ahmad Khan under a registered sale deed, dated the 29th July, 1967, sold to the defendants out of the land comprised in Survey Plot No. 1 12 bighas equal to 8.20 acres of land by a lagga of 5 3/4 cubits prevalent in the locality, as fully described in Schedule I to the plaint. The 12 bighas sold to the defendants, which the defendants purchased in the name of defendant No. 2 was shown in yellow colour in a map attached to the plaint. Since the date of purchase, the defendants are in exclusive possession of the lands sold to them and the remaining lands of Survey Plot No. 1 were coming in cultivating possession of the plaintiffs as Syed Mohammad Khan had sold his interest to plaintiffs 1 and 2. The further case of the plaintiffs-respondents was that the outgoing Mokarraridars whose mokarrari interest was annulled and extinguished got a petition filed before the Anchal Adhikari, Imamganj, for settlement of

land of Plot No. 1 on the allegation that it was gairmazrui malik land and had vested in the State under the Land Reforms Act. The Anchal Adhikari referred the matter to L. R. D. C., who by his order dated 10th April, 1957, decided that Plot No. 1 was gairmazrui malik land and had vested in the State of Bihar. The decision of the L. R. D. C., was upheld by the Additional District Magistrate, Gaya, by his order, dated the 23rd June, 1958. Thereafter, the plaintiffs and the defendants brought Title Suit No. 158 of 1959, in the Court of Munsif, 1st Court, Gaya, for a declaration that the Survey Plot No. 1 measuring 42 bighas 1 katha of village Lauter was bakashta land of the outgoing landlord and was the Kastha land of the plaintiffs and defendant No. 2, and that the order passed by the L. R. D. C. and the Additional Collector were illegal, ultra vires, void and without jurisdiction. The said title suit was decreed in their favour under judgment dated 21st of August, 1962, except with regard to 7 kathas 10 dhurs of land in the eastern portion of Plot No. 1 which was used as grave-yard. It was held by the Court that the entire Plot No. 1 was the Bakashta land of the outgoing landlords and was now the Kastha land of the plaintiffs and under the Land Reforms Act, the same had not vested in the State of Bihar. The further case of the plaintiffs in Title Suit No. 180 of 1965 was that the defendants were the members of a joint Hindu family and they were bent upon vexing the plaintiffs without any rhyme and reason and were trying to take forcible possession of 1 acre of land of the plaintiffs towards north which was shown in green colour in the said map attached to the plaint. On 1st of September, 1965, the defendants went to cultivate the said 1 acre of land shown in green colour in the map, but the plaintiffs did not allow them to do so. Thereupon, the defendants engaged lathials in order to cultivate the same by force. The plaintiffs, however, resisted, but the defendants were bent upon cultivating the same by force. On these allegations, the plaintiffs, therefore, prayed for permanently restraining the defendants from taking forcible possession of the said 1 acre of land, which was situate contiguous north of the 12 bighas of land sold by the plaintiffs to the defendants. They also prayed for recovery of possession together with mesne profits in case they were found to have been dispossessed from their land. They also prayed for demarcation of their land and

the land of defendant No. 2 by appointing a pleader commissioner and for fixing pillars demarcating the lands.

3. Whereas, the case of the defendants in brief was that the suit as framed was not maintainable and the plaintiffs had no cause of action. The suit was barred by estoppel, waiver, acquiescence and limitation. Their further case was that the plaintiffs and Syed Ahmad Khan had sold 12 bighas of land equivalent to 8.28 acres under sale-deed dated the 29th of July, 1957 (Ext. 1) in Survey Plot No. 1 to defendant No. 2 over which defendant No. 2 was in possession. The boundary and description of the said 12 bighas of land as given in the plaint was wrong and the sketch map forming part of the plaint and showing the said 12 bighas in yellow colour was also wrong. The defendants have also attached a map to their written statement wherein the said purchased land measuring 12 bighas in survey Plot No. 1 has been shown in red colour. According to the defendants, the location of the 12 bighas as given by the plaintiffs was wrong. In fact, the location of 12 bighas which was sold to defendant No. 2 was at the place shown in red colour, in the map which the defendants had attached to their written statement. Their further case was that the land towards south of the area purchased by defendant No. 2 in Plot No. 1 was of Kuldip Singh as Mokarraridar and the said area was always remembered in the name of Kuldip Singh though the mokarrari was annulled and extinguished. Apart from that Kuldip Singh's land was actually towards south of the portion of land purchased by defendant No. 2 in Plot No. 1. Plots Nos. 3, 5 and 6 which were to the further south of Plot No. 1 were not of Kuldip Singh. The eastern portion of Plot No. 3 was of Sheo Narayan Singh alias Shiv Singh and the western portion of defendant No. 1, Plot No. 5 was of Akash Kuer and others at the relevant time, namely, in the year of the purchase. Plot No. 6 was of Rajpati Singh whereas Plot No. 4 was of Karu Mahto. Therefore, according to the defendants, Plots Nos. 3 to 6 have been wrongly shown in the map attached to the plaint by the plaintiffs towards south of 12 bighas of land which was purchased by defendant No. 2. According to the defendants to the south of the land purchased by defendant No. 2 was a portion of the Plot No. 1 itself. In order to fix the location, defendants' further case

was that the land purchased by defendant No. 2 was in the western side of Plots Nos. 43, 44, 46 and 52 and a major portion of Plot No. 53 which were Jagir and were also called Mafidar-lands. According to them, the land purchased under Ext. 1 began from the south-west corner of Plot No. 44 and extended upto the major portion of Plot No. 53. To the west of the land purchased by the defendants, were the lands known as Takhta Kapildeo Singh and the lands comprised under Plot No. 1/144. According to them, since after the purchase (vide Ext. 1), defendant No. 1 was in possession of the 12 bighas of the land shown in red colour in the map attached to the written statement. Prior to the annulment of Mokarrari, defendant No. 1 was in possession of this very area as Mokarraridar. According to them, the area of the land shown in green colour in the map attached to the plaint was, therefore, in possession of defendant No. 2 from the time of the purchase of the land under Ext. 1. In other words land shown in green colour in the map attached to the plaint, was part and parcel of the land contained in Ext. 1. Therefore, according to the defendants, there was no question of their taking possession of the said land by force. The plaintiffs, according to them, were not entitled to the same, being demarcated through the court and the plaintiffs had no cause of action and, therefore, the suit be dismissed.

4. The trial court after considering the evidence on the record decreed the suit in part and held that the defendant No. 2 under Ext. 1 had purchased 12 bighas of land at the place shown in yellow colour in the map attached to the plaint and further found as follows:—

"Furthermore, from the sale deed itself and the other documentary evidence as discussed above, it is clearly proved that actually the plaintiffs and Syed Ahmad Khan sold 12 bighas of land which is shown in yellow colour in the sketch map prepared by the plaintiffs.

xx xx xx xx

A survey knowing pleader commissioner will be appointed on depositing necessary fee by the plaintiffs and he will demarcate the lands of both the parties as per sketch map appended at the foot of the plaint. The portion showing in yellow ink should be demarcated as the land of the defendant No. 2 whereas the remaining portion of the land of Plot No. 1 should be demarcated as the land of the

plaintiffs and pucca pillars may be put showing the necessary demarcation."

5. Being aggrieved by the said judgment and decree, the defendants filed an appeal. The Appellate Court also confirmed the judgment and decree of the trial Court, holding that:—

"In view of this, I accept the plaintiffs' case that the twelve bighas of land shown in yellow colour in the map attached with the plaint had been sold to the defendants and not those lands which were shown in red colour in the map (Ext. A) attached with the written statement of the defendants and it is held accordingly."

Hence, this appeal.

6. Learned Counsel appearing on behalf of the appellants has raised the following points for consideration by this Court:

(i) The Court below erred in placing the burden of proof on the defendants.

(ii) When the lands were sold under Ext. 1 Kuldip Singh was not the owner of Plots Nos. 3, 5 and 6. If the southern boundary meant Takhta of Kuldip Singh, the sale deed (Ext. 1) would have also said so, as it was mentioned in the case of western boundary. According to the appellants, the court below had erred in making surmises as to the lands on the southern boundary that where Kuldip Singh was mentioned in Ext. 1, it meant the Takhta of Kuldip Singh.

(iii) The court below had erred in misreading the pleadings of the defendants on the basis of which the court below further erred in rejecting the oral evidence of the defendants.

(iv) The court below wrongly thought that Jagir Lautar was merely a description of Plot No. 44. The Court below itself has found that Plot No. 53 is also Jagir Lautar. Plot No. 53 was situate at extreme north of Plot No. 44. Therefore, according to the appellants, Plot No. 53 also was on the eastern boundary of the land sold under Ext. 1.

(v) Obviously, the finding of the court below regarding location was bad as according to the appellants, if the land under Ext. 1 was situate at the place shown in yellow colour in the map attached to the plaint, the eastern boundary of the land sold must not have been only Plot No. 44, but also 43 as well as the land of niz.

(vi) The maps attached to the plaint as well as to the written statement were not according to the sketch. Therefore,

the lands sold under Ext. 1 shown in yellow colour in the map attached to the plaint might not have consisted of the entire land sold measuring 12 bighas, as the court below itself has directed the commissioner that he might extend and demarcate the land even beyond the yellow portion towards the niz lands. According to the appellants, the court below has erred in substituting a new contract for the purpose, and

(vii) if the contention of the defendants were true, in that case, the finding of possession of the court below that the land marked in green colour was in possession of the plaintiffs cannot be upheld.

7. Learned counsel for the appellants has placed before me the judgment of the lower appellate Court. In my opinion, from the findings of the lower appellate Court, it cannot be said that he has committed any error of law or procedure justifying interference in the second appeal under Section 100 of the Code of Civil Procedure. As mentioned earlier, in the instant case, the main question before the court below was with regard to location of the lands sold under Ext. 1. The appellate Court after reference to the boundary given in the sale deed as well as the Khatian and also the evidence of the witnesses came to the conclusion that the location of the lands sold was at the place marked yellow in the map attached to the plaint. Therefore, it would be a case of finding of facts.

8. Reference may be made to the case of Anup Mahato v. Mita Dusadh, (AIR 1934 PC 5) wherein it was held that inferences drawn from statements in the Khatian are inferences of fact with which a High Court cannot interfere in a second appeal. In *Secy. of State v. Rameswaram Devasthanam* in the same volume (AIR 1934 PC 112) at Page 113 it was held that under Section 100 the High Court has no jurisdiction to reverse the findings of fact arrived at by lower appellate Court however erroneous, unless they are vitiated by some error of law. The rule is equally applicable to cases in which the findings of the lower appellate Court are based on inferences drawn from documents exhibited in evidence. I have already mentioned that in this case, the appellants have filed the second appeal against the judgment of affirmation. Reference may be made to the case of *H. A. Morine v. London Loan Assets, Ltd.*, of the same volume (AIR 1934 PC 127) where it was observed that a litigant who sought before a second appellate Tribunal

to reverse findings of fact which had been arrived at by the trial Judge and had, after consideration, been confirmed on appeal, came always with a very heavy burden upon his shoulders. But when he was the principal witness in regard to the crucial facts, and has been crushingly discredited by the trial Judge the weight of his burden was so great that few, if any, could survive under it. It may be noticed that in the instant case, the appellant had examined himself as D. W. 9. He along with other witnesses examined on his behalf was disbelieved by the trial court as well as the appellate court. It will also be relevant to refer to the case of *Deity Pattathiramswamy v. S. Hanymayya* (AIR 1959 SC 57) where their Lordships in paragraph 13 at page 59 observed: Nor does the fact that the finding of the first appellate court was based upon some documentary evidence made it any the less a finding of fact (Vide ILR 11 Lah 199 = AIR 1930 PC 91). But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100, some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. That introduced, apart from the fact that the High Court assumed and exercised a jurisdiction which it did not possess, a gambling element in the litigation and confusion in the mind of the litigant public. Their Lordships, therefore, set aside the decree of the High Court on the simple ground that the learned Judges of the High Court had no jurisdiction to interfere in the second appeal with the finding given by the first appellate court based upon an appreciation of the relevant evidence. In *V. Ramachandra Ayyar v. Ramalingam Chettiar*, (AIR 1963 SC 302), it was observed that even if the appreciation of evidence made by lower appellate Court was patently erroneous and the finding of fact recorded in consequence was grossly erroneous, that could not be said to introduce a substantial error or defect in the procedure. In the same volume in the case of *Ramappa v. Bojjappa*, (AIR 1963 SC 1633), it was observed at page 1634 that it had always been recognised that the sufficiency or adequacy of evidence to support a finding of fact was a matter for decision of the court of facts and could not be agitated in a second appeal.

9. In view of these observations, in my view, none of the points raised on

behalf of the appellants justifies interference with the finding of facts arrived at by the court below in second appeal nor is there any question of law or procedure involved justifying interference under Section 100 of the Code of Civil Procedure.

10. In the result, the appeal is dismissed and the judgment and the decree of the court below are affirmed. There will be no order as to costs.

Appeal dismissed.

AIR 1976 PATNA 282

H. L. AGRAWAL, J.

Indu Bhusan Bose Choudhary, Appellant v. Hari Bhajan Singh and others, Respondents.

A. F. A. D. No. 557 of 1973, D/- 19-11-1975.*

(A) Transfer of Property Act (1882), Section 106 — Determination of tenancy — Notice of eviction — Who can give — Co-sharer authorised to receive rent on behalf of all others — Agency is created — Notice given by him held valid. (Contract Act (1872), Section 187).

Where one co-sharer has been acting as the manager on behalf of all the co-sharers, he can give a valid notice to quit on behalf of all. (Para 7)

(B) Transfer of Property Act (1882), Sections 105, 106 — Lease — Sale of property — Tenancy after the purchase of property — Date of commencement of Tenancy. AIR 1973 Cal 515, Dissented from.

In absence of any evidence to suggest that the date of commencement of the tenancy was in any way altered, it would be the date of tenancy which was in force between the tenant and previous owner.

Where after the purchase of the house on 19-3-1964 the tenant and the landlord entered into an agreement on 23-4-1964 that the rent would be raised from Rs. 35/- to Rs. 45/- p.m. from 1-4-1964, it was held that the tenancy was to govern according to English Calendar and not from the date of purchase of proper-

*(Against decision of Nagendra Nath Sinha, Addl. Sub. J., 1st Court, Dhanbad, D/- 21-7-1973.)

DT/DT/B47/76/ABR/LGC

ty. AIR 1973 Cal 515, Dissented from. (Para 9)

(C) Transfer of Property Act (1882), Section 105 — Lease — Tenancy at will — Tenancy at will of the tenant must be held to be at will of the landlord also. AIR 1971 All 297, Dissented from.

When a tenancy is terminable at the will of the tenant it must be held to be terminable at the will of the landlord also. It is not necessary to give the tenants a notice to quit in order to become entitled to obtain a decree of ejectment and damage for occupation. Case law discussed. AIR 1950 SC 1 and AIR 1962 SC 413, Distinguished; AIR 1971 All 297, Dissented from. (Para 11)

Cases Referred: Chronological Paras

AIR 1973 Bom 111 = 1973 Mah LJ 72	9
AIR 1973 Cal 515	9
AIR 1973 Guj 131 = 13 Guj LR 880 (FB)	8
AIR 1971 All 297 = ILR (1971) 1 All 31	10
AIR 1962 SC 413 = (1962) 3 SCR	876
	10, 12
AIR 1957 Pat 490 = 1957 BLJR 291	11
AIR 1954 Bom 257 = 56 Bom LR 61	10
AIR 1950 SC 1 = 1950 SCR 75	10
1946 KB 613 = (1946) 2 All ER 329	8
AIR 1941 Pat 228 = 22 Pat LT 721	11
(1868) 3 QB 567 = 37 LJQB 198	8

S. C. Ghose, Chittaranjan Ghose and Kalyan Kumar Ghose, for Appellant; Shail Kumar Mazumdar, for Respondents.

JUDGMENT:— This is a defendant's second appeal arising out of a suit for ejectment from a house described in Schedule B of the plaint situated in Mauza Kheshmi, in the District of Dhanbad, on two grounds, namely, default in payment of monthly rentals and personal necessity. Admittedly, the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, have not been made applicable to the area in question and therefore the two grounds for eviction taken by the plaintiffs are not relevant as under the general law the consideration would be quite different.

2. Originally, the suit premises belonged to one Makund Lal Sud. By a registered sale deed dated 19-3-1964, the plaintiffs purchased the same. The defendant was already in occupation of the premises in suit from before on a monthly rental of Rs. 35/-, and admittedly according to the English Calendar month. The sale deed was taken in the names of all the six plaintiffs, out of whom, four, namely, plaintiffs Nos. 3 to 6 are minors

and the two major plaintiffs, namely, Har Bhajan Singh and Hardayal Singh are brothers. After the purchase aforesaid, the tenant defendant and the plaintiffs landlords entered into an agreement on 23-4-1964 (Ext. A) under which it was agreed that the rent of the premises in question would be raised from Rs. 35/- to Rs. 45/- per month from the 1st of April, 1964 and that the rent would be received by Har Bhajan Singh, plaintiff No. 1. This agreement was signed, besides the defendant, by the father of the two major plaintiffs, plaintiff No. 1 and some witnesses. It is also necessary to refer to a further stipulation under this agreement on which long arguments were advanced by Mr. S. C. Ghose appearing for the appellant. This agreement provided that the tenant could continue in the premises so long as he desired (wo jabtak chahe makan me rah sekta hai, kiraya deta huye). A notice dated 22-8-1967 (Ext. 1) under Section 106 of the Transfer of Property Act was issued through a lawyer on the instruction of plaintiff No. 1, terminating the tenancy on the expiry of September 1967. It further appears from Ext. B, an office copy of an earlier notice dated 30-3-1964, issued through another lawyer on behalf of all the plaintiffs, immediately on the purchase of the premises in question, to the defendant, demanding possession of the same "within a week from the service hereof". This notice was issued on behalf of all the plaintiffs, which seems to have resulted in the settlement at the intervention of their well-wishers, evidenced under the deed of agreement (Ext. A) referred to above.

3. The suit was contested by the defendant who denied the allegation of default in payment of rents and personal necessity, etc., with which we are not concerned any more. The other plea was that the agreement in question created a perpetual lease in favour of the defendants and, therefore, the same could not be terminated or determined by the plaintiffs and that he was entitled to live in the house till his lifetime. The validity of the notice Ext. 1 was also challenged on the ground that it was issued on behalf of only one of the plaintiffs who was only a co-sharer and not entitled to terminate the tenancy on behalf of the other co-sharers, unless specifically authorised.

4. The trial Court dismissed the suit on the finding that the tenancy was for life and the notice terminating the tenancy was invalid, having been issued

by only one of the plaintiffs. On appeal, the learned Additional Subordinate Judge has decreed the suit. One further contention that appears to have been urged on behalf of the defendant in the court of appeal below, which has been very seriously pressed by Mr. Ghose in this Court, is that the period of commencement of the tenancy in this case would be not according to the English Calendar month, but from the 19th of March, 1964, the date of the purchase of the premises in question by the plaintiffs and therefore, the notice to quit, in any event, must be held to be invalid.

5. The Court of Appeal below, however, held that the agreement in question did not create any perpetual lease or a lease up to the life of the defendant, but only a tenancy at will and the defendant could be ejected without any notice. Considering the notice (Ext. 1), it also recorded a clear finding that it was a valid notice. It rejected the defendant's objection that the notice being only on behalf of plaintiff No. 1, a co-sharer, was invalid, on recording a finding that Har Bhajan Singh (plaintiff No. 1) would be deemed to be authorised on behalf of the other plaintiffs, who was acting as their agent.

6. In this court Mr. S. C. Ghose has seriously pressed this appeal and has raised the following contentions:

1. The tenancy was at the will of the tenant and was not a tenancy at will as such which could be determined at the option of the plaintiffs landlords.

2. The tenancy must be deemed to commence from the date of the plaintiffs' purchase and, therefore, termination of the tenancy on a date different from the tenancy month was invalid, and,

3. The notice (Ext. 1) was invalid because it was issued by only one of the co-sharers who was not authorised by the other plaintiffs.

7. I shall take up the last two contentions first. It has already been said that earlier to the notice in question (Ext. 1) dated the 22nd August, 1967, a notice dated the 30th March, 1964, (Ext. B) was issued to the defendant on behalf of all the plaintiffs and, therefore, when the dispute arose between the parties, they arrived at an agreement (Ext. A). On behalf of the plaintiffs it was agreed that the plaintiff No. 1 alone would receive the rents of the premises in question. Mr. Ghose has referred to a statement of plaintiff No. 1 (P. W. 5)

that "the notice in the present case was given on my instruction. I do not hold any power of attorney on behalf of three brothers". On this statement Mr. Ghose contended that the notice under Section 106 of the Transfer of Property Act was essentially by only one of the co-sharers and that there was no evidence that the said co-sharer was either acting as an agent of the other co-sharer or was authorised by them to serve the notice in question and, as such, the notice must be held to be invalid. It does not require much discussion as the proposition is well-settled that one co-sharer cannot give notice to quit unless otherwise authorised by others. At the same time it is also equally settled that where one co-sharer has been acting as the manager on behalf of all the other co-sharers, he can give a valid notice to quit on behalf of all. In support of this point I would refer to some of the circumstances and the authorities. After purchase of the house in question, when a dispute arose between the plaintiffs and the defendant, by the agreement it was settled that plaintiff No. 1 alone would receive the rent of the premises in question. By this authority to receive rent, an agency was certainly created by the other co-sharers in his favour. Although the provisions of the Bihar Buildings (Lease Rent and Eviction) Control Act have no application to the present case, reference may be usefully made to the definition of "landlord" in the said Act, where a person receiving the rent for the time being is also deemed to be a landlord. Although I do not intend to base my conclusions on the definition, the element of payment and receipt of rent is surely a relevant consideration to determine the question of Agency. The plaintiffs are all related and belong to the same family. If it was decided by them that only one of them should be made incharge to deal with the premises in question, then giving a notice determining the tenancy, on the failure to pay the rent, is an act in ordinary course of dealing within the meaning of Section 187 of the Contract Act. I do not find anything in the statement of P. W. 5, so emphatically referred to by Mr. Ghose, derogatory to the inference of agency created in favour of plaintiff No. 1 with respect to the suit premises.

8. A Full Bench of the Gujarat High Court in Nanalal Girdharlal v. Gulamnabi Jamalbhai, (AIR 1973 Guj 131) has held that a notice to quit by a co-

owner is sufficient if it is given by someone acting as an agent on behalf of the co-owners, and such an authority may be express or implied. If such an agent is acting on the authority incidental to the general agency, to manage the demised property, he may give it in his own name. It was stipulated in the agreement (Ext. A) that the tenant has to go on paying rent to the plaintiff No. 1. If, therefore, the defendant committed a default, the authorised agent, namely, plaintiff No. 1 certainly could determine the tenancy as he was accountable to the other co-sharers for the receipt of the rents and if he allowed the defendant to remain in occupation without payment of rent, it would have been a failure of the agent's duty. The Full Bench relied upon two English cases, namely, *Jones v. Phipps*, (1868) 3 QB 567 and *Lemon v. Lardeur*, (1946) KB 613, for the view that where a co-sharer is, by common consent of all co-owners, entrusted with the management of the leased property, he may give notice to quit in his own name and the notice to quit need not show on the face of it that he is acting as agent on behalf of the other co-owners. Apart from the fact that the ultimate Court of fact in the present case has taken the view on the basis of the agreement (Ext. A) and the evidence on the record that Har Bhajan Singh (Plaintiff No. 1) who had given the notice to the defendant would be deemed to be necessarily authorised on behalf of the other co-sharers, which finding is prima facie binding in second appeal; I also, on examination of the materials which have been placed before me, am inclined to take the same view and hold that the notice (Ext. 1) issued by Har Bhajan Singh (plaintiff No. 1), a co-sharer of the premises in question, was a valid and legal notice as he must be deemed to have implied authority in the circumstances of this case on behalf of the other co-sharers.

9. Mr. Ghose placed strong reliance upon a decision of a learned Single Judge of the Calcutta High Court in *Bimalendu Bhusan Das v. Firm Mitra and Ghosh*, (AIR 1973 Cal 515) in support of his contention that the period of commencement of the tenancy in question must be deemed to be the date of the purchase of the premises in question by the plaintiffs, and not according to the English calendar month. It is true that the Calcutta decision fully supports the contention of Mr. Ghose. In that case, the plaintiffs had purchased the property

in question on the 20th of September, 1965. The rent from 1st to 19th September, 1965, was paid to the old landlord and that from 20th to 30th September, 1965, to the plaintiffs-purchasers. Thereafter rent for full months had been paid under receipts according to English calendar months, a situation almost similar as in the present case. It was held that the new tenancy in favour of the plaintiffs commenced from the date of the transfer of the premises for the purposes of Section 106 of the Transfer of Property Act and, therefore, the notice expiring with the end of a calendar month was invalid. I do not find it possible to agree with the view of the Calcutta High Court. There are two prominent circumstances in this case. Firstly, the date of the commencement of the original tenancy in force when the plaintiffs had purchased the suit premises was according to English Calendar, and, secondly, the purchasing plaintiffs had also taken rent for part of the month of September 1965, that is, from the 20th to 30th of September, 1965, and, therefore, both the parties agreed to fix the period of the payment of the monthly rent according to the English calendar. In my opinion, by the circumstance mentioned above and the conduct of both the parties, it was sufficiently indicated that the commencement of the tenancy was intended according to the English calendar month. I may refer to a decision of the Bombay High Court in the case of *P. Ratnam Yeshwantraaj v. Vimalchandra Shiv Datta*, (AIR 1973 Bom 111) where the plaintiffs had purchased the premises in question. The tenancy month in force between the tenant and the previous owner was according to the English calendar month, although the purchase was effected on a different date. It was held that in the absence of any evidence to suggest that the date of the commencement of the tenancy was in any way altered, it would be the date of the tenancy which was in force between the tenant and the previous owner. Apart from the decision of the Bombay High Court, there is a further fact in this case that the previous rate of rent which was Rs. 35/- per month was raised to Rs. 45/- from the 1st of April, 1964, under Ext. A. All these circumstances establish beyond any doubt that both the parties had agreed that from 1st April, 1964, the tenancy will be governed according to the English calendar. I would, accordingly, reject both the contentions of Mr. Ghose urged by him with respect

to the invalidity of the notice in question.

10. Now remains to be considered the first contention, namely, the nature of the tenancy created in favour of the defendant according to the agreement (Ext. A). It cannot be disputed that no notice under Section 106 of the Transfer of Property Act is required to be served by a landlord for ejection of a tenant at will. In order to obviate from this position, Mr. Ghose contended that the tenancy in question was not at will, but was for an uncertain period at the will and option of the tenant defendant which could not be determined by the notice in question. In support of this contention he placed strong reliance upon two decisions of the Supreme Court. (i) *Maneklal Mansukhbhai v. Hormusji Jamshedji Ginwala and Sons*, (AIR 1950 SC 1) and (ii) *Sivayogeswara Cotton Press v. M. Pan-chaksharappa*, (AIR 1962 SC 413). He also referred to a decision of the Allahabad High Court in *B. P. Sinha v. Som Nath*, (AIR 1971 All 297). The first case, namely, AIR 1950 SC 1, is entirely on a different point. There the question was as to whether an agreement of lease creating a present demise, but not registered, was admissible in evidence as a part performance of the agreement, and if the lessee had taken possession of the premises in accordance with the terms of the agreement, whether he was protected by the application of the principles of part performance within the meaning of Section 53-A of the Transfer of Property Act.

In AIR 1962 SC 413, a land was let out for building purposes under a document of lease. It was stipulated that for the first period of twenty years, the lessee would pay a sum of Rs. 350/- as annual rent and thereafter he was at liberty to continue the lease of the said land as long as he might desire, but then paying a sum of Rs. 400/-, as the annual rent, however, giving him further "full liberty to give up the said land, the said road and terminate this lease at any time you may desire so to do after the 1st October, 1934", that is, after the fixed period of twenty years. On the death of the lessee, his executors assigned the lease in the year 1933 and subsequently there were other assignments. The assignee, however, continued in possession on payment of yearly rent which contained factory, buildings and residential quarters. The plaintiff sought to terminate the tenancy

by issuing notices on various grounds and thereafter instituted a suit for a declaration that the defendants were tenants at will. The suit was resisted on the ground that the tenancy was a permanent tenancy and, therefore, the defendants could not be ejected. Construing the document of lease and the attending circumstances, the Supreme Court held that the tenancy in question was clearly a tenancy for an indefinite period, and not a tenancy at will. The basic factor which was taken into consideration by the learned Judges of the Supreme Court in coming to that finding was that the land being leased out for building purposes without a fixed period, the presumption was that it was intended to create a permanent tenancy, and the term expressly giving the lessee the right to give up possession at will, was wholly inconsistent with the permanency of the tenancy and did not weaken the presumption raised by the fact that the lease was for building purposes and, therefore, intended to be permanent. In my opinion, therefore, this decision is entirely distinguishable and does not lend support to the contention of Mr. Ghose.

In the Allahabad case, which seems to be more in point, a learned single Judge of that Court while construing a document of lease under a similar stipulation, namely, option to determine the lease being given to the lessee, it was held, following a decision of the Bombay High Court in *Bava Saheb v. West Patent Press Co.*, (AIR 1954 Bom 257) that such a lease was not a tenancy at will.

11. With great respect to the learned single Judge of the Allahabad High Court, I do not find it possible for myself to agree to his view as the view of this Court is entirely different. Reference may be made in this regard to two Division Bench decisions, namely, *Ramlal Sahu v. Mt. Bibi Zohara*, (AIR 1941 Pat 228) and *Babu Lal Seth v. Gopi Lal Seth*, (AIR 1957 Pat 490). AIR 1941 Pat 228 was noticed in the Bombay Case, followed in turn by the Allahabad High Court. AIR 1941 Pat 228 was noticed and distinguished by the Bombay High Court. In *Ram Lal Sahu's* case (supra), it was clearly held that "when a tenancy is terminable at the will of the tenant it must be held to be terminable at the will of the landlord also". This decision was followed in the later decision in the case of *Babu Lal Seth* (Supra) where also the lease stated that "the lessees may remain in the house as long as they please". It

was held that the tenancy was a tenancy at will and it was not necessary to give the tenants a notice to quit in order to become entitled to obtain a decree for ejectment and damages for occupation.

12. In view of the above clear exposition in the two Division Bench decisions of this court, Mr. Ghose contended that the view taken in these decisions must be deemed to be impliedly overruled by the Supreme Court in AIR 1962 SC 413. This argument must be rejected as from the facts and the conclusions of the Supreme Court case already noticed above, it is not possible to take the view that the view expressed by this court in the two cases referred to above has been impliedly overruled by the Supreme Court. It must, therefore, be held that the defendant appellant was a tenant at will and not entitled to any notice under Section 106 of the Transfer of Property Act. In any view of the matter, the tenancy in question must be deemed to be governed according to the English calendar month and it was validly determined by the notice Ext. 1 issued by the plaintiff No. 1, having the implied authority of the other plaintiffs.

13. This appeal, accordingly, fails and is dismissed with costs. Hearing fee is assessed at Rs. 200/-.

Appeal dismissed.

AIR 1976 PATNA 286

LALIT MOHAN SHARMA, J.

Ram Shankar Kumar, Petitioner v. Gopal Prasad Singh and others, Opposite Parties.

Civil Revn. No. 405 of 1973, D/- 3-3-1975.*

(A) Civil P. C. (1908), S. 151, O. 9, R. 9 and O. 47, R. 1 — Application for grant of probate dismissed for default — Application for restoration under O. 9, R. 9 also dismissed for default — Application for restoration of application under O. 9, R. 9 allowed by Court under O. 47, R. 1 and S. 151 without giving notice to opposite party — Order held illegal.

(Para 2)

Ram Anugrah Prasad Singh, for Petitioner; B. C. Verma, for Opposite Parties.

ORDER:— The opposite party filed an application under the provisions of the

*(Against order of M. A. Bakar, Sub. J., Begusarai, D/- 19-2-1973).

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Indian Succession Act for grant of a probate which was dismissed for default. An application for restoration of the same was filed under Order 9, Rule 9 of the Code of Civil Procedure which was also dismissed for default. Thereafter an application under Order 47, Rule 1 and Section 151 of the Code of Civil Procedure was filed for restoration of the restoration application. The Court below allowed the last mentioned application and the opposite party in the Court below has filed the present civil revision application.

2. It is stated in paragraphs 8 and 10 of the civil revision application that the learned Subordinate Judge allowed the application under Order 47, Rule 1 and Section 151 of the Code of Civil Procedure without giving any notice to the petitioner. This fact has not been controverted before me. The learned Subordinate Judge clearly was in error in allowing the application without affording an opportunity to the petitioner in the matter. The application, therefore, is allowed and the order passed by the Court below is set aside. The matter is sent to the Court below for reconsideration on merits after hearing both sides. There will be no order as to costs.

Revision allowed.

AIR 1976 PATNA 287

LALIT MOHAN SHARMA AND BIRENDRA PRASAD SINHA, JJ.

Rohan Kumar and another, Appellants v. Lachhuman Pathak and others, Respondents.

A. F. A. D. No. 638 of 1969, D/- 22-1-1976.*

(A) Civil P. C. (1908), Order 1, R. 1 — Necessary parties — Partition suit claiming relief against Defendants 1 and 2 who claimed title and possession — Defendants 3 and 4 supporting case of defendant — Death of defendant No. 4 — Effect — Appeal does not abate — Suit against defendants 1 and 2 is not adversely affected by non-substitution of heirs of defendant No. 4. (Para 6)

(B) Hindu Law (Dayabhaga) — Applicability — Territories where Dayabhaga applies.

*(From decision of R. L. Das 2nd Addl. Dist. J., Dumka (Santhal Parganas), D/- 28-8-1969.)

Dayabhaga School of Hindu Law was applicable in Bengal and Mitakshara law applies to the rest of India; of course, different Schools were recognised for different parts of the country within the Mitakshara Law. Where however it is suggested that the law applies to parganas which are part of the State of Bihar, it should be supported by evidence or else it must be shown that parties although residents of Bihar were governed by Dayabhaga School of Hindu Law. AIR 1974 Pat 147, Dist. (Para 8)

(C) Hindu Law — Sapindas.

The Sapindas of a person include besides his six male descendants in the male line and six ascendants in the male line, the six male descendants in the collateral male line of each of his six male ascendants. (Para 10)

Cases Referred: Chronological Paras
AIR 1974 Pat 147 8

R. S. Chatterjee, H. R. Das and Nares Kumar Sinha, for Appellants; J. C. Sinha, and Sudarshan Choudhary, for Respondents.

LALIT MOHAN SHARMA, J.:—

This second appeal has been filed by defendants 1 and 2 in a suit filed for the declaration of the title of the plaintiffs and for recovery of possession of the lands described in Schedule-B to the plaint. It is mentioned in the plaint that in case the relief regarding Schedule-B properties be not permissible in law, a decree for partition of the lands of Plots Nos. 41, 85, 250, 330, 337 and 628 of Jote No. 14 of village Bhaiyadih in the District of Santhal Parganas with the total area of 10.59 acres be passed.

2. According to the plaintiffs' case, one Tarachand left behind two sons, Meghlal and Chintamani. Meghlal had a son Madhusudan and his wife was Khema. They had a daughter Lakshmi. Defendants 3 and 4 were sons of Lakshmi. Defendant No. 4 has since died. Chintamani had two sons Kala and Ramlal. Kala's son Gonu had a son Sukha, who died in 1948. The plaintiffs are the sons and grandsons of Sukha. Ramlal's only son was Mukund who died in 1940 leaving behind his widow Mossamat Jago. The lady also died in 1951. The lands in suit were recorded in the survey records in the names of Mukund and Khema. The plaintiffs further alleged that there was a partition between the two owners half and half and Schedule-B properties were allotted to Mukund's share. On his death Jago Kuer came in possession and

remained so till her lifetime. After her death the plaintiffs being the nearest reversioners inherited to the estate of Mukund including the Schedule-B properties. Defendants 1 and 2 who claimed to be settlees of the lands raised some dispute and dispossessed the plaintiffs after a decision in Section 145 of the Code of Criminal Procedure.

3. The defence of defendants 1 and 2, who are defendants first party is that Chintamani had only one son Ramlal and Kala was not related to Mukund. In this way the title of the plaintiffs is challenged. It is further asserted that defendants 1 and 2 got a settlement of the lands from Mossamat Jago and remained in possession. There was some quarrel with defendants 3 and 4 which was ultimately settled in favour of defendants first party. The plaintiffs are said to have no locus standi to maintain the suit.

4. Defendants 3 and 4 also filed a written statement supporting defendants 1 and 2.

5. The trial Court rejected the case and evidence of the plaintiffs on the question of their claim of relationship with Mukund. It held that defendants 3 and 4 were the nearest heirs of Mukund and inherited the entire properties on the death of Mossamat Jago in 1951. No finding was recorded on the story of settlement set up by defendants 1 and 2. The plaintiffs appealed. It has been held by the lower appellate Court that the plaintiffs are the nearest agnatic relations of Mukund and came in possession of his lands on the death of his widow. It was further held that the lands always remained in possession of Mossamat Jago during her lifetime and thereafter in possession of the plaintiffs. Sukha had died in 1948, that is, earlier than Jago's death. Although no finding on the case of partition made out in the plaint was recorded by the court, a decree was passed in favour of the plaintiffs specifically in regard to Schedule-B lands as asked for in the plaint. Defendants 1 and 2 have appealed.

6. Mr. R. S. Chatterjee, learned counsel for the appellants first contended that defendant No. 4 died when the case was pending in the trial Court and his heirs were not substituted. The result, as suggested by learned counsel is that the entire appeal abated. It is true that the appeal must be held to have abated against defendant No. 4, but on the facts

of this case, I am not satisfied that the argument addressed on behalf of the appellants is correct. The relief prayed for in the plaint is directed against defendants 1 and 2, who claim the title as well as the possession. Defendant Nos. 3 and 4 supported the claim of defendants 1 and 2 and in this situation it cannot be said that defendant No. 4 or for that matter defendant No. 3 were necessary parties to be impleaded in the suit. I, therefore, hold that the maintainability of the suit against defendants 1 and 2 was not adversely affected by the non-substitution of the heirs of defendant No. 4 in the trial Court.

7. Mr. Chatterjee next argued that under the Hindu Law the plaintiffs were not the heirs to the estate of Mukund in 1951 and the suit must, therefore, be held to be not maintainable at their instance. It is said that defendants 3 and 4 must be held to be the heirs at law to the estate of Mukund. Learned counsel said that this is the main point in the case for the consideration of which the learned single Judge has referred this appeal to be decided by a Division Bench.

8. Mr. Chatterjee contended that the inheritance to the estate of Mukund would be governed by Dayabhaga School of Hindu Law, as he was the resident of Santhal Parganas. Reliance was placed on the case of Batai Bala Dasi v. Chabial Sen, (AIR 1974 Pat 147). The argument does not appear to be correct. It has been fully established at all points of time that the Dayabhaga School of Hindu Law was applicable in Bengal and the Mitakshara law applies to the rest of India; of course, different Schools were recognised for different parts of the country within the Mitakshara law. No material has been produced before us to support the argument that the Dayabhaga School of Hindu Law should be held to prevail in parganas which are a part of the State of Bihar. The decision in Batai Bala Dasi (supra) does not deal with this aspect of the matter at all. It was assumed that Dayabhaga School of Hindu Law was applicable to the parties to that case. It is fully established that a family migrating from one part of the country to another may carry his personal law, that is, the law applicable to the place of his earlier residence. I, therefore, assume that in the case of Batai Bala Dasi the parties being Bengalis as is apparent from the judgment, must have come from Bengal and must have carried the law applicable in Bengal with them.

ty of payment of land-revenue is on the person who is the owner of the land and he is liable to pay the same.

9. The Financial Commissioner, under Section 63 of the Act, is authorised to fix the number and amount of the instalments, and the times, places and manner, by, at and in which land-revenue is to be paid. In paragraph 502 of the Land Administration Manual by Sir James Mc. Douie (hereinafter referred to as the 'Manual'), it is stated that instalments are now arranged so as to become payable shortly after the garnering of the crops. The number, dates and amounts of the instalments are fixed at settlement with the approval of the Financial Commissioner, and are often identical for all the estates in a tahsil. It is further stated therein that if experience shows clearly that the arrangements originally made are unsuitable for any estate, or group of estates, the Dy. Commr. should not hesitate to ask to have them changed. It is not disputed before us that the dates are fixed for making payments of the amounts of land-revenue.

10. In clause (8) of Section 3 of the Act, the words which have been underlined, have been added by the Punjab Land Revenue (Amendment) Act, 1974. I shall deal with the question as to why the amendment has been made in the aforesaid definition, at a later stage. It is, however, an admitted case of the parties that the lambardar is not a surety for the payment of arrears of land-revenue. The contention of the learned counsel for the appellants is that the Lambardar is liable for the arrears of land revenue in the same way as the landowner is.

11. Chapter III of the Act deals with the provisions relating to Kanungos, Zaildars, Inamdars and Village-Officers. Section 28 (1), which is in this chapter, authorises the State Government to make rules to regulate appointment, duties, emoluments, punishment, suspension and removal of Kanungos and village-officers. 'Village-Officer' has been defined in clause (11) of Section 3 and the term includes a headman. I shall deal with the relevant rules in the later part of the judgment.

12. Chapter VI starts with Section 61 and ends with Section 96. It relates to collection of land-revenue. Section 61 is regarding security for payment of land-revenue. Sub-section (1) of this section is as follows:—

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"61 (1). In the case of every estate, the entire estate and the landowner or, if there are more than one, the landowners jointly and severally, shall be liable for the land-revenue for the time being assessed on the estate:

Provided that"

Section 62 deals with further security for payment of land-revenue. Section 63, with orders to regulate payment of land-revenue and Section 64 authorises the Financial Commissioner to make rules to regulate collection, remission and suspension of land-revenue. The Financial Commissioner has framed rules under the aforesaid section. Sections 67 to 77 deal with the processes for recovery of arrears of land-revenue. Section 67 is as follows:—

"67. Subject to the other provisions of this Act, an arrear of land revenue may be recovered by any one or more of the following processes namely:—

(a) by service of writ of demand on the defaulter;

(b) by arrest and detention of his person;

(c) by distress and sale of his moveable property and uncut or ungathered crops;

(d) by transfer of the holding in respect of which the arrear is due;

(e) by attachment of the estate or holding in respect of which the arrear is due;

(f) by annulment of the assessment of that estate or holding;

(g) by sale of that estate or holding;

(h) by proceedings against other immovable property of the defaulter.

The processes for recovery provided in clauses (a) to (h) have been dealt with in detail in Sections 68 to 77. Sections 79 to 96 relate to procedure in sales.

13. Chapter VII is regarding recovery of other demands by revenue-officers. There are only three sections in this chapter, namely, Sections 97, 98 and 99. Section 97 deals with the recovery of certain arrears through Revenue-officer instead of suit, Section 98, with other sums recoverable as arrears of land-revenue and Section 99 with application of Chapter VI to sums recoverable under Chapter VII. Section 97 is as follows:—

"When a village-officer required by rules under Section 28 to collect any land-revenue or sum recoverable as an arrear of land-revenue satisfies Revenue-officer that the revenue or sum has fallen due and has not been paid to him, the

Revenue-officer may, subject to any rules which the Financial Commissioner may make in this behalf, recover it as if it were an arrear of land-revenue."

Section 98 (e) authorises the Government to recover sums payable to the Government by a person who is surety for the payment of any of the sums mentioned in the other clauses of the said section, as arrears of land-revenue. Under Section 99, the provisions of Chapter VI have been made applicable to the extent to which they can be made applicable for the recovery of the sums referred to in Chapter VII, as if those sums were arrears of land revenue and the persons from whom the amounts were due, were defaulters in respect of such arrears.

14. Section 158 excludes the jurisdiction of the Civil Courts in matters which are within the jurisdiction of the revenue officers.

15. A reading of Section 61 shows that the liability to pay the land revenue is cast jointly and severally on all the landowners in the estate. No specific liability has been put on the Lambardar to pay land-revenue due from other owners in the estate. His liability in terms of Section 61 is as one of the owners in the estate. In the present case, it is admitted by the learned counsel for the parties that the recovery was not sought to be made from Sardara Singh deceased under Section 61 of the Act. In clauses (a), (b), (c), and (h) of Section 67, specific mention has been made of the defaulter, whereas in the other clauses, the word 'defaulter' has not been mentioned. Clause (d) deals with transfer of the holding in respect of which the arrear is due; clause (e), with the attachment of the estate or holding in respect of which the arrear is due; cl. (f), with the annulment of the assessment of that estate or holding; and cl. (g) with the sale of that estate or holding. Sections 71, 72, 73 and 75 deal in details with the aforesaid clauses, namely, (d), (e), (f) and (g). In S. 71, it is stated that at any time after an arrear of land-revenue has accrued on a holding, the Collector may transfer the holding to any person being a land-owner of the estate in which this holding is situate and not being a defaulter in respect of his own holding, on condition of his paying the arrear before being put in possession of the holding. The transfer may be either till the end of the agricultural year in which the defaulter pays to the transferee the amount of the arrear which the

transferee paid before being put in possession of the holding, or for a term not exceeding fifteen years from the commencement of the agricultural year next following the date of the transfer. It is further stated that a transfer under this section shall not affect the joint and several liability of the land-owners of the estate in which it is enforced, and that the person to whom the holding is transferred shall, subject to the conditions of the transfer, stand in the same position as that in which the defaulter would have stood if the holding had not been transferred. In the end it is stated that when the transfer was for a term, the holding shall, on the expiration of the term, be restored by the Collector to the defaulter free of any claim on the part of the Government or the transferee for any arrear of land-revenue or rates and cesses due in respect thereof. Section 72 (1) says that at any time after an arrear of land-revenue has accrued, the Collector may cause the estate or holding in respect of which the arrear is due to be attached and taken under his own management or that of an agent appointed by him for that purpose. Sub-section (4) of this section provides that land shall not be attached for the same arrear for a longer term than five years from the commencement of the agricultural year next following the date of the attachment, but, if the arrear is sooner discharged, the land shall be released and the surplus receipts, if any, made over to the land-owner. Section 73 deals with annulment of assessment of estate or holding and according to it, when an arrear of land-revenue has been due for a longer period than one month, and the foregoing processes are not deemed sufficient for the recovery thereof, the Financial Commissioner may, in addition to or instead of all or any of those processes, order the existing assessment of the estate or holding in respect of which the arrear is due to be annulled. Section 75 relates to sale of estate or holding, and it says that when an arrear of land-revenue has accrued and the foregoing processes are not deemed sufficient for the recovery thereof, the Collector with the previous sanction of the Commissioner, may, in addition to, or instead of, all or any of those processes, and subject to the provisions hereinafter contained, sell the estate or holding in respect of which the arrear is due. Section 77 relates to proceedings against other immovable property of defaulter. The aforesaid section is as follows:—

"77. (1) If the arrear cannot be recovered by way of the processes hereinbefore provided, or if the Commissioner considers the enforcement of any of those processes to be inexpedient, the Collector may, where the defaulter owns any other estate or holding, or any other immovable property, proceed under the provisions of this Act against that property as if it were the land in respect of which the arrear is due:

Provided that no interests save those of the defaulter alone shall be so proceeded against, and no incumbrances created, grants made or contracts entered into by him in good faith shall be rendered invalid by reason only of his interests being proceeded against.

(2) When the Collector determines to proceed under this section against immovable property other than the land in respect of which the arrear is due, he shall issue a proclamation prohibiting the transfer or charging of the property.

xx	xx	xx	xx
xx	xx	xx	xx

(5) In proceeding against property under this section the Collector shall follow, as nearly as the nature of the property will admit, the procedure prescribed for the enforcement of process against land on which an arrear of land-revenue is due."

A joint reading of the aforesaid sections clearly shows that if any amount as arrear of land-revenue is due from a landowner and the same could not be recovered by any other processes, in the first instance, his holding in respect of which the arrear is due, is to be sold and thereafter his other property. It is also clear that the word 'defaulter' in the various sections has been used for the landowner from whom the arrears of land revenue are actually due. It cannot be inferred from the said sections that the word 'defaulter' would include a Lambardar. My attention has not been drawn to any section from which it could be inferred that the Legislature intended to include a Lambardar within the meaning of the word 'defaulter'.

16. Section 97, as stated above, is a part of Chapter VII, which deals with recovery of other demands by revenue officers. According to this section, if the Village Officer, who is required by rules under Section 28 to collect any land revenue or sum recoverable as an arrear of land revenue satisfies revenue officer that the revenue or sum has fallen due and

has not been paid to him, the revenue officer can recover it as if it were an arrear of land revenue. Rule 20 of the Land Revenue Rules, relates to the duties of the headman, wherein it is provided that in addition to other duties, he shall collect by due date all land revenue and all sums, recoverable as land revenue from the estate, or sub-division of an estate in which he holds office, and pay the same personally or by revenue money-order or by remittance of currency notes through the post or at places where treasury business is conducted by the Imperial Bank of India by cheque on a local bank at the place and time appointed in that behalf to the revenue officer or assignee empowered by Government to receive it. A reading of the aforesaid section with the rule also does not show that a Lambardar is personally liable to pay the amount which is due from a landowner as arrears of land revenue. The learned counsel for the appellants sought to argue that in Rule 20, the words 'and to pay the same personally' have been used by which his liability to pay personally can be safely inferred. I regret my inability to accept the same. If the words are read in the context these show that a Lambardar has to deposit the amount collected by him either personally or by sending the same by revenue money order or by remittance of currency notes through the post, or in certain circumstances, by cheque on a local bank. It is an established principle of law that the sections are to be read and construed harmoniously. In case all the aforesaid sections are read together, it is evident that the word 'defaulter', as defined prior to the Punjab Land Revenue (Amendment) Act, 1974, did not include a Lambardar. The definition says that the 'defaulter' is a person who is liable for arrears of land revenue. A Lambardar, as such, cannot be held to be liable for payment of arrears of land revenue of the landowners in the estate/portion of the estate, of which he is a Lambardar and is, therefore, not included in the definition of the term 'defaulter'.

17. I also get support in the aforesaid view from the fact that the definition of the word 'defaulter' was amended by the abovementioned Amendment Act and the words 'a Village Officer, who collects land revenue or any other sum recoverable as land revenue, and does not pay the same to the State Government in accordance with the rules framed under this Act' were included in the definition

clause of the word 'defaulter'. In the Statement of Objects and Reasons, for the aforesaid amendment, it is mentioned that the headman of a revenue estate is responsible for collecting land revenue from all landowners in the estate and to deposit it into the Government treasury. There have been occasions when Lambardars collected the land revenue due from some landowners but failed to deposit it into the treasury. In such cases proceedings were initiated against them under Section 69 of the Punjab Land Revenue Act. However, the High Court has observed in a recent case in *S. Sarup Singh v. Collector Hissar*, 1970 Punj. LJ. 313, that Sections 97, 98 and 99 of the Punjab Land Revenue Act, apply to the recovery of the land revenue or sums recoverable as arrears of land revenue from the defaulters and do not apply to the Lambardars because the definition of the term 'defaulter' as given in Section 3 (8) of the Act, does not include a Lambardar who acts as an agent of the State in collecting Government dues. It is further stated that for the aforesaid reasons, the definition of the term 'defaulter' in Section 3 (8) of the Act, needs amendment so as to include in the definition, a Lambardar who defaults in depositing the land revenue collected by him into the Government treasury. I may at this stage, refer to the observations of Tuli J. in *Sarup Singh's* case (supra), which are as follows:—

"From Section 3 (8) of the Punjab Land Revenue Act, it is evident that this definition relates to the landowner from whom the land revenue is due or a person who is responsible as surety for the payment of land revenue. A Lambardar who has collected the land revenue but has not deposited the same in the Treasury, or the Lambardar who has not collected the land revenue from the landowners, cannot be termed as 'defaulter' as defined in sub-section (8) of Section 3. Sections 97, 98 and 99 apply to the recovery of land revenue or sums recoverable as arrears of land revenue from the defaulters and do not apply to a Lambardar who has collected the land revenue but has not deposited in the Treasury, or who has not collected the land revenue. Rules 20, 64, 65 and 66 of the Punjab Land Revenue Rules made under the said Act also do not lead to the conclusion that a Lambardar who has collected the land revenue but has not deposited in the Treasury, or who has not collected the land revenue can be proceeded against as a defaulter under the said Act or the

Rules. A Lambardar while collecting the land revenue acts as an agent of the State Government and he can be proceeded with civilly or criminally if he has collected the land revenue but has not deposited the same in the Government Treasury, but he cannot be proceeded with as a defaulter under the Punjab Land Revenue Act or the Rules framed thereunder. He cannot be held liable for the payment of the land revenue which he has not collected from the landowners as no statutory provision either of the Act or the Rules mentioned above, holds the Lambardar liable for land revenue which has not been collected by him. Section 69 of the Act provides for the issue of a warrant for the arrest of a defaulter and since the Lambardar was not a defaulter as defined in Section 3 (8) of the Act, no warrant could be issued against him under that section."

The Legislature thereafter amended the definition of the term 'defaulter' and included in it 'a Village Officer who collects the land revenue or any other sum recoverable as land revenue, but does not pay the same to the State Government in accordance with the Rules made under the Act'. The addition of the aforesaid phraseology shows that though it was held by the learned Judge that even a Lambardar, who had not collected the land revenue, was not a defaulter, yet the Legislature in its wisdom did not consider it proper to include Lambardar who had not collected the land revenue in the definition of the word 'defaulter'.

18. The learned counsel for the appellants has made reference to some of the paras of the Land Administration Manual and the Rules framed under the Act. Especially reference has been made by him to paragraph 516 which relates to the meaning of the word 'defaulter'. It is mentioned in the aforesaid paragraph that in practice, the milder coercive processes are directed either against the owner of the holding in respect of which the default arises or against his headman. A similar view has been expressed by the author in paragraphs 521 and 522. These are the views of the author or might be the practices in the Department. These views or the practices have not the support of the provisions of the Act. No doubt the views expressed by Mr. Douie are treated with great respect, but these cannot take the place of provisions of the Act. If the views of the learned author are in contravention of such provisions, the same can be ignored to that extent.

19. Mr. Sachdeva, the learned counsel for the appellants, has referred to Rules 64, 65, 66, 67 and 68 of the Punjab Land Revenue Rules. Rule 64 relates to the application of headman for recovery of arrears from the defaulter under Section 97 of the Act, Rule 65, to summoning of the defaulter; Rule 66, to recovery of arrears from the defaulter and Rule 67, to bail of the defaulter under detention. From the aforesaid Rules no inference can be drawn that a Lambardar is a defaulter or that recovery can be made from his property. Rule 68 deals with the circumstances under which defaulter is liable to detention or imprisonment for arrears. It is stated in this Rule that no defaulter shall be detained under Section 69 (2) of the Act or confined under Section 69 (3) for an arrear unless it is due from himself or from a co-proprietor of whom he is the representative village headman; nor shall any defaulter be imprisoned for an arrear due before he came into possession or office. The Rule no doubt authorises the revenue officer to detain a Lambardar in case any landowner from whom he has to collect the land revenue has not paid the same. The Rule talks of a milder process. The Act, however, does not provide that a rule can be framed under it by which such liability can be fixed on a Lambardar. It is true that it is the duty of the Lambardar to collect the land revenue and deposit the same in the treasury. It, however, cannot be held on the basis of the paragraphs in the Land Administration Manual or in the Rules that the Lambardar, who has not collected the land revenue, falls under the definition of the word 'defaulter'. The opinion of the author is of great value, but it cannot be the guiding principle for interpreting the Act. Therefore, the learned counsel for the appellants cannot derive any benefit either from the Manual or from the Rules.

20. Mr. Sachdeva, learned counsel for the appellants, then referred to Kirpal Singh v. Collector, Ferozepur, 1963 Pun LJ 87 and Gurbakhsh Singh v. Deputy Commr., Amritsar, 1967 Pun LJ 168. In both these cases it has been held that the Lambardar, who collects the land revenue from the right holders and does not deposit the same, is a defaulter within the meaning of Section 3 (8) of the Act. He has also cited Gurmukh Singh v. State of Punjab, 1971 Pun LJ 166 and Naunihal Singh v. Janga Singh, (1975) 77 Pun LR 492. The former case was decided before

the amendment of the definition of the word 'defaulter' while the latter, after that amendment. In both the cases it has been held that the word 'defaulter' does not include a person who has misappropriated or embezzled Government money or the money that he had collected on behalf of the Government. All the aforesaid cases are distinguishable on facts from the present case and the appellants cannot derive any benefit from them.

21. The learned counsel for the respondents has mainly placed reliance on S. Sarup Singh's case (1970 Pun LJ 313) (supra). The observations made therein have already been reproduced above. In my view, the word 'defaulter' has been correctly interpreted in that case. I am in respectful agreement with the observations of the learned Single Judge.

22. The learned counsel for the appellants, faced with the aforesaid difficulty, sought to challenge the judgment of the first appellate Court on the ground that Sardara Singh deceased had recovered land revenue from the landowners and had not deposited the same. In support of his contention he has referred to the statement of Sardara Singh deceased dated May 29, 1956, Exhibit D/4, wherein he stated that he would be personally liable to pay the land revenue. He has also referred to a personal bond of Sardara Singh deceased, dated August 22, 1962, (Exhibit D/8) wherein he admitted that he was liable to pay Rs. 11,500 which he would pay within 15 days and in case he failed to do so, he would pay Rs. 1,000 as damages. He also referred to the statement of Santokh Singh, Wasil Baqi Nawis, D.W. 1, but he could not point out in his statement that Sardara Singh deceased had made recovery of the amount and had not deposited the same. From the aforesaid evidence it cannot be held that the deceased had recovered the amount of land revenue from the landowners. In the circumstances, I reject this contention of the learned counsel for the appellants and hold that Sardara Singh deceased was not a defaulter within the meaning of Section 3 (8) of the Act.

23. The next question that arises for determination is whether the suit is triable by the Revenue Court, in case Sardara Singh deceased was not a defaulter. Section 158 of the Act deals with the exclusion of jurisdiction of civil Courts. Clauses (xiv) and (xv) of sub-section (2) of the said section are relevant

for the determination of the said question and are as follows:—

"158 (2) a Civil Court shall not exercise jurisdiction over any of the following matters, namely—

xx	xx	xx
xx	xx	xx
xx	xx	xx

(xiv) any claim connected with, or arising out of the collection by the Government, or the enforcement by the Government of any process for the recovery of land revenue or any sum recoverable as an arrear of land revenue;

(xv) any claim to set aside, on any ground other than fraud, a sale for the recovery of an arrear of land revenue or any sum recoverable as an arrear of land revenue."

The aforesaid clauses would have applied if Sardara Singh deceased had been liable to pay the said arrears. He, as already held above, was not liable to pay any arrears of land revenue. In these circumstances, the revenue authorities had no jurisdiction to recover the amount from him. As his property had been sold by the revenue authorities without jurisdiction, he had the right to file a suit in the civil Court and it had the jurisdiction to decide the matter.

It is an established principle of law that if the act of the authorities under any Act is without jurisdiction, then the jurisdiction of the civil Court is not excluded. In my view, the civil Court had the jurisdiction to try the present controversy. The learned counsel for the appellants has placed reliance on a decision of Peshawar Judicial Commissioner's Court in *Raja Safdar Jang v. Kazi Mohd. Azam*, (1945) 218 Ind Cas 195 = (AIR 1945 Pesh 3). In that case, the property of the person from whom the arrears of land revenue were due, was sold. He instituted a suit for a declaration in the civil Court that he was the owner of the properties and the sales were irregular and invalid. The facts of that case are materially different than the facts of the present case. In my view, the observations in that case have no applicability to this case. The learned counsel for the appellants has also relied on the observations of the learned Judge in *Naunihal Singh's case* ((1975) 77 Pun LR 492) (*supra*) to the effect that all the provisions of the Act, when read together, provide remedies to save the land from being sold for recovery of land revenue, but when such sale is confirmed, it becomes final and cannot be

challenged in a civil Court on any ground other than the fraud. In that case the land was sold on the ground that the Lambardar had failed to deposit the land revenue which he had collected from the land-owners. The said case, as already mentioned above, had been decided after the amendment of the definition of the word 'defaulter'. In my view, the aforesaid observations will not be applicable to the facts of the present case. In the circumstances stated above, I am of the view that the suit is triable by a civil Court.

24. The last question that arises for determination is, whether the sale was a nullity as the purchasers failed to deposit seventy-five per cent of the purchase money within the period prescribed by law? The property was auctioned on January 15, 1965, and twenty-five per cent of the sale price was paid on the same day in terms of Section 85. The balance amount was not deposited within 15 days from the date of sale as required by Section 88 of the Act. Section 88 says that full amount of the purchase-money shall be paid by the purchaser before the close of the 15th day from that on which the purchaser was declared. According to Section 39, if default takes place in payment of full amount of purchase-money within the period mentioned in Section 88, the deposit referred to in Section 85, after defraying the expenses of the sale, is to be forfeited to the Government and the property resold. Sections 85, 88 and 89 are *pari materia* with Order 21, Rules 84, 85 and 86 of the Civil Procedure Code, respectively. The Supreme Court in *Manihal Mohanlal Shah v. Sardar Sayed Ahmed Sayad Mahmud*, AIR 1954 SC 349, has held that if the price is not paid as required by Order 21, Rules 84, 85 and 86, the sale is a nullity. The observations of Ghulam Hasan J., speaking for the Court, are as follows:—

"The provisions of Order 21, Rules 84, 85 and 86 requiring the deposit of 25 per cent of the purchase-money immediately, on the person being declared as a purchaser, such person not being a decree-holder, and the payment of the balance within 15 days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a stranger purchaser without depositing 25 per cent. of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of

these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property (Rule 86) in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law."

A similar matter also came up for decision before this Court in *Ganga Singh v. State of Punjab*, 1968-70 Pun LR 395. That case was under the Act. R. S. Narula, J., as my Lord the Chief Justice then was, following the observations of the Supreme Court, held that the consequences that follow non-payment of balance of the bid money within the prescribed time in the case of sale under Order 21, Rule 86 of the Code of Civil Procedure, also follow in the case of non-payment of the entire balance within 15 days in case of the sale under the Act as provided by Section 89 thereof. The learned Judge further held that there is no material difference between the language of Rule 86 of Order 21 of the Code and that of Section 89 of the Act. The above observations fully apply to the present case. Admittedly, in the present case, 75 per cent of the amount was not deposited within the period prescribed by Section 88. In the aforesaid situation, the sale is a nullity. In case, it is so, the civil Court has the jurisdiction to decide the matter.

25. For the reasons recorded above, I do not find any merit in the appeal and dismiss the same with no order as to costs.

PREM CHAND JAIN, J.:— I agree.
Appeal dismissed.

**AIR 1976 PUNJAB & HARYANA 279
FULL BENCH**

PREM CHAND JAIN, BHOPINDER SINGH DHILLON AND A. S. BAINS, JJ.

Rattan Singh and another, Petitioners v. The State of Punjab and others, Respondents.

Civil Writ No. 6535 of 1975, D/- 23-4-1976.*

*(Decided by Full Bench on order of reference made by P. C. Jain and A. S. Bains JJ. on 10-3-1976.)

FT/GT/B884/76/LGC

(A) Land Acquisition Act (1894), Sections 4 (1) and 5-A (1) — Notification under S. 4 (1) — Validity — To make the notification valid it is essential to give publicity of its substance in concerned locality simultaneously with or immediately after its publication in official Gazette — Object of Ss. 4 (1) and 5-A (1), pointed out.

The substance of the notification has to be published in the concerned locality simultaneously with the publication of notification under S. 4 (1) in the Official Gazette and in case it is not possible to give notice of the substance in the concerned locality simultaneously, then at least it has to be done immediately after the publication of the notification in the Official Gazette and it would be for the State to show that whatever time was taken to give notice of the substance in the concerned locality was the minimum possible time taken for this purpose. Case law discussed.

(Para 12)

Under Section 4 (1), it is contemplated that besides publication of the notification in the Official Gazette, the Collector is required to give public notice of the substance of such notification at convenient places in the concerned locality. The notification under Section 4 shall be valid only when both the conditions mentioned in Section 4 (1) have been complied with.

(Paras 6, 7)

The object of giving publicity of the substance of the notification in the concerned locality is to make known to the affected persons the intention of the Government to acquire land so as to give opportunity to the landowners to file objections under Section 5-A (1) of the Act against the proposed acquisition. In our country, illiterate people cannot be expected to have knowledge of the intended acquisition merely from the publication made in the official Gazette.

(Para 10)

If the publication in the concerned locality is not made either simultaneously with or immediately after the publication in the Official Gazette, then the reasonable period as provided under Section 5-A (1) for filing objections, shall stand curtailed. Such could never be the intention of the Legislature. The time of 30 days for filing objections under Section 5-A (1) starts from the date of the publication of the notification in the Official Gazette and not from the date of publication of public notice of the substance of such notification at convenient places in the concerned locality.

(Paras 9, 10)

Where publication of the substance in the concerned locality was made as late as on the 29th day after the publication in the Official Gazette, it was held that the notifications issued under Sections 4 and 6 could not be sustained. (Para 13)

Cases Referred : Chronological Paras
(1975) 77 Pun LR 747 = 1975 Pun LJ 396 9

AIR 1973 SC 552 = (1973) 2 SCJ 378 9

AIR 1973 SC 2361 = (1974) 1 SCJ 492 9, 10

AIR 1967 SC 1074 = (1967) 1 SCR 120 6

(1961) 39 Mys LJ 883 = 1LR (1960) Mys 636 10

M. L. Sarin with Sarwan Kumar and V. Kataria, for Petitioners; I. S. Tiwana, Deputy Advocate General, Punjab, for Respondents; R. K. Chhokar with G. C. Garg and D. V. Kansal, as Interveners.

PREM CHAND JAIN, J.:— Rattan Singh and another have filed this petition under Articles 226/227 of the Constitution of India, for the issuance of a writ in the nature of certiorari for quashing the notifications issued under Sections 4 and 6 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), copies Annexures 'P-1' and 'P-2' respectively. The facts of the case may briefly be stated thus:—

The petitioners are small landowners in village Nijjarpura, Tahsil and District Amritsar, and own about 51 Kanals each of agricultural land. It is stated in the petition that respondent No. 1 issued a notification under Section 4 of the Act, to the effect that the land in the locality, specified in the notification was needed by the Government at public expense for a public purpose, namely, for allotment of house sites to the landless workers in the rural areas. Later on, the Collector, Amritsar, respondent No. 2, issued notification under Sections 6 and 7 of the Act, which was published in the Punjab Government Gazette (Extraordinary), dated 26th June, 1975. In the said notification it has been stated that the land specified in the said notification was needed by the Government as public expense for a public purpose, namely, for the allotment of house sites to the landless workers in the rural areas. As the two notifications also included the land belonging to the petitioners, the present petition has been filed challenging the legality of the said two notifications.

2. This matter came up for hearing earlier before me and my learned bro-

ther Bains J. Finding that the point involved in the petition was of importance, we decided to refer the matter to a larger Bench. That is how, we are seized of the matter.

3. The question that falls for determination may be stated thus:—

To make Section 4 notification valid, is it legally essential to give publicity of the substance of the notification in the concerned locality simultaneously with or immediately after publication of the notification in the official Gazette?

4. The contention of Mr. M. L. Sarin, learned counsel for the petitioners was that after the publication of the notification in the official Gazette, publicity of the substance of the notification in the concerned locality has to be given simultaneously or immediately, failing which the notification under Section 4 as a whole, as well as the subsequent acquisition proceedings, are illegal. On the other hand, Shri I. S. Tiwana, learned Deputy Advocate General questioned the correctness of the said contention and inter alia submitted that publication of the substance in the concerned locality could be done any time and that it would be from the date of the publication of the substance of the notification that a landowner would get a period of 30 days for filing objections under Section 5-A of the Act. According to the learned Deputy Advocate General, the time for filing objections would not start from the date of the publication of the notification in the official Gazette, but from the date when publication of the substance of the notification has been made in the concerned locality.

5. To find out as to which contention has merit, the relevant provisions of the Act may be noticed:—

"4 (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.

5-A (1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be."

6. Under Section 4 (1), it is contemplated that besides publication of the notification in the official Gazette, the Collector is required to give public notice of the substance of such notification at convenient places in the concerned locality. The question whether this requirement is directory or mandatory has been set at rest by the decision of their Lordships of the Supreme Court in *Khubchand v. State of Rajasthan*, AIR 1967 SC 1074, wherein it has been observed thus:—

"The statutory intention is, therefore, clear, namely, that the giving of public notice is mandatory. If so, the notification issued under Section 4 without complying with the said mandatory direction would be void and the land acquisition proceedings taken pursuant thereto would be equally void."

7. In view of the aforesaid observations it follows that the notification under Section 4 shall be valid only when both the conditions mentioned in Section 4 (1) of the Act have been complied with.

8. The next question that requires determination is the point of time when the public notice of the substance of the notification has to be given at convenient places in the concerned locality. Has it to be simultaneously with or immediately after the publication of the notification in the official Gazette or can it be done any time? The contention of Mr. Tiwana, based on the provisions of Section 5-A (1), that the time for filing objections would start when public notice of the substance has been given in the concerned locality, on the face of it, appears to be fallacious. The plain reading of Section 5-A (1) shows that the person interested gets 30 days for filing objections after the issue of notification in the Official Gazette. Mr. Tiwana tried to draw a distinction between the words 'issue of notification' as used in Section 5-A (1) and the words 'publication of notification' as used in Section 4 (1). This distinction, to my mind, is meaningless and of no consequence. The words 'issue of notification' used in Section 5-A (1) connote the same meaning as the words 'publication of notification' in the official Gazette as used in Section 4 (1). The Government issues notification by publishing it in the official Gazette and it can never be said that the notification would be deemed to have been issued only when its substance has been published in the concerned locality and, therefore, under Section 5-A (1) the

time for filing objections starts from the date of the publication of the notification in the official Gazette. If the intention of the Legislature had been to allow time for filing objections from the date of publication of the substance in the locality, then it would have been so mentioned in the section.

9. Having found that the time for filing objections under Section 5-A (1) starts from the date of the publication of the notification in the official Gazette, the crucial point that now requires determination is whether public notice of the substance of such notification at convenient places in the concerned locality, has to be given simultaneously with or immediately after the publication of the notification in the official Gazette. For this proposition that publicity of the substance of the notification in the concerned locality has to be given simultaneously with or immediately, reliance was placed by the learned counsel on two decisions of their Lordships of the Supreme Court in *Narinderjit Singh v. State of U. P.*, AIR 1973 SC 552 and *State of Mysore v. Abdul Razak Sahib*, AIR 1973 SC 2361 and a Single Bench decision of this Court in *Sat Dev v. The State of Punjab*, 1975-77 Pun LR 747. After giving my thoughtful consideration to the entire matter in the light of the observations made by their Lordships of the Supreme Court in the aforesaid two decisions, I find no escape from the conclusion that the publicity of the substance of the notification in the concerned locality has to be given simultaneously or at least immediately after the publication of the notification in the official Gazette.

10. The object of giving publicity of the substance of the notification in the concerned locality is to make known to the affected persons the intention of the Government to acquire land so as to give opportunity to the landowners to file objections under Section 5-A (1) of the Act against the proposed acquisition. In our country, illiterate people cannot be expected to have knowledge of the intended acquisition merely from the publication made in the official Gazette. The Legislature purposely made the provision of giving public notice of the substance of such notification at convenient places in the concerned locality with a view more or less to give direct information of the proposed acquisition, to the affected persons. If the publication in the concerned locality is not made either simultaneously

ly. with or immediately after the publication in the official Gazette, then the reasonable period as provided under Section 5-A (1) of the Act for filing objections, shall stand curtailed. Such could never be the intention of the Legislature. The right of filing objections cannot be made illusory or nugatory by delaying the publication of the substance of the notification in the concerned locality. It has been pointed out to us that in some cases the Collector may not find it possible to give notice of the substance in the concerned locality simultaneously with the publication of the notification in the official Gazette and require some time to complete this formality. Of course it is in consideration of this possible contingency that I am taking the view that the publication in the concerned locality if not made simultaneously, has to be made at least immediately after the publication of the notification in the official Gazette. But it would have to be borne in mind that in every case it would be for the State to show that whatever time was taken to publish the substance of the notification in the concerned locality was the minimum possible time taken for this purpose, failing which the notification issued under Section 4 of the Act and any proceedings taken thereunder would be invalid and ineffective and liable to be struck down. The view I am taking finds full support from the observations of their Lordships of the Supreme Court in *Abdul Razak Sahib's case* (AIR 1973 SC 2381) (*supra*), wherein it has been observed thus:—

"With the above background we have to consider the scope of Section 4 (1). Under certain circumstances publications in the official Gazettes are presumed to be notice to all concerned. But in the case of a notification under Section 4 of the Land Acquisition Act the law has prescribed that in addition to the publication of the notification in the official Gazette the Collector must also give publicity of the substance of the notification in the concerned locality. Unless both these conditions are satisfied, Section 4 of the Land Acquisition Act cannot be said to have been complied. The publication of the notice in the locality is a mandatory requirement. It has an important purpose behind it. In the absence of such publication the interested persons may not be able to file their objections about the acquisition proceedings and they will be deprived of the right of representation provided under Section 5-A, which is very valuable right.

This very question came up for consideration before the High Court of Mysore in *Gangadharaiiah v. State of Mysore*, (1961) 39 Mys LJ 883 and the High Court ruled that Section 4 (1) requires that there should both be a notification in the gazette as also a public notice in the locality in which the property proposed to be acquired is situate. It is only when the notification is published in the Official Gazette and it is accompanied by or immediately followed by the public notice, that a person interested in the property proposed to be acquired can be regarded to have had notice of the proposed acquisition. We are entirely in agreement with the rule laid down by that decision."

11. To the same effect are the observations in *Narinderjit Singh's case* (*supra*), which are reproduced below:—

"We are unable to accept such a contention. In our judgment the provisions of Section 4 (1) cannot be held to be mandatory in one situation and directory in another. Section 4 (1) does not contemplate any distinction between those proceedings in which in exercise of the power under Section 17 (4) the appropriate Government directs that the provisions of Section 5-A shall not apply and where such a direction has not been made dispensing with the applicability of Section 5-A. It lays down in unequivocal and clear terms that both things have to be simultaneously done under Section 4 (1), i.e. a notification has to be published in the official Gazette that the land is likely to be needed for any public purpose and the Collector has to cause notice to be given of the substance of such notification at convenient places in the locality in which the land is situated."

12. I do not agree with Mr. Tiwana that the aforesaid judgments are distinguishable as in these cases the publication of the substance of the notification had been made after the expiry of 30 days, and it was for that reason that the notification had to be quashed. As would be clear, their Lordships were considering the scope of Section 4 (1) and in doing so, the aforesaid observations were made, which leave no room for any doubt that the publication of the substance in the concerned locality has to be made simultaneously with or immediately after the publication of notification in the official Gazette. In view of the aforesaid discussion I hold that the substance of the notification has to be published in the concerned locality simultaneously and in case

it is not possible to give notice of the substance in the concerned locality simultaneously, then at least it has to be done immediately after the publication of the notification in the official Gazette and it would be for the State to show that whatever time was taken to give notice of the substance in the concerned locality was the minimum possible time taken for this purpose.

13. Adverting to the facts of this case, I find that publication of the substance in the concerned locality was made as late as on the 29th day after the publication in the official Gazette. That being so, the impugned notifications cannot legally be sustained. Accordingly, I allow this petition, quash the impugned notifications, Annexures P-1 and P-2, issued under Sections 4 and 6 of the Act respectively.

14. However, in the circumstances of the case, I make no order as to costs.

BHOPINDER SINGH DHILLON, J.: I agree.

AJIT SINGH BAINS, J.: I also agree.
Petition allowed.

AIR 1976 PUNJAB & HARYANA 283

B. S. DHILLON AND M. R. SHARMA, JJ.

The Bapauli Co-operative Agricultural Service Society, Petitioner v. The State of Haryana and others, Respondents.

Civil Writ Nos. 427 of 1975 and 5078, 5202, 5522 and 6431 of 1974, D/- 19-4-1976.*

(A) Punjab Co-operative Societies Act (1961) (as amended by Haryana State Legislature), Ss. 84-A, 85 (2) and 23 — Haryana State Central Co-operative Bank Staff Service (Common Cadre) Rules, 1975 — Validity — Rules do not infringe upon statutory rights of primary Societies and are not ultra vires — There is no conflict between area of operation of Ss. 84-A and 23.

Provisions of S. 84-A do not run counter to Ss. 23 and 85 (2) (xxxviii) of the Act and are therefore not ultra vires the Act. Likewise the Haryana State Central Co-operative Bank Staff Service (Common Cadre) Rules, 1975 do not infringe the statutory rights of primary Societies and are not ultra vires. The service Rules framed by the apex society lay

*(Case referred by B. S. Dhillon J. on 7-11-1975.)

FT/GT/B885/76/GGM

conditions of service of the Secretaries of the Primary Societies which do not necessarily impinge upon the authority of the general body of a society conferred upon it under Section 23 of the Act. Such a general body or a small body would continue to give day-to-day instructions to the Secretaries who shall be bound to follow them. The rules would come into play only when a dispute touching upon the relationship of a master and servant vis-a-vis the general body of the Primary Societies and its Secretaries is being considered. Where a Secretary does not follow or obey the lawful directions issued by the general body of the primary society, penal action against him would have to be taken under the Common Cadre Rules, but it does not mean that the Secretary is not subordinate to the general body of the members. There is no conflict between the areas of operation of Sections 23 and 84-A of the Act. Both have been enacted for different purposes and can be given full effect without impairing in any manner the applicability of the other. (Para 20)

(B) Interpretation of Statutes — Construction of two provisions of a Statute — Principle.

Two provisions of a Statute have to be read in such a manner that one of them does not necessarily repeal the other. The question of repeal of one provision of a statute by another arises only when two of them are wholly incompatible with one another or if they are read together they would lead to wholly absurd consequences. If on a fair and proper interpretation these two provisions can be reconciled with each other, the Courts of law are under a duty to adopt such an interpretation and to give full effect to the two provisions of the Act instead of holding that one of them is repealed by the other. AIR 1959 Punj 1 (FB), Rel. on.

(Para 18)

(C) Punjab Co-operative Societies Act (1961) (as amended by Haryana State Legislature), S. 84-A — Haryana State Central Co-operative Bank Staff Service (Common Cadre) Rules, 1975 — Validity — S. 84-A provides sufficient guidelines — Rules do not therefore suffer from excessive delegation. AIR 1968 SC 1232, Rel. on. (Para 21)

Cases Referred: Chronological Paras
AIR 1968 SC 1232 = (1968) 3 SCR 251 21
AIR 1969 Punj 1 = 60 Pun LR 515 (FB)

18

Prem Singh with N. S. Ahlwat, for
Petitioners R. K. Chhokar, Intervener;

C. B. Kaushik for A. G. (Haryana), for Respondents Nos. 1 to 4.

M. R. SHARMA, J.:— The petitioner is a Co-operative Society registered under the Punjab Co-operative Societies Act, 1961 (hereinafter called the Act). In exercise of powers under Section 84-A of the Act, the Registrar Co-operative Societies, Haryana, Chandigarh, directed the Apex Society respondent No. 3 to frame Common Cadre Rules applicable to some of the categories of servants of its member societies, including the petitioner-Society. Respondent No. 3 consequently framed the Primary Co-operative Agricultural Credit/Service Societies, Secretaries Common Cadre Rules, 1973, which were later on replaced by the Haryana State Central Co-operative Bank Staff Service (Common Cadre) Rules, 1975 (hereinafter called the Rules). It is alleged that these Rules infringed upon the statutory rights of the Primary Co-operative Societies conferred on them under Section 23 (1) of the Act, which lays down that final authority in a co-operative society shall vest in the general body of the members and where the bye-laws of such a society provide the constitution of a smaller body, such authority shall vest in the smaller body consisting of the delegate members of the society.

2. The other ground of challenge is that the Legislature has not provided sufficient guidelines in Section 84-A of the Act to the apex societies to frame the requisite rules. The petitioner-Society has urged that it is highly satisfied with the services rendered by the Secretary appointed by it about five years back whom it wants to retain even now and because of the Common Cadre Rules it may be forced to dispense with his services.

3. This petition and certain other such petitions came up for hearing before my learned brother Dhillon, J., on November 7, 1975. It was argued before him that the provisions of Section 84-A run counter to the provisions of Section 23 and Section 85 (2) (xxxviii) of the Act. My learned brother was of the view that the question involved was of considerable importance affecting a large number of employees of the various societies, and for this reason he recommended that the case be decided by a larger Bench. This is how, this reference has come up before us for decision.

4. At the very outset I would like to notice the provisions of the Act. Section 2 of the Act provides the definition of

certain expressions used in the Act. According to sub-section (aa) an 'apex society' means 'a co-operative society whose membership includes central societies'. According to sub-section (bb) a 'central society' means 'a co-operative society whose membership includes primary societies'. According to sub-section (bbb) a 'primary society' means 'a co-operative society whose membership consists exclusively of individuals'.

5. According to sub-section (b) of Section 2 'committee' means 'the governing body of a co-operative society, by whatever name called, to which the management of the affairs of the society is entrusted'.

6. Each and every society is not entitled to be registered as a co-operative society under the Act. Section 4, lays down that subject to the other conditions of the Act, a society which has its object the promotion of the economic interests of its members in accordance with the co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under the Act with or without limited liability. The emphasis is on the promotion of the economic interests of the members of a society in accordance with co-operative principles.

7. Section 7 lays down the manner in which an application for registration of a society is to be made to the Registrar. Section 8 (1) is of some importance which may be reproduced as under :

"8. Registration (1) If the Registrar is satisfied—

(a) that the application complies with the provisions of this Act and the rules,

(b) that the objects of the proposed society are in accordance with Section 4,

(c) that the proposed bye-laws are not contrary to the provisions of this Act and the rules, and

(d) that the proposed society has reasonable chances of success, the Registrar may register the society and its bye-laws."

8. Not only the object of the society should be the promotion of the economic interests of its members in accordance with co-operative principles but its bye-laws should also not be contrary to the provisions of the Act and the Rules.

9. Section 10-A empowers the Registrar to direct the amendment of the bye-laws of a society if he is satisfied that such an amendment is necessary or desirable in the interests of such a society.

10. Section 23 is again of some importance and reads as under:—

"23. Final authority in a co-operative society:—

(1) The final authority in a co-operative society shall vest in the general body of members:—

Provided that where the bye-laws of a co-operative society provide for the constitution of smaller body consisting of delegates of members of the society elected or selected in accordance with such bye-laws the smaller body shall exercise such powers of the general body as may be prescribed or as may be specified in the bye-laws of the society.

(2) Notwithstanding anything contained in sub-section (2) of Section 19, each delegate shall have one vote in the affairs of the society."

11. The question which is likely to crop up in this case is whether the managing body possesses unlimited authority to carry on its business regardless of the other provisions of the Act or not.

12. There have been some instances in which the managing body could not elect its successor before the expiry of its term. In such an eventuality, Section 26-A of the Act empowers the Registrar to constitute a new committee in certain cases.

13. Section 27 empowers the Registrar to supersede a committee if in his opinion such a committee persistently makes default or is negligent in the performance of the duties imposed on it by the Act or the rules framed thereunder or the bye-laws, or the Society commits any act which is prejudicial to its interest or its members.

14. Section 30 provides that the registration of a co-operative society shall render it a body corporate by the name under which it is registered having perpetual succession and a common seal, and also enjoy power to hold property, the power to enter into contracts and the power to institute and defend legal proceedings.

15. The next section which is of relevance for the purpose of this case is Section 84-A of the Act which is under challenge. It reads as under:—

"84-A. Constitution of common cadre:

(1) The Registrar may require an apex society to constitute a common cadre of all or specific class of employees in the service of that society or in the

service of the central societies which are members of the apex society, or in the service of the primary societies which are members of the apex society or the aforesaid central societies.

(2) When a common cadre is constituted under sub-section (1), the apex society shall, with the prior approval of the Registrar, make rules for the regulation of recruitment and the conditions of service of such employees."

16. Section 85 of the Act empowers the State Government to carry out the purposes of the Act. Sub-section (2) of this section lays down that rules also be framed for—

"85 (2) (xxxviii): qualifications for members of the committee and employees of a society or class of societies and the conditions of service subject to which persons may be employed by societies."

17. A cumulative consideration of the aforementioned provisions of the Act makes it abundantly clear that the societies formed only with the object of promoting economic interests of its members on co-operative principles can be registered by the Registrar under the Act. The bye-laws of these societies are not supposed to be contrary to the provisions of the Act and the rules framed thereunder. Apart from the right of the society to suo motu apply to the Registrar for the amendment of bye-laws, the Registrar himself is empowered to direct a society to amend its bye-laws if he is satisfied that such an amendment is necessary or desirable in the interests of such a society. Since the bye-laws of a society have of necessity to be in conformity with the provisions of the Act and the Rules as laid down in Section 8 (1) (c) of the Act, it is reasonable to infer that wherever it appears to the Registrar that the bye-laws of a particular society come in conflict with the provisions of the Act and the rules framed thereunder, he would not only be empowered to order an amendment of the bye-laws but shall also be under a duty to do so under Section 10-A of the Act. The Registrar acts as a mentor and a guide for the co-operative societies. He is under a statutory obligation to see that these societies continue to function. For this purpose, he has been empowered to supervise the election of the managing committees and to nominate or to supersede the committee if the term of the elected committee expires or the committee is found to be amiss in the performance of its statutory duties, as the

case may be. In short, the ultimate power of control and supervision vests in the Registrar. He is expected to see that the co-operative societies which are corporate bodies under the Act continue to function in accordance with the provisions of the Act and the Rules.

18. The final authority in a co-operative society does of course vest in the general body of its members or its managing body elected in accordance with its bye-laws as laid down in Section 23 of the Act, but this authority is not absolute and free from restraints. Even the general body of the members cannot take any steps which may be derogatory to the promotion of the economic interests of the members of a society in accordance with co-operative principles; nor can the general body take any decision which may be contrary to the Act or the Rules framed thereunder. When considered in this light, Section 23 of the Act has to be interpreted in such a manner so that its operation does not set at naught some of the other provisions of the Act. It is settled law that two provisions of a statute have to be read in such a manner that one of them does not necessarily repeal the other. The question of repeal of one provision of a statute by another arises only when two of them are wholly incompatible with one another or if they are read together they would lead to wholly absurd consequences. If on a fair and proper interpretation these two provisions can be reconciled with each other, the Courts of law are under a duty to adopt such an interpretation and to give full effect to the two provisions of the Act instead of holding that one of them is repealed by the other. See in this connection, *The Ambala Ex-Servicemen Transport Co-operative Society Ltd., Ambala City v. The State of Punjab*, AIR 1959 Punj 1 (FB). In modern times the theory of *laissez faire* allowing absolute right to the master to terminate the services of his employees has lost all significance. Under the industrial law, elaborate provisions have been made to avoid security of tenures to the industrial workers. Thus, even a private master cannot be allowed to put an end to the employment of industrial workers so long as they do not commit an act of misconduct. Even when misconduct is alleged, an enquiry has to be held in accordance with the provisions of standing orders which by and large correspond to the principles of natural justice. Precisely for these reasons, it is said that now-a-days elements of con-

tractual liability are slowly vanishing as necessary attributes of a public service which is becoming more and more a matter of status.

19. Even under the common law, it is not necessary that the master himself should exercise all the powers of control over the servant. According to Halsbury's *Laws of England*, Third Edition, Volume 25, page 447—

"A person may be the servant of another although a third party has the power of appointing or dismissing him or of requiring his dismissal, or has powers of direction and control in regard to his work, or pays him his wages. A person may be a servant although remunerated otherwise than by wages or although only employed at will; and the relation is not destroyed because the master works with the servant. A person may be a servant to different masters; and a contract for exclusive personal service does not necessarily establish the relation of master and servant."

20. An apex society shall advance money to the central and primary societies. It is, therefore, essential that this money should be put to an effective use for the benefit of the borrowing and the lending societies. The law can, therefore, lean in favour of the interests of the borrowing society by providing that such societies should frame rules governing the classes of public servants who are entrusted with the duty of handling the money advanced by them. This is precisely what Section 84-A of the Act authorised the Registrar to do. The service rules framed by the apex society lay conditions of service of the Secretaries of the Primary Societies which do not necessarily impinge upon the authority of the general body of a society conferred upon it under Section 23 of the Act. Such a general body or a small body would continue to give day-to-day instructions to the Secretaries who shall be bound to follow them. The rules would come into play only when a dispute touching upon the relationship of a master and servant vis-a-vis the general body of the Primary Societies and its Secretaries is being considered. Where a Secretary does not follow or obey the lawful directions issued by the general body of the primary society, penal action against him would have to be taken under the Common Cadre Rules, but it does not mean that the Secretary is not subordinate to the general body of the members. Speaking

for myself, I can see no conflict between the areas of operation of Sections 23 and 84-A of the Act. Both have been enacted for different purposes and can be given full effect without impairing in any manner the applicability of the other. The first contention raised on behalf of the petitioner-society must, therefore, be repelled.

21. The second ground of attack does not stand even a moment's scrutiny in view of the authoritative pronouncements of their Lordships of the Supreme Court in a large number of cases. Section 84-A (2) of the Act lays down that the apex society shall, with the prior approval of the Registrar make rules for the regulation of recruitment and the conditions of service of such employees (emphasis supplied). The words 'recruitment' and 'conditions of service' have come to acquire meanings which are well known. These words furnish sufficient guidelines to the apex society to make rules. Where the Legislature retains in its own hands the essential legislative functions and delegates the task of implementing the purposes and objects of the statute by enunciating a legislative policy with sufficient clearness, the rules made by the rule-making authority cannot be said to suffer from the vice of excessive delegation. In the *Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi*, AIR 1968 SC 1232, it was observed as under:—

"What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

22. The apex society which supplies funds to its member-society is expected to know that officials of a particular standard and security of service would be best suited to handle the funds advanced by it. The rules have to be framed by it regarding regulation of recruitment and conditions of service only. By enacting Section 84-A (2) of the Act, the Legislature has given a clear expression to its policy and has not delegated its essential legislative functions in favour of an outside agency. The second contention raised

on behalf of the petitioner also deserves to be repelled and I order accordingly.

23. For the reasons mentioned above, I would hold that the rules framed under Section 84-A of the Act do not infringe upon the rights of a managing body of a primary co-operative society appearing in Section 23 (1) of the Act and by enacting Section 84-A of the Act the Legislature has not abdicated its essential legislative functions. I would accordingly order that this petition be dismissed with no order as to costs.

BHOPINDER SINGH DHILLON, J.:—
I agree.

Petition dismissed.

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R. S. NARULA, C. J. AND

D. S. LAMBA, J.

Thakur Singh and others, Appellants
v. Inder Singh, Respondent.

Second Appeal No. 63 of 1972, D/-
22-3-1976.*

(A) Oaths Act (1969), S. 9 — Repeal of Sections 9 to 12 of Act of 1873 — Effect — Party offering to be bound by special oath — Statement made on such special oath — Effect — Compromise containing offer of special oath would be covered by S. 20, Evidence Act, if statement made strictly in accordance therewith. (Evidence Act (1872), S. 20).

The only effect of exclusion of Sections 9 to 12 of the Oaths Act, 1873 by Oaths Act, 1969 is that if any party to any judicial proceeding offers to be bound by any special oath and the Court thinks it fit to administer such an oath to the other party consenting thereto and such oath is taken by the other party, the evidence given on such oath as against persons who offered to be bound as aforesaid would no more be conclusive proof of the matter stated in such deposition. Where an agreement was arrived at between the counsel for parties that if the defendant were to take oath in a particular Gurdwara stating that the suit land was not of plaintiff and that defendant had not executed any agreement in favour of plaintiff, the suit of plaintiff be dismissed and in pursuance of the order of the Court on the basis of agreement, the de-

*(Case referred by M. R. Sharma J. on 4-10-1973.)

defendant did take oath, there being no special oath either prescribed or taken, and the suit having been dismissed on the basis of such oath,

Held that the compromise arrived at between the counsel for the plaintiff on behalf of his client and the defendant-appellant would be covered by Section 20 of the Evidence Act and the plaintiff would be bound by the statement made by the defendant if the same is found to have been made strictly in accordance with the terms offered by him. (Para 5)

Cases Referred: Chronological Paras
AIR 1972 Punj 398 = 75 Pun LR 498 4
AIR 1968 Ker 213 = 1968 Ker LJ 62 (FB) 4

AIR 1963 Punj 376 4

AIR 1930 PC 158 = 57 Ind App 133 4

R. L. Luthra, for Appellants; H. L. Sarin, Sr. Advocate, M. L. Sarin with him, for Respondent.

R. S. NARULA, C. J.:— In a suit for specific performance of an alleged agreement by which defendant-appellant agreed to execute a deed transferring the ownership rights of a specific piece of land measuring 17 Kanals and 18 Marlas, an agreement was arrived at between the counsel for the parties in the trial Court after a good deal of evidence had already been led by them. This happened on August 19, 1971. Shri Brij Mohan Lal, counsel for the plaintiff, made the following statement:—

"Suit of the plaintiff may be dismissed, if Thakar Singh defendant takes oath in the Kandh Sahib Gurdwara that suit land is not of the plaintiff and he has not made any agreement of it in favour of plaintiff. In case he does not take oath suit of the plaintiff may be decreed." The statement was signed not only by Brij Mohan Lal Advocate but also by the plaintiff's son Sohan Singh. On that statement being made on behalf of the plaintiff, Thakar Singh defendant made the following statement on oath before the trial Court:—

"I accept the offer of the counsel of the plaintiff; suit may be decided according to it." Thakar Singh's statement was thumb-marked by him and also signed by his Advocate. The following order was thereupon passed by the trial Court on that date:—

"In view of the statements of counsel of parties and defendant Thakar Singh, I appoint Gurmukh Singh to administer oath to Thakar Singh defendant as stated

by the counsel of the plaintiff, that Thakar Singh made no agreement in favour of plaintiff of the suit land. If he takes oath suit will be dismissed, otherwise the same would be decreed. His fee is fixed at Rs. 30 to be paid half and half by parties."

It may be noticed at this stage that Inder Singh plaintiff (who is present before us today) is stated to be more than 100 years old. It is the common case of both sides that his son Sohan Singh has been actively prosecuting this litigation on his behalf. It may also be of interest to note that Inder Singh plaintiff and Thakar Singh, contesting defendant, are real brothers and the claim relates to certain land which is alleged to have been allotted in excess to Thakar Singh in lieu of the joint land which had been left behind by the parties in Pakistan. What happened in pursuance of order of the Court dated August 19, 1971, was that Gurmukh Singh who is stated to be the Reader of the Court of Shri A. C. Rampal, the learned Sub-Judge before whom the case was pending at the trial stage, went to the Kandh Sahib Gurdwara along with plaintiff's son Sohan Singh, defendant Thakar Singh and certain counsel. On his return, he submitted his report on the same day in the following words:—

"I am appointed as Local Commissioner for administration of oath to Thakar Singh. Thakar Singh has taken oath as per statement in Court in the presence of Sohan Singh son of Inder Singh plaintiff. Submitted."

On the receipt of the above report, the trial Court recorded the statement of plaintiff's counsel, which is also signed by plaintiff's son Sohan Singh wherein it is recorded that the suit of the plaintiff may be dismissed and it is added that Thakar Singh defendant had taken an oath. After that statement of the counsel for the plaintiff, the suit of the plaintiff was dismissed by the Court of Shri A. C. Rampal "in view of statement of counsel of plaintiff". No objections were filed against the report of the Commissioner. Mr. Sarin's case is that his client was not even given breathing time and there was no opportunity to file any objections.

2. An appeal against the decree was preferred by the plaintiff to the Court of the District Judge, Shri Ved Parkash Sharma, District Judge, Gurdaspur, allowed the plaintiff's appeal by his judgment dated May 31, 1972. The learned Dist. Judge held that Shri Brij Mohan

Lal, Advocate for the plaintiff, had no power to consent to the settlement of the case by an oath being taken by the opposite party under S. 9 of the Indian Oaths Act, 1873, nor did Section 36 of the Code of Civil Procedure, 1882, give him any such authority as no specific power to that effect had been given to him in the Vakalatnama executed in his favour by the plaintiff. In addition, he held that the trial Court acted in an indecent haste to decide the case inasmuch as the report of the Commissioner did not specifically show that Thakar Singh had actually stated in the Gurdwara and the Commissioner had not even reported as to where and in whose presence the statement was made by Thakar Singh. An objection was taken by the learned District Judge to the words spoken by Thakar Singh not having been recorded by the Local Commissioner. Notice was also taken of the difference in the statement required to be given by Thakar Singh on oath between what had been stated by the Advocate for the plaintiff and what had been recorded in the order of the trial Court. The decree of the trial Court was set aside for the foregoing reasons and the case was ordered by the lower appellate Court to be remanded to the trial Court for re-decision on merits.

3. The unsuccessful defendant then filed this appeal against the order of the learned Additional District Judge. When the appeal came up before a learned Single Judge of this Court, he noticed the contention of the counsel for the defendant-appellant that an Advocate has an inherent right to enter into a compromise and that even if the provisions of the Indian Oaths Act, 1873, could not apply on account of the repeal of that Act by the Oaths Act 44 of 1969, nothing could stop the Advocate of the plaintiff-respondent in settling the case on the basis of certain conditions. Since, in the opinion of the learned Single Judge, this question was one of importance and there is also some judicial opinion to the effect that the provisions of the Act were against public policy, the learned Judge thought it proper that the case should be decided by a larger Bench and, therefore, made this reference on October 4, 1973.

4. At the hearing of this appeal before us, Mr. R. L. Luthra, the learned counsel for the defendant-appellant, referred to the basic decision of their Lordships of the Privy Council in *Sourendra Nath Mitra v. Tarubala Dasi*, AIR 1930

PC 158; the judgments of two learned Single Judges of this Court in *Mst Bachni v. Kartar Singh*, AIR 1963 Punj 376 and *Suraj Bhan v. Jogi Ram*, 1973-75 Pun LR 498 = (AIR 1972 Punj 398) and the Full Bench decision of the Kerala High Court in *Chengan Souri Nayakam v. A. N. Menon*, AIR 1968 Ker 213; and submitted that Advocates in India have inherent right to enter into a compromise on behalf of their clients even if no such specific authority is conferred on them in their Vakalatnamas unless such an authority is expressly excluded by a special stipulation in the Vakalatnama or otherwise countermanded by a client. It is unnecessary to discuss this point further as Mr. H. L. Sarin, the learned senior counsel for the plaintiff-respondent, has frankly conceded this issue. He does not deny that in the absence of an express stipulation to the contrary, his client's counsel in the trial Court had authority to enter into a compromise with the other side in Court.

5. Mr. Sarin has, however, argued that the effect of the repeal of the 1873 Act by the 1969 Act and the express exclusion of the provisions contained in Sections 9 to 12 of the 1873 Act is that no suit can now be compromised on the basis of a special oath. Sections 8 to 12 of the Act X of 1873 were in the following terms:—

"8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. If such party or witness agrees to make such oath or affirmation, the Court

may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal."

The whole of the 1873 Act has been repealed by Section 9 of the 1969 Act. Whereas provisions corresponding to other Sections of the 1873 Act have been made in the new Act, no provisions have been made therein corresponding to Sections 9 to 12 of the old Act. The only effect of the exclusion of Sections 9 to 12 of the old Act is that if any party to any judicial proceeding offers to be bound by any special oath and the Court thinks it fit to administer such an oath to the other party consenting thereto and such oath is taken by the other party, the evidence given on such oath as against persons who offered to be bound as aforesaid would no more be conclusive proof of the matter stated in such deposition. In the instant case, it is significant to note that no special oath was prescribed. The counsel for the plaintiff in his statement (which has already been quoted above) did not prescribe any special oath nor any special form of the oath but merely offered the defendant-appellant to take oath and make statement on the two crucial points in issue in a particular Gurdwara. He was not required to swear by the Gurdwara or by Guru Granth Sahib or in any other special manner. In these circumstances, it appears to us that the compromise arrived at between the counsel for the plaintiff on behalf of his client and the defendant-appellant would be covered by Section 20 of the Evidence Act and the plaintiff would be bound by the statement made by the defendant on the two crucial issues if the same is found to have been made strictly in accordance with the terms offered by him.

6. Mr. Sarin has then submitted that the record of this case does not show as to what Thakar Singh defendant-appellant, exactly stated in the Gurdwara. On the last hearing, there was some dispute about the parties having gone to the Gurdwara or not having gone there at all. We, therefore, sent for the parties. Thakar Singh, defendant-appellant, is stated to be ill. His son Dalip Singh is present before us. Inder Singh plaintiff who, as already stated, is a very old man, is also present in Court. Both of them have told us that Thakar Singh had gone to Gurdwara Kandh Sahib and that the plaintiff had sent his son Sohan Singh. The plaintiff has also admitted before us that when Sohan Singh came back from the Gurdwara, he told the plaintiff that Thakar Singh had taken a false oath. None is, however, able to state as to what exact words were uttered by Thakar Singh in the Gurdwara as neither Dalip Singh nor Inder Singh plaintiff were present there. What was stated by Thakar Singh at the spot would be known only either to him or to Gurmukh Singh, Local Commissioner, unless there was by chance any other independent person. Mr. H. L. Sarin has suggested that if the appeal has to be allowed and if the order has to be set aside, the lower appellate Court should be directed to hold an enquiry into the question whether Thakar Singh had or had not, in fact, stated both the things in his statement on which the plaintiff had, through his counsel, agreed to have the suit dismissed.

7. We, however, find another infirmity in the case of the defendant-appellant. In the statement made by Shri Brij Mohan Lal, Advocate for the plaintiff, he had offered to have the suit dismissed only if the defendant were to take oath in the specified Gurdwara, (a) that the suit land was not of the plaintiff; and (b) that the defendant had not made any agreement in respect of land in favour of the plaintiff. This was the offer which had been accepted by the defendant. While purporting to accept the compromise arrived at between the parties in the above terms, the learned Subordinate Judge somehow omitted to mention one of the two essential ingredients of the statement which was to be made by the defendant in order to succeed in the suit in terms of the compromise. The order (as already quoted in the earlier part of this judgment) stated that if Thakar Singh had said that he made no agreement in

favour of the plaintiff of the suit land, the suit was to be dismissed. He did not specify the other condition on which the counsel for the plaintiff had made the express offer.

8. Mr. Luthra has contended that, notwithstanding the erroneous order of the Court, the Oath Commissioner had, in fact, given an opportunity to the defendant to make statement on both the points as his report mentions that the defendant had taken oath "as per statement in Court." The learned District Judge is correct in remarking that the report of the Commissioner is beautifully vague and does not convey anything. We would normally have acceded to Mr. Sarin's request to have the matter further enquired into by the lower appellate Court if the order of the Court had been inconsistent with the compromise between the parties. The Local Commissioner was confined to the directions given to him by the trial Court. He is presumed to have confined his actions within the scope of that authority. That being so, Thakar Singh's statement on oath is presumed to have been confined to only one of the two points on which he was expected to speak on oath in order to succeed in the suit in terms of the compromise. The statement made by Thakar Singh on oath in the Gurdwara in accordance with the order of the trial Court dated August 19, 1971, could not, therefore, fulfil the requirements of the offer made by the counsel for the plaintiff.

9. We agree with the learned District Judge that the trial Court appears to have acted in an indecent haste. The fact that the counsel for the plaintiff-respondent agreed to the dismissal of the suit on learning that Thakar Singh had taken the oath, does not make any difference as the statement made before the Local Commissioner is presumed to have been made in terms of the order given by the Court to the Local Commissioner. In fact, it appears to us that Thakar Singh was not to make an oral statement and the compromise between the parties envisaged that his statement was to be recorded. Court cases are not decided on oral statements which do not become part of the record. The Oath Commissioner does not appear to have done his duty properly in not recording the statement and has merely submitted a laconic report to the effect that the defendant had made a statement on oath. The learned Subordinate Judge should not have accepted this

kind of report of the Commissioner and should have insisted on the Commissioner's going back to the Gurdwara and recording the statement of the defendant in terms of the offer made by the counsel for the plaintiff.

10. For the foregoing reasons, we are unable to allow this appeal and dismissing the same, uphold the order of the learned District Judge. The parties are directed to appear before the trial Court on April 19, 1976. They are left to bear their own costs. The lower Court record should be returned immediately.

Appeal dismissed.

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S. S. SANDHAWALIA AND

S. C. MITAL, JJ.

Sadhu Ram and another, Petitioners
v. The State of Haryana and others, Respondents.

Civil Writ No. 2842 of 1973, D/- 3-2-1976.*

(A) Punjab Co-operative Societies Rules (1963) (as applied to Haryana), R. 23 (before amendment of 1974) — Bye-law of Co-operative Society permitting indirect elections to Managing Committee through delegates — Bye-law violates Appendix 'C' framed under R. 23 and is invalid — (Indri Cane Growers Co-operative Society, Bye-laws framed by Bye-law 15). (Para 12)

In May 1973, the law did not sanction an election through the delegates. It is well settled that the bye-laws of a Society cannot violate or run counter to the statutory provisions under which the same has been duly registered. In a case of conflict between the Act and the Rules framed thereunder, the bye-laws must give way to the parent provisions. Consequently, bye-law 15 of the Indri Cane-growers Co-operative Society, which was at the relevant time (in May 1973) in direct and flagrant contradiction with the provisions of Appendix 'C' framed under Rule 23 (which prescribed the mode of elections) must be deemed to be of no validity. Any election held in accordance with the bye-law 15 which was in patent conflict with Appendix 'C', the statutory

* (Decided by Division Bench on order of reference made by M. R. Sharma J. on 18-9-1974.)

provisions then existing, has, therefore, to be set aside. (Paras 9, 10)

The Proviso to S. 23 (1) of the Punjab Co-operative Societies Act would not in any way affect the provisions regarding the mode of holding elections to the Managing Committee of the Society at the material time. Civil Writ No. 365 of 1966, D/- 20-5-1966 (P & H), Approved.

(Para 11)

Cases Referred: Chronological Paras
Civil Writ No. 365 of 1966, D/- 20-5-1966.
(Punj & Har) 11

G. S. Sandhu, for Petitioners; C. B. Kaushik (for Nos. 1 to 5); Bhagirath Dass (for Nos. 6 to 10), for Respondents.

S. S. SANDHAWALIA, J.:— Whether bye-law 15 of the Indri Cane Growers Co-operative Society Ltd. providing that the members of the said Society will exercise their votes through their delegates and will have no vote of their own is violative of Appendix 'C' framed under Rule 23 of the Punjab Co-operative Societies Rules, 1963, is the primary and indeed the sole question which calls for determination in this writ petition before us on a reference.

2. Since the only legal issue pressed before us is the one mentioned above, it suffices to advert to the facts relevant thereto. The two petitioners are the members of the Indri Cane Growers Co-operative Society Ltd., (hereinafter called the Society) which is a body duly registered under the Punjab Co-operative Societies Act 1961. The Cane Commissioner Haryana (respondent No. 4) fixed the election to the Managing Committee of the Society on a zonal basis for the 31st of May, 1973, and appointed the Assistant Registrar, Co-operative Societies (respondent No. 5) as the Returning Officer therefor. The election programme provided that the nomination papers were to be filed on the 23rd of May, 1973; which were to be scrutinised on the following day; the date for withdrawal of nominations and the allotment of symbols was fixed for the 26th of May, 1973. On this date, the Returning Officer declared respondents Nos. 7 to 10 as having been elected uncontested to the Managing Committee of the Society from zones Nos. 1 to 4. However, on the 30th of May, 1973, vide Annexure 'A', the Cane Commissioner Haryana postponed the election scheduled to be held on the following day till further orders. It is unnecessary to advert to the reasons or the validity of this postponement and it suffices to men-

tion that the election of persons from zones Nos. 5 to 7 was ultimately fixed for the 16th of September, 1973.

3. The core of the petitioners' case pressed on their behalf is that the aforementioned elections were required to be contested through delegates in accordance with the bye-laws of the Society (in particular bye-law 15 thereof) which were patently violative of Appendix 'C' framed under Rule 23 of the Punjab Co-operative Societies Rules, 1963 (hereinafter referred to as the Rules). It has been claimed that such an election to be of validity must be held in accordance with the provisions of Appendix 'C'. On behalf of the petitioners it has been pointed out that though the elections of all Co-operative Consumers Stores in the State were earlier held through delegates but after the promulgation and enforcement of Appendix 'C' these elections were now being held like all other Societies under the relevant provisions of Appendix 'C'. Consequently it is highlighted that the election through the medium of delegates to the Managing Committees of all Cane Growers Co-operative Societies including the present one is violative of the mandatory provisions of Rule 23 and Appendix 'C' thereto. It is the petitioners' case that by virtue of the said provision the right to be a candidate in the election and the right to vote therein are vested in every member of the Society directly and not through the agency of the delegates of those voters. It is, therefore, alleged that any provision to this effect in the bye-laws cannot stand and be of validity against the prescribed statutory provisions and hence all elections held in accordance with the said bye-laws through the delegates are invalid. It is prayed that the elections of respondents Nos. 7 to 10 as members of the Managing Committee of the Society be struck down because the same had been held through the medium of delegates and further that the orders of respondent No. 4 for fixing the election in an identical manner from zones Nos. 5 to 7 on the 16th of September, 1973, be quashed.

4. The return has been filed on behalf of the official respondents Nos. 1 to 4. In the relevant paragraph thereof it has been claimed that the election to the Managing Committee of the Society has to be held under the direction of the answering respondents and is in no way in contravention of the statutory provisions. It has been stated in para 13 (b) of the

return that the Society is a Central Society and elections to the Managing Committee thereof are to be held in accordance with the provisions of para second of Appendix 'C' framed under Rule 23. It is, however, reiterated that this election has to be held on a zonal basis through delegates as provided by the abovesaid provision. It is also highlighted that the bye-laws of the Society itself provide for the election of managing committee through delegates. These provisions are reiterated to be legal and valid and it is the respondent's case that the same have not become infructuous or illegal by virtue of the enforcement of Appendix 'C' under the Rules.

5. Inevitably a reference has first to be made to Section 19 of the Act which lays down the cardinal rule regarding the manner of exercising a vote. There have been material changes made in the Act after the formation of the States of Punjab and Haryana, but as the present case relates to the State of Haryana, it suffices to advert to the relevant provision as it now stands:—

"19. Every member of a co-operative society shall exercise his vote in person and no member shall be permitted to vote by proxy:

Provided that—

(a) a co-operative society which is a member of another co-operative society, may, subject to the rules, appoint one of its members to vote on its behalf in the affairs of the other society;

(b) a class or classes of persons or associations of persons, authorised to become members of a co-operative society under clause (1) of Section 15, may, subject to the rules, appoint one of its representatives to vote on its behalf in the affairs of the society."

As a matter of legal history, however, it may be noticed that originally Section 19 had two sub-sections and by the amending Haryana Act No. 13 of 1971 sub-section (2) was omitted and the proviso noticed above was added to the statute. Construing the plain language of Section 19 above-quoted it is evident that it provides for the exercise of a vote primarily in person. Two exceptions to this rule, however, are now laid down by the proviso. Clause (a) thereof obviously provides for the manner of voting by a legal person (i.e. a Co-operative Society which is a member of another Co-operative Society) through an authorised representative thereof. Similarly clause (b) provides

that where a class or classes of persons or associations of persons have become a member of a co-operative society they may appoint one of their representatives to vote on their behalf in the affairs of the Society. It is significant to note that Section 19 itself does not directly provide that actual persons who are members of a co-operative society may exercise their votes through delegates only for the purposes of the election.

6. We may, therefore, turn to the other relevant statutory provisions in order to determine whether voting through delegates alone is authorised or sanctified by them and further whether they warrant the denuding of a right of vote in person vested in a member of a Co-operative Society. Section 26 of the Act lays down that the members of the Committee of a Co-operative Society shall be elected in the manner prescribed and no person shall be so elected unless he is a shareholder of the Society. Statutory Rules have been framed for the purpose of laying down in detail the manner in which the elections are to be held. The primary rule in this context is Rule 23 to the following effect:—

"Election of Committee: The members of the Committee of a Co-operative Society shall be elected in accordance with the rules given in Appendix C."

It is the common case of the parties before us that the validity of the impugned election is to be tested on the touch-stone of the law as it existed on the 26th of May, 1973, when respondents Nos. 7 to 10 were declared elected. Therefore turning to Appendix 'C' as it then stood in the State of Haryana, the material provisions are in part I thereof which consists of two basic rules laying down the definitions of the terms used in this Appendix and the qualification for election as a member of the Committee. Particular reference is merited by the definition given herein to the words 'candidate' and 'voter' which are quoted in extenso for facility of reference:—

"1 (a) 'Candidate' means a voter who files his nomination papers to seek election; and

(g) 'Voter' means a person who is either a shareholder or an authorised representative of a member co-operative society, duly qualified to participate in the election."

7. Reading the aforesaid two definitions together (as they must necessarily be) it is plain that a person cannot be a

candidate unless he is first a voter. To qualify for being a voter, two conditions are prescribed, namely, that he is either to be a shareholder of a Society or an authorised representative of a member co-operative society. It is evident that either of the persons satisfying these two qualifications is intended to and has been vested by the law with the right to vote. The statutory provisions make no mention either expressly or by necessary implication of an election through the media of delegates only or further that a member will not have a vote of his own and shall exercise the same only through an indirect manner. The core of the issue primarily, therefore, is whether an indirect election through delegates only is valid or whether the law requires a direct exercise of the vote by the shareholders who are actual persons or in case of member co-operative society through their authorised representatives. We are afraid that the definitions as they stood at the material time did not countenance in theory of an election through delegates only or what may be called as a strictly indirect mode of election.

8. The abovesaid view is further fortified when a reference is made to Part II of Appendix 'C' which lays down very detailed rules for elections to the Committees of the Apex; Central Co-operative Societies, and the Primary Co-operative Societies, and the Primary Co-operative Land Mortgage Banks. It is even the admitted case of the respondents that the aforesaid provisions of Part II of Appendix 'C' are applicable to the present elections. No provision in the thirty-three exhaustive rules which fall therein has been pointed to us which makes any reference to voting by delegates alone. Indeed Rule 19 in Part II of Appendix 'C' by necessary implication implies a direct exercise of votes by the voters.

9. The subsequent amendment made in Part I of Appendix 'C' by the State of Haryana would further make it manifest that the earlier provisions did not warrant an election through the media of delegates. On the 31st of October, 1974, the Punjab Co-operative Societies (Haryana 1st Amendment) Rules, 1974, were promulgated. These provisions amended the definition of the voter as it stood earlier and directed that the following shall be substituted therefor:—

"(g) 'Voter' means a person who is either a shareholder or an authorised re-

presentative of a member co-operative society duly qualified to participate in the election and includes, a delegate of a Co-operative Society elected or selected in accordance with the proviso to Section 23 of the Act."

The aforesaid change is indeed significant and the new provision expressly brought in within the definition of voters a delegate of a co-operative society elected or selected in accordance with the proviso to Section 23 of the Act. However, for the relevant period with which we are concerned (in May 1973) the definition of voter stood unamended and did not have within its scope any concept of delegates or an indirect mode of election. The subsequent amendment indeed strengthens the case advanced on behalf of the petitioners. If the original definition as it stood was intended to and could envisage within it an election by delegates there was obviously no need to amend the definition and expressly include within it an election through the media of delegates. The subsequent amendment cannot be deemed to be a mere surplusage or one which is redundant. The plain intention was to bring within the definition of a voter what it earlier did not contain. It has, therefore, to be concluded that as on the 26th of May, 1973, when respondents Nos. 7 to 10 were declared elected the law did not sanction an election through the delegates. Their election through this medium thus cannot be sustained.

10. It is true that the bye-laws of of the Society did envisage and provide for an indirect mode for electing one delegate for every 15 members from amongst the members of a Society in a village. It is, however, equally well settled that the bye-laws of a Society cannot violate or run counter to the statutory provisions under which the same has been duly registered. In a case of conflict between the Act and the Rules framed thereunder, the bye-laws must give way to the parent provisions. Consequently bye-law 15 of the Society which was at the relevant time in direct and flagrant contradiction with the provisions of Appendix 'C' (which prescribed the mode of elections) must be deemed to be of no validity. Any election held in accordance with the bye-laws which were in patent conflict with the statutory provisions then existing has, therefore, to be set aside.

11. Before parting with this judgment, I deem it necessary to make a re-

ference to the view expressed by the learned referring Judge. A vacillating doubt about the correctness of the decision in Civil Writ No. 365 of 1966 (Punj & Har), *Hukam Singh v. Niranjan Singh*, decided by Pandit, J., on May 20, 1966, was cast on the ground that perhaps the true impact of the proviso to S. 23 of the Act had not been adequately canvassed before him. We have closely examined the provisions of Section 23 of the Act as amended in Haryana and this may be set down in extenso for facility of reference:

"23 (1) The final authority in a co-operative society shall vest in the general body of members:

Provided that where the bye-laws of a co-operative society provide for the constitution of smaller body consisting of delegates of members of the society elected or selected in accordance with such bye-laws the smaller body shall exercise such powers of the general body as may be prescribed or as may be specified in the bye-laws of the society."

To our mind the aforementioned proviso would not in any way affect the provisions regarding the mode of holding elections to the Managing Committee of the Society at the material time. Construing the section as a whole it appears that it first lays down the primary principle that the final authority in a Co-operative Society vests in the general body of its members. To this a rider has been attached by the proviso that a smaller body may exercise the powers vested in the general body which are so specified and provided in its bye-laws. On behalf of the respondents it was not so canvassed, and we are consequently unable to hold that this proviso would in any way govern the detailed mode of election to the Managing Committees which has been duly provided in Rule 23 read with Appendix 'C' thereto. The ratio of *Hukam Singh's* case (supra) does not appear to us as being in any way affected by the aforesaid proviso and would still hold the field. In any case we are of the view that so far as the present issue of the validity of the election to the Managing Committee of the Society is concerned the said proviso is not directly attracted.

12. We accordingly hold that bye-law 15 of the Society at the relevant time was in conflict with the statutory provisions and therefore of no validity. The election of respondents Nos. 7 to 10 held in accordance with the said bye-law and its connected ones was thus illegal and is

hereby set aside. The writ petition is allowed in these terms but the parties are left to bear their own costs.

S. C. MITAL, J.:— I agree.

Writ petition allowed.

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MUNI LAL VERMA, J.

Rajinder Khandpur and others, Petitioners v. The Director-Principal, Medical College, Rohtak and another, Respondents.

Civil Writ No. 1 of 1975, D/- 23-10-1975.

(A) Punjab University Calendar (1971), Regulation 12 — Faculty of Medical Sciences — Concession granted to students of First Professional M.B.B.S. class to attend Second Professional Class even on failure in Annual Examination — Not promotion — The said concession not applicable to students of second professional class who fail in Annual Examination.

Proper Analysis of Regulation 12 of Faculty of Medical Sciences points out unmistakably that even a student of First Professional M.B.B.S. class if he fails to clear in all the subjects in the Annual Examination held in December for that class is not entitled to promotion to the second professional class, he is merely allowed by way of concession, only to attend the second professional class till the supplementary examination to be held in April next or in any month subsequent thereto but if he again fails to clear in all subjects of the first professional class in the supplementary examination the said concession would not be available to him. (Para 3)

Where students of First professional class who had failed in the First Professional Examination (Annual) held in December 72 were allowed simply by way of concession to attend the second professional class till April next, it was held to be not equivalent to promotion to higher class. (Para 4)

In absence of any such provision affording benefit to students of the second professional class, the practice of allowing the students who failed in the second professional examination to attend in Final Professional class was irregular and illegal. The benefit if derived by any student situated like the petitioners who were allowed to attend the final profes-

sional class in the past on account of the irregular and illegal practice obtaining then, cannot earn any right of promotion or the like to the petitioners to attend the Final Professional Class without passing the Second Professional Class. Therefore the order directing such students to attend the Second Professional M.B.B.S. class on the ground that they had failed to clear in all subjects in the Second Professional Examination held was valid. (Para 4)

G. C. Garg, for Petitioners; C. D. Dewan, Addl. Advocate-General, Haryana, for Respondents.

ORDER :— The material facts which led to this writ petition as well as writ Petition No. 2 of 1975 are that the petitioners as well as Sarvshri Ashok Sharma, Chhaju Ram and Ramesh Gupta who are petitioners in Writ Petition No. 2 of 1975 (hereinafter called the second petitioners) joined the Medical College, Rohtak as M.B.B.S. students in the year 1971. The said college was then affiliated to the Panjab University and the Regulations governing the class joined by them, were contained in the Panjab University Calendar 1971. According to the said Regulations, the course of instructions for M.B.B.S. including the internship extended to a period of five and a half years, and examination for the degree of Bachelor of Medicine and Bachelor of Surgery (M.B.B.S.) consisted of three parts, viz., First, Second and Final Professional examinations.

The First Professional examination (Annual) was held in December 1972, and the petitioners as well as the second petitioners took the said examination, but they could not clear in all the papers. They, however, continued to attend the next higher class, i.e. Second Professional which commenced from January 1973. They re-appeared in the papers wherein they had failed earlier, in the Supplementary Examination held in April 1973, and were declared successful. So, they continued attending the Second Professional class and the petitioners appeared in the Second Professional Examination (Annual) held in May 1974. This time again they could not clear in all the subjects. They, however, attended the next higher class, i.e. Final Professional commencing from July 1974. They re-appeared in the Second Professional examination (supplementary) held in September 1974, but could not succeed in clearing in all the subjects. The second petitioners

could not appear in the Second Professional Examination (Annual) because of shortage of lectures in certain subjects. So, they appeared in the Second Professional Examination (Supplementary) held in September 1974, but they could not clear in all the subjects. They had, however, joined the higher class, i.e. Final Professional from October 1974. On December 18, 1974, the Director-Principal (respondent No. 1) passed the order (Copy Annexure 'P-1' and marked 'P-2' in Civil Writ 2 of 1975, hereinafter called the impugned order), directing the petitioners and the second petitioners to attend the Second Professional M.B.B.S. class on the ground that they had failed to clear in all the subjects in the Second Professional Examination (Supplementary) held in September 1974. The said order was displayed on the Notice Board on December 19, 1974. The petitioners as well as the second petitioners took the said order as their demotion to a junior class. Therefore, they approached the Director-Principal and also the Vice-Chancellor of the Kurukshetra University to which the Medical College had been affiliated by that time. They also served a notice on the Director-Principal requesting him to withdraw the aforesaid order. When they did not get any favourable response, they filed the writ petitions, referred to above challenging the validity of the impugned order on the grounds; (i) that the M.B.B.S. course was integrated one consisting of three parts, i.e. First, Second and Final Professional examinations, to be held at intervals; (ii) that the Panjab University Calendar 1971 governing them contained no provision barring their promotion to the Final Professional class even if they had failed to clear in all the subjects of the Second Professional Examination; (iii) that when they had already been promoted to the Final Professional class, they could not be demoted to the Second Professional class; (iv) that earlier, the students who had not been able to clear in all the subjects of the Second Professional examination had been allowed to continue in the Final Professional class and were further permitted to appear in the Final Professional examination, and (v) that it (the impugned order) was not a speaking one. Hence, a writ of certiorari was prayed for to quash the impugned order.

2. In the return which had been filed on behalf of the Director-Principal (respondent No. 1), the broad facts were

admitted. The validity of the impugned order was, however, defended and the writ petitions were resisted with the pleas that the petitioners or the second petitioners were never promoted to the Final Professional class; and no such promotion to a student who had not cleared in all the subjects of Second Professional examination to the Final Professional class was either contemplated or permissible by the Regulations contained in the Panjab University Calendar 1971 (hereinafter referred to as the Calendar); and it was due to irregular and illegal practice that students who did not clear in all the subjects of Second Professional examination had been allowed in the past to join the Final Professional class; and it was on account of the said irregular and illegal practice that the petitioners and the second petitioners had been permitted to attend the Final Professional class, and the said permission was withdrawn since it was not warranted by the Rules or Regulations; and the said withdrawal of the permission did not tantamount to demotion of the petitioners or of the second petitioners to the Second Professional class.

3. The principal contentions raised by Shri G. C. Garg, appearing for the petitioners and the second petitioners are three. First, that the M.B.B.S. course joined by them was integrated one extending to three examinations, the First Second and Final Professional, to be held at intervals and, as such, they were entitled to join higher class after annual examination of the class which they had attended during the academic year irrespective of their failure to clear in all the subjects of that examination. Second, that once they had been allowed to attend the Final Professional class, though they had been unable to clear in all the subjects of the Second Professional examination, they could not be demoted, or asked to attend the Second Professional class which pertained to the batch of students who had joined the M.B.B.S. course one year later, i.e. in 1972; and third, that in the past students who had not cleared in all the subjects of the Second Professional examination were being allowed to attend the Final Professional class and therefore the withdrawal and withholding permission to attend the Final Professional class from them led to inequality and discrimination. None of these contentions, in my opinion, is well founded. The ordinary rule, and just as well as equitable, seems

to be that no student is entitled to promotion to higher class unless he passes the junior class. The students of M.B.B.S. class cannot claim exception to the said rule unless otherwise provided for in the Rules and Regulations governing them. Regulation No. 12 of the Faculty of Medical Sciences of the Calendar (hereinafter referred to as Regulation No. 12), which is mainstay of the arguments advanced by the learned counsel for the petitioners and second petitioners reads thus :—

"A candidate shall not be promoted to the next higher class unless he has passed the First Professional examination.

However, candidates failing in the December examination for the first time may be allowed to attend the next higher class till April next. This concession will not be given to the candidates failing in April or any subsequent examination."

This Regulation, therefore, provides only one exception to the said rule, and, that is, that the students of the First Professional class even if they fail in the annual examination held in December for the first time, can attend the higher class till the month of April next. What is provided by Regulation No. 12, is that if a student of First Professional class fails for the first time in the annual examination to be held in December, he may be allowed to attend the Second Professional class till April next; and that would be a sort of concession which shall not be available to him if he again fails in the Supplementary Examination to be held in April, or in any other such examination to be held subsequently in the subject(s) of the First Professional examination. The first sentence of the aforesaid Regulation reads consistent with the ordinary rule, stated above, and provides clearly that a student of First Professional class shall not be promoted to the Second Professional class unless he passes the First Professional examination. It clearly directs that promotion to the Second Professional class can be claimed by a student of First Professional class only when he passes the First Professional examination. The second sentence of Regulation No. 12, however, provides that a student of First Professional class failing for the first time in the annual examination held in December, may be allowed to attend the Second Professional class. That is a mere concession, and that too is not unrestrained. It is available to him only till

the month of April when the First Professional examination (Supplementary) is held. If he again fails to clear in all the subjects in the said First Professional Examination (Supplementary) held in April, or in any month subsequent thereto, the said concession would lapse and the same would no longer be available to him, and he has to go back to the First Professional class. This is, what is evident from the last sentence of the aforesaid Regulation. So, the proper analysis of Regulation No. 12 points out unmistakably that even a student of the First Professional class if he fails to clear in all the subjects in the annual examination held in December for that class is not entitled to promotion to the Second Professional class; he is merely allowed by way of concession only, to attend the Second Professional class till the Supplementary Examination to be held in April next, or in any month subsequent thereto, but if he again fails to clear in all the subjects of the First Professional class in the Supplementary Examination, the said concession would not be available to him and he will have to appear with the junior class in the annual examination in the subjects which he could not clear in the annual examination held in December, and also in the Supplementary Examination held either in the month of April, or in any other month subsequent thereto. No such provision as contained in Regulation No. 12 meant for the First Professional class, has been made in the Calendar for a student of the Second Professional class. Therefore, the petitioners who were students of Second Professional class, could not possibly claim any concession, what to say of right to promotion to the Final Professional class, on their failure to pass the Second Professional examination (Annual) held in the month of April 1974, on the analogy of Regulation No. 12 which, as indicated above, was for the benefit of the students of First Professional class only. It is pertinent to note that the petitioners as well as the second petitioners could not clear in all the subjects even in the Second Professional examination (Supplementary) which was held in September 1974. The second petitioners could not appear in the Second Professional examination (Annual) held in May 1974 because of shortage of lectures. Therefore, even if it is claimed, though remotely on the analogy of Regulation 12—not admitted and conceded for the sake of argument only—they (the petitioners) were not entitled to

the said concession to attend the Final class after September 1974 because they had failed to clear in all the subjects in the examination (Annual) held in April 1974 as well as in the Supplementary Examination held in September 1974, and the second petitioners could not take the Second Professional class (Annual) held in May 1974 and they too failed to clear in all the subjects in the Supplementary Examination held in 1974. It, thus, follows that the case may be viewed from any angle, neither the petitioners nor the second petitioners were entitled to any right of promotion to, nor even the concession to attend the Final Professional class since they failed to pass in all the subjects of the Second Professional Examination and, as such, the first contention, raised on behalf of the petitioners and the second petitioners, is devoid of any force.

4. As discussed above, the students of First Professional class including the petitioners and the second petitioners who had failed in the First Professional Examination (Annual) held in December 1972 were never promoted to the Second Professional class. It was under Regulation No. 12 that they were simply allowed, and that too, by way of concession to attend the Second Professional class till April 1973, and that is not equivalent to promotion to higher class. In the absence of any provision akin to Regulation No. 12 affording any such benefit to the students of the Second Professional class, the permission given to the petitioners who had failed to pass in the Second Professional Examination (Annual) held in April 1974, and then again could not clear in all the subjects of that class in the Supplementary Examination held in September 1974, or allowed to the second petitioners who did not appear in the aforesaid annual examination held in May 1974 and failed to pass in all the subjects in the Second Professional Examination (Supplementary) held in September 1974, to attend the Final Professional class was misconceived and illegal, for the obvious reason that the same was not warranted or permissible by any Rule or Regulation contained in the Calendar. Thus, the practice obtaining in the past allowing the students who had failed in the Second Professional examination to attend the Final Professional class was irregular and illegal. The same, when came to light, had to be corrected rather than perpetuated, and this is what appears to have been done by

passing the impugned order by the Director-Principal (respondent No. 1). In that view of the matter, it cannot be claimed by the petitioners or the second petitioners that they had ever been promoted to the Final Professional class. When they were never promoted to the said class, the question of their demotion from that class does not arise. As such, the impugned order cannot be censured as directing their demotion from the Final Professional class to the Second Professional class. The benefit, if derived by any student situated like the petitioners and the second petitioners in the past on account of the irregular and illegal practice obtaining then, cannot, in my opinion, earn any right of promotion or the like to the petitioners or the second petitioners to attend the Final Professional class without passing the Second Professional class. Therefore, neither the second contention nor the third one, raised on behalf of the petitioners and the second petitioners, is tenable.

5. The impugned order mentions the names of the petitioners and the second petitioners, and directs them to attend the Second Professional class and further contains that the said direction was grounded on their failure to pass the Second Professional Examination (Supplementary) held in September 1974. Therefore, the impugned order is well informative, and does not suffer from any lack or ambiguity. As such, there is no justification in criticising the same as non-speaking order.

6. In the last, Mr. Garg, submitted that the petitioners except Shri Rajinder Khandpur (petitioner No. 1), and Shri Chhaju Ram out of the second petitioners had cleared in all the subjects of the Second Professional examination held in May 1975, i.e. during the pendency of the writ petitions; and, relying on Regulations Nos. 20 and 21 of the Faculty of Medical Sciences of the Calendar, urged that they should be allowed to appear in the Final Professional examination to be held in April 1976. The said contention is apparently beyond the scope of the writ petitions. The subject of attack in the writ petitions was the impugned order, and the question as to whether the petitioners other than Shri Rajinder Khandpur or Shri Chhaju Ram out of the second petitioners are entitled to appear in the Final Professional examination to be held in April 1976, because they had cleared in all the subjects in the Se-

cond Professional examination held in May 1974, needs no answer being extraneous to the matter which was subject of controversy in the writ petitions. Anyhow, the aforesaid Regulations are examined simply because solace was solicited from the provisions contained therein. Regulation No. 20 only directs the University to hold Final Professional examination twice a year in the months of December and April, at least sixteen months after the completion of the annual Second Professional examination, or on such other dates as may be fixed by the Syndicate. So, it is of no avail and does not afford any benefit to the petitioners or Shri Chhaju Ram who had passed the Second Professional examination held in May 1975. Two of the conditions provided in Regulation No. 21 required to be fulfilled by a student for taking Final Professional examination are (i) that he has been enrolled during the year preceding the said examination; and (ii) that he has passed Second Professional examination not less than eleven months previously. Despite my asking pointedly and repeatedly, the learned counsel appearing for both the parties were unable to furnish any information about the period which would make 'the year' as mentioned in clause (i) of Regulation No. 21. Does it mean twelve months, sixteen months or eleven months? Both the learned counsel showed their inability to throw light on that matter. Therefore, the said question cannot be answered, much less with accuracy, at this stage. Anyhow, since it appears that the petitioners other than Shri Rajinder Khandpur and Shri Chhaju Ram out of the second petitioners would be fulfilling the second condition provided in clause (ii) of Regulation No. 21 requiring them that they should have passed the Second Professional examination not less than eleven months before taking the Final Professional examination to be held in April 1976, the Director-Principal (respondent No. 1) may be good enough to consider their case sympathetically, if I may say favourably, so as to allow them the advantage of appearing in the said Final Professional examination to be held in April, 1976, provided in doing so no illegality or violation of Rules and Regulations is committed, so that they may take the benefit of saving some months, may be eight, of their academic career. I leave the said matter to the good sense and sound discretion of the Director-Principal.

Lest there be any misunderstanding, I make it clear that whatever has been said above, would not be taken as expression of my views on merits of the claim now made by the petitioners except Rajinder Khandpur (petitioner No. 1), and Chhaju Ram out of the second petitioners for appearing in the Final Professional examination to be held in the month of April 1976, on the ground that they had cleared in all the subjects of the Second Professional examination held in the month of May 1975.

7. It, thus, follows from the discussion above, that the impugned order does not suffer from any infirmity, and it has not infringed any right, much less legal, possessed by the petitioners or the second petitioners and, therefore, I find unhesitatingly that both the petitions are bereft of any merit.

For the foregoing reasons, I dismiss this writ petition as well as Writ Petition No. 2 of 1975. Having regard to the peculiar circumstances of the case, especially that the wrong practice obtaining in the past could have encouraged the petitioners and the second petitioners to file the writ petitions against the impugned order, I leave the parties to bear their own costs.

Petitions dismissed.

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MUNI LAL VERMA, J.

Tara Chand, Appellant v. Smt. Narain Devi, Respondent.

F. A. F. O. No. 133-M of 1974 D/- 11-9-1975.*

(A) Hindu Marriage Act (1955), S. 10 (1) (a) — 'Desertion' — What amounts to — 'Wilful neglect' — Import of — Elements essential for granting separation — Nature of Hindu marriage. (Words and Phrases — 'Wilful neglect' — Connotation).

'Desertion' as contemplated by clause (a) of sub-section (1) of Section 10 of the Act, means intentional permanent abandonment of one spouse by the other without the other's consent and without reasonable cause. So far as deserting spouse is concerned, there must be two essential conditions; (i) factum of separation, and

*(From decree of Mewa Singh, Sr. Sub-J. Ropar, D/- 5-9-1974.)

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(ii) intention to bring marital life permanently to an end (animus deserendi). Similarly, two elements are essential so far as deserted spouse is concerned; firstly, absence of consent; and, secondly, absence of conduct giving reasonable cause to the deserting spouse to form necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

There may, however, be a case where a spouse is forced by the conduct of the other to live separately or to stay away. In such a case, desertion would not be attributed to the spouse who lives separately or stays away, for the simple reason that the said situation has been brought about by the act of the spouse who had misconducted himself or herself. So, if it is a natural consequence of the misconduct and misbehaviour of one spouse that the other spouse will have to stay away, the offending spouse must be presumed to have intended that such an eventuality will take place. Cases in which the parting of the spouses has arisen in such circumstances, are called constructive desertions and the spouse responsible for creating the situation in which the other spouse is forced to stay away, is guilty of constructive desertion. The words 'wilful neglect' in Explanation to sub-section (1) of Section 10 of the Act, are designed to cover such constructive desertion, and mean that the guilty spouse has been acting knowingly or has been consciously failing in a reprehensible manner in the discharge of his or her marital obligations.

The marriage performed by a Hindu couple is a holy union and the same cannot be broken by the consent of the parties or by collusiveness. The promises made by a Hindu couple before the nuptial fire cannot be easily disregarded by them. Therefore, the appellant who is himself responsible for creating the situation which forced the respondent to stay away is not entitled to plead desertion as a ground for claiming decree for judicial separation. AIR 1957 SC 176 and AIR 1964 SC 40, Rel. on. (Paras 4, 6)

(B) Hindu Marriage Act (1955), S. 23 (1) (a) — Relief in proceedings under the Act — When cannot be granted — Principle underlying the section.

The rule enunciated in Section 23 of the Act which contains overriding provision is based on the principle that wrongdoer should not be permitted to take advantage of his or her own wrong, while

seeking relief under the Act from the Court. For that matter, it is necessary to take into consideration the conduct of the petitioner who approaches the Court for any relief under the Act. If he or she by his or her own misdeeds forces the other spouse to leave him or her and to stay away, the petitioner cannot be allowed to take advantage of his or her own wrong and ask the Court to perpetuate it. Therefore, the claim of a husband for judicial separation on the ground of desertion when he himself has been guilty of constructive desertion which compelled his wife to stay away from him has to be disregarded on the principle enacted by Section 23 of the Act. (Para 5)

Cases Referred: Chronological Paras

AIR 1964 SC 40 = (1964) 4 SCR 331 4
AIR 1957 SC 176 = 1956 SCR 838 4

C. D. Dewan, (S. P. Jain with him), for Appellant; R. L. Sharma (Bhim Sain Chaudhry, with him), for Respondent.

JUDGMENT:— The circumstances giving rise to this appeal may be briefly stated as under:—

2. Tara Chand appellant was married to Shrimati Narain Devi respondent on February 28, 1960 at Bassi Pathana, and thereafter they had been living as husband and wife at different places, and had last resided as such, in the month of September, 1968, at Nangal Township. No issue was, however, born from their wedlock. On September 26, 1968, Kishan Chand—the father of the respondent, accompanied by his nephew—Nandu Ram, Chhinku Ram and Jumma Ram, visited the house of the appellant at Nangal and asked him to send the respondent with them to enable her to participate in the marriage of Nandu Ram, which was to be performed a few days later. He declined and told them that he would be sending her in the first week of the following month after receiving his salary. The said representation did not find favour with them, and on the night intervening between September 26 and 27, 1968, the respondent left his (the appellant's) house without his consent in the company of her father, and the aforesaid three persons. She had then carried away clothes and ornaments of the value of Rs. 8,000 with her. Thereafter, she did not return to his house. Therefore, on April 16, 1973, the appellant, with the said allegations, made a petition for judicial separation under Section 10 of the Hindu Marriage Act, 1955 (hereinafter called the Act), on the ground of desertion by the respon-

dent for more than two years. The other ground of cruelty raised by him for obtaining judicial separation was based on the averment that the respondent had been insulting, abusing and had also been giving beatings to him. The said petition was resisted by the respondent. She admitted the factum of marriage, but controverted the other material allegations. Hence, the petition was tried on the following issues:

(1) Whether the respondent deserted the petitioner for the last more than two years? O. P.

(2) Whether the respondent treated the petitioner with such cruelty as to raise reasonable apprehension in his mind that it will be injurious for him to live with her? O. P.

(3) Relief.

The learned Senior Subordinate Judge who heard the petition, answered issues Nos. 1 and 2 in the negative and dismissed it with costs. Dissatisfied with the said result, Tara Chand came to this Court in appeal.

3. Mr. C. D. Dewan, the learned counsel for the appellant, challenged the judgment and decree recorded by the trial Court on law as well as on facts. He contended that the trial Court did not appreciate the evidence present on record rightly and its approach to law on the subject was incorrect. In my opinion, his contentions are not well founded. That the parties were married in the month of February 1960 and the respondent was taken by her father from the house of the appellant at Nangal in the month of September 1968 to enable her to participate in the marriage of her cousin—Nandu, and since then she had been living at the house of her parents are admitted facts. The deposition made by the appellant from the witness-box on August 17, 1974 is most damaging to his cause and discloses the following facts which are also deducible from the evidence and circumstances of the case:

(a) that there had been lack of cordiality between the parties from the very beginning of the marriage;

(b) that the appellant began to doubt the fidelity and character of the respondent after about six months of the marriage;

(c) that he did not love her;

(d) that in or about the year 1962, the respondent's father had taken her from the house of the appellant at Ambala;

(e) that sometime in the year 1963, the appellant, on making an application under Section 100, Code of Criminal Procedure, obtained search warrant against her, and it is said in the written statement that when the appellant had gone to the house of the parents of the respondent for executing the said search warrant her grandmother was lying dead and she was taken into custody and was produced before the Magistrate First Class, Bassi;

(f) that the respondent had made an application under Section 488, Code of Criminal Procedure (old), and succeeded in obtaining an order directing the appellant to pay Rs. 30 per month as maintenance to her;

(g) that the appellant filed a petition, most probably as a counter-blast as represented in the written statement, for restitution of conjugal rights under Section 9 of the Act, and it was compromised;

(h) that as a result of the said compromise the respondent returned to the house of the appellant in the year 1965, and thereafter they had lived together at Ambala, Gurgaon and Nangal, but their relations did not improve;

(i) that in the month of August 1968, the respondent had poisoned the meals of the appellant;

(j) that the appellant did not make any effort to bring back the respondent from the house of her parents, or to secure her society after she had left his house at Nangal in the month of September 1968.

4. 'Desertion' as contemplated by clause (a) of Section 10 of the Act, means intentional permanent abandonment of one spouse by the other without the other's consent and without reasonable cause. So far as deserting spouse is concerned, there must be two essential conditions; (i) factum of separation, and (ii) intention to bring marital life permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as deserted spouse is concerned; firstly, absence of consent, and, secondly, absence of conduct giving reasonable cause to the deserting spouse to form necessary intention aforesaid. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. I am guided in the aforesaid matters by *Bipinchandra Jaisinghbhai Shah v. Prabhavati*, AIR 1957 SC 176, and *Lachman Utamchand Kirpalani v. Meena*, AIR 1964 SC

40, relied on by the learned counsel for the appellant. There may, however, be a case where a spouse is forced by the conduct of the other to live separately or to stay away. In such a case, desertion would not be attributed to the spouse who lives separately or stays away, for the simple reason that the said situation has been brought about by the act of the spouse who had misconducted himself or herself. So, if it is a natural consequence of the misconduct and misbehaviour of one spouse that the other spouse will have to stay away, the offending spouse must be presumed to have intended that such an eventuality will take place. Cases in which the parting of the spouses has arisen in such circumstances, are called constructive desertions and the spouse responsible for creating the situation in which the other spouse is forced to stay away, is guilty of constructive desertion. The words 'wilful neglect' in Explanation to sub-section (1) of Section 10 of the Act, are designed to cover such constructive desertion, and mean that the guilty spouse has been acting knowingly or has been consciously failing in a reprehensible manner in the discharge of his or her marital obligations.

5. The rule enunciated in Section 23 of the Act which contains overriding provision, is based on the principle that wrongdoer should not be permitted to take advantage of his or her own wrong, while seeking relief under the Act from the Court. For that matter, it is necessary to take into consideration the conduct of the petitioner who approaches the Court for any relief under the Act. If he or she by his or her own misdeeds forces the other spouse to leave him or her and to stay away, the petitioner cannot be allowed to take advantage of his or her own wrong and ask the Court to perpetuate it. Therefore, the claim of a husband for judicial separation on the ground of desertion when he himself has been guilty of constructive desertion which compelled his wife to stay away from him, has to be disregarded on the principle enacted by Section 23 of the Act.

6. When the facts enumerated in para 3 above and the circumstances of the case, are viewed from the proper angle having regard to the connotation of desertion, as indicated in para 4 above, and the principle contained in Section 23 of the Act, referred to in the preceding paragraph, there can be no escape from the conclusion that the appellant had been guilty of constructive desertion.

According to him, there had been no genial sincerity or affection between the parties from the beginning of the marriage, and he began to suspect her fidelity and character about six months after the marriage. He had obtained a search warrant under Section 100, Code of Criminal Procedure, against the respondent in the year 1963 and went to her parents' house at an inopportune moment. He had made a petition under Section 9 of the Act when the respondent had approached the criminal court for seeking maintenance allowance. Since there had been compromise between the parties in the year 1965 and they had lived together as husband and wife at Ambala, Gurgaon and Nangal, it can be said that there had been condonation of the defaults committed by the parties earlier to 1965. The appellant, however, maintained that he did not love the respondent. He suspected her of administering poison to him in the meals in the month of August, 1968. He had never gone to the house of the parents of the respondent to fetch her after September, 1968. He did not write any letter to her to return to his house and he did not send any letter to her father to send her back to him. He did not send any maintenance allowance to her. He did not file any application for restitution of conjugal rights against her during the period extending to four and a half years, i.e. from September 26, 1968 to April 16, 1973, when he made the petition for judicial separation. The aforesaid conduct of the appellant, in my opinion, constitutes constructive desertion. The marriage performed by a Hindu couple is a holy union and the same cannot be broken by the consent of the parties or by collusiveness. The promises made by a Hindu couple before the nuptial fire cannot be easily disregarded by them. Therefore, the appellant who is himself responsible for creating the situation which forced the respondent to stay away, is not, in my opinion, entitled to plead desertion as a ground for claiming decree for judicial separation. In addition to the facts that the appellant had no love for the respondent, and doubted her fidelity and character, and suspected her of administering poison to him in meals, he had last cohabitation with her in the month of June, 1968. All these factors coupled with the conduct of the appellant, referred to above, point out unmistakably that he afforded a cause, and reasonable too, to the respondent to stay away from him; and the said matters further give rise to

a reasonable and legitimate inference that he was consenting to the living of the respondent at her parents' house. In that view of the matter and in view of the Explanation to sub-section (1) of Section 10 of the Act, I am in agreement with the trial Court in finding that the appellant failed to substantiate the plea raised by him that the respondent had been guilty of desertion.

7. There is the solitary statement of the appellant that the respondent had administered poison in meals to him, that she had been abusing him and giving him beating with danda. The respondent had repudiated the said charges. The appellant claimed that he was treated by Hakim Relu Ram when he had been administered poison by the respondent. The said Relu Ram was not produced for reasons best known to the appellant. The presumption, therefore, is that Hakim Relu Ram, if produced, would have not given evidence favourable to the appellant. Hira Lal (P.W. 4) affords no assistance to the appellant. He did not say that any meals, much less poisoned, had been served by the respondent to the appellant in his presence. He did not state that the appellant had made any complaint to him that poison had been administered to him by the respondent. The trial Court, who had the advantage of seeing the parties, had observed in the judgment that the appellant was more strong in physique than the respondent. On the said state of things, it is difficult to believe that the respondent could dare to beat the appellant with danda. No evidence, much less reliable, in confirmation of the statement of the appellant that the respondent had been hurling abuses or had been beating him, has been brought on record. Therefore, the trial Court was right in observing that the evidence present on record does not bear the plea of cruelty by the respondent towards the appellant, raised by him.

8. It, thus, follows from the discussion above that the findings recorded by the trial Court on issues Nos. 1 and 2 are correct, and do not suffer from any infirmity. So, the same are affirmed. In that view of the matter, the judgment and decree of the trial Court are impeccable and this appeal is bereft of any merit.

Consequently, I, maintaining the judgment and decree of the trial Court, dismiss this appeal with costs.

Appeal dismissed.

**AIR 1976 PUNJAB & HARYANA 304
FULL BENCH**

**S. S. SANDHAWALIA, PREM CHAND
JAIN AND MAN MOHAN SINGH
GUJRAL, JJ.**

M/s. Daulat Ram Trilok Nath and others, Petitioners v. The State of Punjab and others, Respondents.

Civil Writ No. 1877 of 1975, D/- 15-4-1976.

(A) Constitution of India, Art. 226 — Writ of Mandamus — Claim for refund of excess tax paid — Claim unquantified — Writ petition not maintainable. AIR 1969 Orissa 180 and AIR 1969 Orissa 182, Dissented from.

Under the earlier unamended S. 23 of the Punjab Agricultural Produce Markets Act, the Market Committees were entitled to levy fee ad valorem at the rate of Rs. 1-50 on purchase or sale of agricultural produce worth Rs. 100 only. The fee was raised to Rs. 2-25 by an amendment of S. 23. In a spate of writ petitions challenging the vires of the amendment, the Act enhancing the rate of levy of market fee was struck down as unconstitutional. In those petitions though express prayers for refund of the excess tax paid had been made the matter was not pressed and accordingly relief was not granted. Thereafter a spate of writ petitions arose claiming that unquantified sums of excess tax alleged to have been paid under mistake of fact or law be directed to be refunded to the petitioners.

Held, that though the High Court under Art. 226, whilst quashing a Statute or setting aside an illegal order could grant as a consequential relief the refund of illegally collected taxes or direct the payment of a specific amount of money, but if the claim for refund was not pressed and therefore no relief was granted in the earlier petition, a fresh petition for mandamus for claim of money simpliciter could not lie. AIR 1969 Orissa 180 and AIR 1969 Orissa 182, Dissented from; AIR 1965 SC 1740, Applied. Case law discussed.

(Paras 6 and 22)

The *sine qua non* for the issuance of a writ of mandamus is the existence of a statutory or a public duty devolving upon the person or the body against whom the said writ is directed. Equally settled it is that along with this must co-exist a corresponding right in the petitioner which would entitle him to claim the enforce-

ment of the said statutory public duty. Unless these two pre-conditions are satisfied, the requisite foundation for the issuance of a writ of mandamus can hardly be said to exist. There is not a single statutory provision in the Punjab Agricultural Produce Markets Act or the Rules framed thereunder, which imposed upon the respondent any statutory public duty to pay unquantified sums of money claimed on behalf of the numerous petitioners. Equally no provision in the same set of laws could be pointed out which inhere in the petitioners a fundamental right to the relief which they seek to claim.

(Para 9)

The primary scope and the function of a writ of mandamus is that it is issued to command and execute and not to enquire and adjudicate; not to establish a legal right but to enforce one. It is only where the legal public duty is clear, unqualified and specific that a writ of mandamus can be truly claimed. It has not to be granted where the claim of the petitioner has, in fact, to be first established and adjudicated upon before it can be enforced.

(Para 11)

Assuming that a writ of mandamus is competent (as an abstruse legal proposition), the question still remains whether it is a sound and proper exercise of judicial discretion to grant the same in a case of exclusive money claim. It is axiomatic that the writ jurisdiction generally is discretionary but even stricter considerations apply as regards mandamus.

(Para 19)

Further, judicial notice can well be taken of the fact as to how overburdened the writ jurisdiction of High Courts has become in the last two decades. Therefore, on such empirical considerations also it is hardly a sound discretion for the High Court to entertain a mere money claim in its extraordinary writ jurisdiction when the same can be adequately dealt with in other forums.

(Para 21)

(B) Constitution of India, Art. 141 — The construction which the Supreme Court itself places on an earlier precedent is obviously binding and authoritative.

(Para 16)

Cases Referred: Chronological Paras

AIR 1976 Punj & Har 1 = ILR (1976) 1	
Punj & Har 807	2, 3
AIR 1975 Delhi 248 (FB)	13
1974 Delhi LT 120 = (1974) 76 Pun LR (D)	13
111	13
(1972) Civil Writ No. 1317 of 1972, D/-	
11-10-1972, (Punj)	22

tion under Article 226 of the Constitution. In support of this contention, reliance has been placed by Mr. Lodha on authorities in *Girdharilal Bansidhar v. Union of India* AIR 1964 SC 1519 and *V. V. Iyer of Bombay v. Jasjit Singh, Collector of Customs* AIR 1973 SC 194.

13. In *Girdharilal's* case AIR 1964 SC 1519, the interpretation of Entry 22 of Part I of the Import Trade Control Hand-book was challenged and it was urged that the High Court while exercising its jurisdiction under Article 226 of the Constitution should not interfere with the conclusion reached by the authority under the Act, which on the very face of it appears to be quite reasonable. While dealing with this point learned Judges held that "a court dealing with a petition under Art. 226 is not sitting in appeal over the decision of the Customs Authorities and therefore the correctness of the conclusion reached by those authorities on the appreciation of the several items in the Hand-book or the Indian Tariff Act which is referred to in these items, is not a matter which falls within the writ jurisdiction of the High Court." The learned Judges further observed that "there is, here no complaint of any procedural irregularity of the kind which would invalidate the order, for the order of the Collector shows by its contents that there has been an elaborate investigation and personal hearing accorded before the order now impugned was passed."

14. In *Iyer's* case AIR 1973 SC 194, the question that was raised before the Court was whether the High Court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution could interpret the expression used in the Act so as to judge the proper scope of Item No. 74 (vi) of Part V of the I. T. C. Schedule when they have been given proper hearing by the Customs authorities. Their Lordships of the Supreme Court after reviewing their previous judgments in *Venkateshwaran v. Wadhvani* (AIR 1961 SC 1506) and *Girdharilal Bansidhar v. Union of India* (AIR 1964 SC 1519) observed as follows:—

"In view of these two decisions of this Court which are binding on us, we have no manner of doubt that the High Court of Bombay was quite right in accepting the conclusions and findings of the Customs authorities about the proper scope of Item 74 (vi) of the I. T. C. Schedule. In our opinion, there is nothing in the decision of the Collector which can warrant its condemnation as perverse or unreasonable. Even if it be assumed that because of the language used in the two items viz. Item 74 (vi) and 74 (x) of the I. T. C. Schedule, there is some room

for confusion, it would not be competent for the High Court to interfere in a writ petition with the conclusion or findings of the Collector of Customs regarding the scope and ambit of those items."

15. Relying on the observations of this Court in *Krishan Chander v. Board of Revenue for Rajasthan* 1972 WLN 850 = (AIR 1973 Raj 171) Mr. Lodha urged that even if there is possibility of giving a different meaning to a particular item in the Schedule from the one as given by the authorities created under the Act, this Court should adhere to the meaning given by such authorities and should be slow to interfere while exercising its jurisdiction under Article 226 of the Constitution with the verdict given by the authorities.

16. While meeting this argument of Mr. Lodha, Mr. Daphtary vehemently urged that in a taxing statute, like the one under consideration, the court should not, as far as possible, enlarge the scope of the Item mentioned in the Schedule by adhering to the dictionary meaning of the expressions or words used by the legislature. According to him, the expression used by the legislature should be given a meaning as it is commonly understood in commercial world. According to Mr. Daphtary the expression 'woollen fabric' as used in Item No. 21 in Schedule I is understood in common parlance as meaning woollen cloth and woollen textiles; 'felt', which is never used as textiles, cannot be covered by the words "woollen fabric". In support of this argument, reliance has been placed by the learned counsel on the Gujarat High Court judgment and certain other judgments of the Supreme Court and other High Courts; including the decision of the Gujarat High Court in the case of *Gujarat Woollen Mills SCA No. 442 of 1967* (Guj) (supra).

17. In the Gujarat case the petitioner used to manufacture felt of the same type which the petitioner-company produces. The judgment of that case resolves the controversy raised in the instant case and it applies to it on all fours. The learned Judges of the Gujarat High Court after considering various decisions of the Supreme Court under the provisions of the Sales Tax Act, held that in the light of the practical common sense and in applying the tests laid down by the decided cases referred therein, it is clear that the product manufactured by the petitioner firm for industrial use, though a felt as understood from the technical point of view, is not a woollen fabric as is generally understood in common parlance by persons dealing with this commodity and are well conversant with

woollen fabrics in their dealing with this commodity in the course of their trade and business.

18. In another Gujarat case; State of Gujarat v. Umedram Lallubhai (1965) 16 STC 1059 (Guj), a question arose whether borders woven on handloom out of pure silk, art silk and jari threads are handloom cloth within the meaning of entry 29 in Sch. A of the Bombay Sales-tax Act, 1959. In order to interpret this entry 29 the learned Judges were asked to interpret the word 'cloth' used therein. The argument advanced before the Court was that even a carpet would be covered under the expression 'handloom cloth' but in the technical or technological sense meaning given by a dictionary, a carpet may be a woven fabric but it could never be given a meaning which would bring it within the ambit of the word 'cloth' after consulting various dictionaries. The learned Judges quoted with approval the following para,—

"The expression 'cloth' has acquired a secondary meaning, that is to say, a meaning attached to that expression in common parlance by those dealing in and conversant with handloom cloth, and the carpet of the type we have before us would not, in our view, be included in the expression 'handloom cloth of all varieties'."

After taking into consideration various authorities cited before the Court, the learned Judges finally held that the word 'cloth' in entry 29 of Schedule A must be interpreted according to its secondary or popular sense, and not in its primary or technical sense, in which it is commonly understood in ordinary parlance. In ordinary parlance border cannot be regarded as cloth.

19. The Supreme Court in Ganesh Trading Co., Carnal v. State of Haryana (1974) 3 SCC 620 = (AIR 1974 SC 1362) laid down a principle to interpret the taxing statute and observed while deciding a question whether paddy and rice are identical goods for imposition of Sales Tax under the Punjab General Sales-tax Act, 1948, as follows,—

"In order to find out the true meaning of the entries mentioned in the Sales Tax Act, what is relevant is not the dictionary meaning but how those entries are understood in common parlance, specially in commercial circles. Sales Tax primarily deals with dealers who are engaged in commercial activity and, therefore, what is of the essence is to find out whether in commercial circles, paddy is considered as identical with rice."

20. In *Burmah Shell Oil Storage and Distributing Company of India Ltd. Madras v. State of Madras* (1968) 21 STC 227 (Mad)

entry 47 Schedule I of the Madras General Sales-tax Act, 1959, came up for interpretation before the Madras High Court. The said entry contained "lubricating oils, all kinds of mineral oils, quenching oils and greases". A question arose whether furnace oil, a non-lubricant, would fall within the ambit of lubricant. Their Lordships observed that the words "all kinds of mineral oils" in the ordinary sense had only a limited meaning, namely, mineral oils which were lubricants, and therefore mineral oils could not be covered by entry 47.

21. In another case: *Ramavatar Budhai Prasad v. Assistant Sales Tax Officer Akola*, AIR 1961 SC 1325 a question arose before the Supreme Court while interpreting item 6 of Schedule II of the C. P. and Berar Sales Tax Act, 1947, whether 'betel leaves' are included in the vegetables as mentioned in the said entry. While rejecting the case of the assessee that betel leaves were covered by the expression "vegetables" as used in item 6, their Lordships observed that the expression "vegetables" must be interpreted not only on the dictionary meaning or in its technical sense or from the botanical point of view but it should be given a meaning as understood in common parlance. Their Lordships in this connection observed as follows,—

"It, (vegetable) has not been defined in the Act and being a word of every day use it must be construed in its popular sense meaning 'that sense which people conversant with the subject matter with which the statute is dealing would attribute to it'. It is to be construed as understood in common language." While arriving at this conclusion their Lordships referred with approval the following observations of the Nagpur High Court in AIR 1956 Nag 54:—

"In our opinion, the word 'vegetables' cannot be given the comprehensive meaning the term bears in natural history and has not been given that meaning in taxing statutes before. The term 'vegetables' is to be understood as commonly understood denoting those classes of vegetable matter which are grown in kitchen gardens and are used for the table."

22. Mr. Lodha placing reliance on a Supreme Court authority in the State of Gujarat v. Sakarwala Brothers (1967) 19 STC 24 (SC) urged that in that case the expression "sugar" in entry 47 of Schedule A to the Bombay Sales Tax Act, 1959, was given a wider meaning. It covered all types of product of sugar like patasa, harda and alchidana, and similarly any product made from the woollen fabric will be covered by the expression "woollen fabric". This decision, in our opinion, does not affect the principles

laid down by the Supreme Court to interpret the taxing statute in a manner in which the term used therein is generally understood in common parlance by those who deal with such commodities.

23. The law laid down by the Gujarat High Court in the Gujarat Woollen Felt Mills' case clearly covers the controversy raised in the case before us. We are in respectful agreement with the law laid down by the learned Judges of the Gujarat High Court and we feel that the expression "woollen fabric" as used in Item 21 of Schedule I of the Act shall not cover the product of the petitioner-company "woollen felt".

24. As regards the prayer for the refund of the duty realised by the Union of India from the petitioner-company we can say that this Court cannot pass a decree in favour of the petitioner for the refund of the said amount while exercising its extraordinary jurisdiction under Article 226 of the Constitution. The petitioner's learned counsel also did not press this claim with that vehemence with which he had argued the case of other points. We, therefore, reject the prayer of the petitioner for the refund of the amount realised as duty on the products of the petitioner-company.

25. For the reasons mentioned, the writ petition is partly allowed and it is declared that felt produced by the petitioner-company would not be covered by the expression "woollen fabric" as contained in Item No. 21 of Schedule I of the Act and as such the Union of India shall not realise the excise duty from the petitioner-company.

26. Looking to the circumstances of the case we make the costs easy.

Petition partly allowed.

AIR 1976 RAJASTHAN 195

P. D. KUDAL, J.

Vishnu Kumar, Petitioner v. State Bank of Bikaner and Jaipur and others. Non-petitioners.

Civil Revn. No. 474 of 1975, D/- 11-5-1976.*

(A) Civil P.C. (1908), O. 10, R. 4 — Order for personal appearance of party without examining its duly authorised and instructed counsel — Not valid.

*(Against order of R. P. Saxena, Dist. J., Pali in Civil Suit No. 1 of 1975, D/- 2-9-1975).

GT/GT/C259/76/VBB

Where the plaintiff applied under Order 10 Rules 1 and 2, for examination of the defendant as the plaintiff contended that the denial and admission of the documents by the defendant were not specific and a vague reply had been given, and the party (defendant) has a duly authorised and instructed counsel appearing on their behalf, then the counsel should be initially examined under the provisions of O. 10 Rr. 1 and 2, and if after that examination the Court feels that further elucidation is still necessary, then orders could be issued under the provisions of O. 10 R. 4. Where the Court passed an order under O. 10 R. 4 directing the defendant to appear in person without examining the defendant's duly authorised and instructed counsel, the order is clearly in contravention of O. 10, R. 2 and an illegal exercise of jurisdiction, AIR 1918 Oudh 429 and AIR 1933 All 517 and 1956 Raj LW 339, Rel. on.

(Para 5)

Cases Referred : Chronological Paras
1956 Raj LW 339 3
AIR 1933 All 517 = 1933 All LJ 1318 3
AIR 1918 Oudh 429 = 21 Oudh Cases 3
252 3

H. C. Jain, for Petitioner; M. M. Vyas, for non-petitioners.

ORDER:— This is a revision petition under Section 115, CPC against the order of the learned District Judge, Pali dated September 2, 1975.

2. The facts of the case which are relevant for the disposal of this revision petition are that the State Bank of Bikaner and Jaipur filed a suit against the defendants for the recovery of a sum of Rs. 76,281.21. Along with the plaint some documents were also produced. On behalf of the plaintiff an application under O. 10 Rr. 1 and 2, CPC was filed on July 4, 1975, wherein it was contended that the admission and denial of the documents on behalf of the defendant Vishnu Kumar were not specific, and as such, the defendant Vishnu Kumar may be examined orally. On behalf of the defendants, a reply was submitted on July 8, 1975 stating therein that the admission and denial of documents have been in accordance with General Rules (Civil), 1952, and that there was no occasion for examining the defendant Vishnu Kumar as a duly authorised and instructed counsel is appearing on his behalf. The learned District Judge on 2-9-1975 held that the defendant Vishnu Kumar should appear personally in the Court for examination

under the provisions of O. 10 R. 4, CPC. The defendant Vishnu Kumar feeling aggrieved against this order of the learned District Judge has come up in revision before this Court.

3. On behalf of the defendant-applicant Vishnu Kumar, it has been contended that the learned District Judge acted illegally and with material irregularity in ordering that the defendant should appear in person for examination under the provisions of O. 10 R. 4, CPC. It was contended that the application made by the plaintiff purported to be one under O. 10 Rr. 1 and 2, CPC, and thus there was no occasion for the learned District Judge to have passed an order under the provisions of O. 10 R. 4, CPC. It was further contended that if a duly authorised and instructed counsel was appearing on behalf of the defendant-applicant, then under the provisions of O. 10 Rr. 1 and 2, CPC, questions ought to have been put to the learned counsel, and if the learned District Judge felt that still some further elucidation was necessary, then alone the powers under O. 10 R. 4, CPC could be invoked, and the defendants could be directed to appear in person. Reliance was placed on *Sadeshwar Narain v. Qadir Baksh*, AIR 1918 Oudh 429, *Par-marath v. Krishna Dayal*, AIR 1933 All 517 and *Chetanram v. Mangharam*, 1956 Raj LW 339.

4. On behalf of the plaintiff-respondent, it was contended that though the application was made under O. 10 Rr. 1 and 2, CPC, yet an order could be passed under O. 10 R. 4, CPC. It was also contended that the case law cited by the learned counsel for the defendant-applicant does not apply to the facts and circumstances of the present case. It was also contended that the learned lower Court had jurisdiction to decide the application which was made under O. 10 Rr. 1 and 2, CPC, and that a Court of Revision has no jurisdiction to interfere in such interlocutory orders. It was also contended that a Court of revision shall interfere only when there is an improper exercise of jurisdiction, or that there has been a patent illegality in the procedure.

5. The respective contentions of the learned counsel for the parties have been considered and the record of the case carefully perused. The plaintiff applied under O. 10 Rr. 1 and 2, CPC for examination of the defendant, as the plaintiff contended that the denial and admission of the documents were not spe-

cific, and a vague reply has been given. The learned District Judge considered the admissions and denials made by the learned counsel for the defendant Vishnu Kumar, and felt that it needed further elucidation as the admissions and denials were not of a specific character. The ratio decidendi laid down in the rulings cited by the learned counsel for the defendant-applicant is that if the party has a duly authorised and instructed counsel, then the counsel should be initially examined under the provisions of O. 10 Rr. 1 and 2, CPC, and if after that examination the Court feels that further elucidation is still necessary then orders could be issued under the provisions of O. 10 R. 4, CPC. In the present case, the defendants had given a specific reply that a duly authorised and instructed counsel is appearing on their behalf. The learned District Judge did not consider this aspect of the case, and passed an order under the provisions of O. 10 R. 4, CPC directing the defendant Vishnu Kumar to appear in person. The learned District Judge did not comply with the provisions of O. 10 Rr. 1 and 2, CPC inasmuch as that he did not examine the learned counsel for the defendants when such counsel was duly instructed by the defendants. The power under O. 10 R. 4, CPC could only be invoked if after the examination of the learned counsel for the defendants under O. 10 R. 2, CPC the Court still felt that further elucidation was necessary on material points. The order of the learned District Judge is, therefore, clearly in contravention of the provisions of O. 10 R. 2, CPC, and there has been an illegal exercise of jurisdiction in not following the procedure laid down under O. 10 Rules 1 and 2, C. P. C. The preliminary objection raised on behalf of the plaintiff-respondent that the revision does not lie, in face of these circumstances, cannot be sustained. The preliminary objection is, therefore, overruled.

6. For the reasons stated above, the revision petition is allowed, and the order of the learned District Judge is hereby set aside. The learned District Judge shall examine the learned counsel for the defendant-applicant under O. 10 R. 2, CPC and if after examination of the learned counsel for the defendant, the learned District Judge still feels that certain further elucidation is necessary on material points, he may call upon the defendant to appear in person to answer such questions as may be necessary under the provisions of O. 10 R. 4, CPC.

7. The learned counsel for the defendant-applicant also urged that as the Presiding Officer has changed, a discretion may be given to him to examine the learned counsel for the defendant or the defendant or not. I am afraid, this submission of the learned counsel for the defendant cannot be entertained as a Court of law goes by interpretation of statutes and not by the discretion which a Presiding Officer may exercise. An application under O. 10 Rr. 1 and 2, CPC has been made and the Court has to pass a definite order. By mere change of a Presiding Officer, the interpretation of the provisions of O. 10 Rr. 1 and 2, CPC cannot change.

8. Hence, the revision petition is allowed, and the case is remanded to the learned District Judge, Pali for disposal of the application under O. 10 Rr. 1 and 2, CPC in the light of the observations made above.

Petition allowed.

AIR 1976 RAJASTHAN 197

D. P. GUPTA, J.

Laxmi Chand, Petitioner v. The State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 2997 of 1974, D/- 5-5-1976.

(A) Limitation Act (1963), S. 5 — Applicability — Provisions of S. 5 are confined to 'Courts' and are not applicable to Tribunals — R. T. A. or the Appellate Tribunal under Motor Vehicles Act is not a 'Court'. (Motor Vehicles Act (1939) Sections 58 and 64).

The provisions of Section 5 of the Limitation Act are applicable only to the appeals or applications presented before the "Courts of law" within the strict sense of that term, and the provisions of the aforesaid section cannot be invoked in the case of applications or appeals presented before the Tribunals, which are not courts of law, but are statutory bodies performing quasi-judicial functions. Therefore the provisions of Section 5 cannot be invoked in case of appeals or applications presented before Tribunals constituted under the Motor Vehicles Act. AIR 1969 SC 1335; AIR 1970 SC 209 and AIR 1972 Mys 311, Rel. on.

(Paras 4, 6, 7)

Thus the delay, in making the application for renewal of stage carriage permit, in excess of 15 days from the last date as specified in proviso (a) to S. 58

(2) cannot be condoned by the R.T.A. Such a delayed application is bound to be rejected as time barred. (Para 7)

Cases Referred : Chronological Paras

AIR 1972 Mys 311 = (1972) 1 Mys LJ 649 7

AIR 1970 SC 209 = 1970 Lab IC 269 6, 7

AIR 1969 SC 1335 = 1969 Lab IC 1538 5

B. L. Maheshwari, for Petitioner; R. R. Vyas, for Respondent No. 4; A. K. Mathur, Addl. Govt. Advocate, for the State.

ORDER :— The petitioner was the holder of a non-temporary stage carriage permit on Karauli — Narainpur — Tatwada route (hereinafter referred to as "the route"). The aforesaid permit was issued to him by the Regional Transport Authority, Jaipur (hereinafter referred to as "the R.T.A.") on August 20, 1968 and was valid upto August 19, 1971. It was thereafter renewed for a further period of three years i.e. upto August 19, 1974.

2. Under the first proviso to sub-section (2) of Section 58 of the Motor Vehicles Act (hereinafter referred to as "the Act") an application for the renewal of a stage carriage permit is to be made at least 120 days before the date of its expiry. Under sub-section (3) of the aforesaid section, the Regional Transport Authority is further authorised to entertain an application for renewal of a permit, which has been made not more than 15 days after the last date specified in the first proviso to sub-section (2) of the aforesaid section. The petitioner submitted an application for the renewal of his stage carriage permit on June 15, 1974, which was late by 54 days, taking into consideration the limitation prescribed by the first proviso to sub-section (2) of Section 58 of the Act. The R.T.A., therefore, rejected the aforesaid renewal application of the petitioner as time barred, by its order dated June 24, 1974. The petitioner thereafter submitted a further application stating that he could not submit the renewal application earlier on account of his illness and prayed for condonation of the delay in filing the application for renewal of his permit. This request of the petitioner was also turned down by the R. T. A. by its order dated August 28, 1974 on the ground that delay beyond a period of 15 days from the last date as specified in the aforesaid proviso could not be condoned and the delay in excess thereof in submitting the application for renewal of a permit could not be compounded. The petitioner thereupon preferred a revision petition before the State Transport Appellate Tribunal (here-

inafter referred to as "the Tribunal") against the rejection of his application for renewal of the permit and the refusal of the R. T. A. to condone the delay in filing the aforesaid renewal application. The aforesaid revision petition preferred by the petitioner was dismissed by the Tribunal by its order dated September 13, 1974. It is against this order that the present writ petition has been filed in this Court.

3. I have heard learned counsel for the petitioner. The only argument advanced by the learned counsel is that the delay in filing the application for renewal of the stage carriage permit of the petitioner could have been condoned by the R.T.A. and the Tribunal under Section 5 of the Limitation Act, 1963. Section 5 of the Limitation Act, which has been relied upon by the learned counsel for the petitioner, reads as under:

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation—The fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

4. Thus under Section 5 of the Limitation Act "the Court" is empowered to admit any appeal or application filed beyond the prescribed period of limitation, in case the applicant satisfies "the Court" that he had sufficient cause for not preferring the appeal or making the application within the prescribed period. The provisions of Section 5 of the Limitation Act are confined to courts of law and they are not applicable to Tribunals. The R.T.A. or the Tribunal cannot be held to be a "court of law" in the ordinary sense of that term.

5. In *Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli*, AIR 1969 SC 1335 it was held by their Lordships of the Supreme Court that Article 137 of the Limitation Act did not apply to proceedings under S. 33-C (2) of the Industrial Disputes Act before an Industrial Tribunal or a Labour Court.

6. In *Nityanand v. The Life Insurance Corporation of India*, AIR 1970 SC 209 the question raised was as to whether

the provisions of Section 5 of the Limitation Act were applicable to the Tribunals such as Labour Court, constituted under the Industrial Disputes Act. In the aforesaid case, AIR 1970 SC 209 their Lordships of the Supreme Court made the following observations in this connection:

"Section 4 of the Limitation Act, 1963 provides for the contingency when the prescribed period of any application expires on a holiday and the only contingency contemplated is 'when the court is closed'. Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963."

It is, therefore, absolutely clear that the provisions of Section 5 of the Limitation Act are applicable only to the appeals or applications presented before the "courts of law" within the strict sense of that term, and the provisions of the aforesaid section cannot be invoked in the case of applications or appeals presented before the Tribunals, which are not courts of law, but are statutory bodies performing quasi-judicial functions.

7. In *Bando Banaji v. Bhaskar Balaji*, AIR 1972 Mys 311, a Division Bench of the Mysore High Court also relied upon the decision of their Lordships of the Supreme Court in *Nityanand Joshi's case*, AIR 1970 SC 209 and held that the provisions of Section 5 of the Limitation Act could not be made applicable to the proceedings before the Tribunals constituted under the Mysore Land Reforms Act, 1961. I am in respectful agreement with the aforesaid view. There can thus be no doubt that the provisions of Section 5 of the Limitation Act are applicable to the proceedings before the courts of law and they cannot be invoked in case of appeals or applications presented before Tribunals constituted under the Motor Vehicles Act. In the present case the Tribunal, therefore, rightly refused to go into the question of the sufficiency of cause for the delay in presenting the application for renewal of the permit of the petitioner on merits, as Section 5 of the Limitation Act cannot be made applicable to such an application presented before the Regional Transport Authority. Sub-section

(3) of Section 58 of the Act itself provides fifteen days' grace period during which the renewal application, even if late, could be entertained by the R.T.A. on showing good cause for delay. Thus, if an application for renewal of a permit is not submitted at least 105 days before the date of the expiry of the permit, the Regional Transport Authority has no jurisdiction to entertain such an application for renewal. Therefore, an application which is received by the R.T.A. not less than 105 days before the date of the expiry of the permit is bound to be rejected as time barred, and the R.T.A. has no authority under the law to entertain such a delayed application.

8. The State Transport Appellate Tribunal and the Regional Transport Authority, Jaipur were in these circumstances, right in holding that the application of the petitioner for the renewal of his permit was time barred and in rejecting the same on the aforesaid ground learned counsel for the petitioner drew my attention to some of the orders passed by the R.T.A. in cases where the said Authority allowed renewal applications in respect of stage carriage permits, presented before it less than 105 days prior to the date of expiry of such permits and compounded the delay in making the renewal applications by imposing fines on such applicants for renewal of their permits. I must observe in this connection that any action on the part of the R.T.A. in condoning the delay of more than 15 days in presenting the applications for renewal of stage carriage permits beyond the period prescribed under the first proviso of Section 58 (2) or in compounding any such delay is obviously in derogation of the express provisions of law and such illegal action could not justify the condonation or compounding of delay in the case of the petitioner's renewal application. Such condonation or compounding of delay on the part of the R.T.A. in some other cases, in excess of the period of 15 days, which is permissible under clause 3 of Section 58 of the Act, was clearly without jurisdiction and could not be considered as valid precedent in such matters.

9. In the result, the writ petition has no force and the same is, therefore, dismissed. However, the parties are left to bear their own costs.

Petition dismissed.

AIR 1976 RAJASTHAN 199

P. D. KUDAL, J.

Kaloo Singh, Petitioner v. Asstt. Mining Engineer (Recovery) Mines & Geological Department, Jodhpur and another. Respondents.

Civil Revn. No. 191 of 1973, D/- 12-5-1976.*

(A) Rajasthan Court Fees and Suits Valuation Act (23 of 1961), Section 39 (2) — "Summary decision" — Order of Asstt. Mining Engineer for recovery of 'theka' amount as arrears of land revenue amounts to summary decision.

The decision by the Assistant Mining Engineer to make recovery of the 'theka' amount as arrears of land revenue tantamounts to a summary decision within Section 39 (2) of the Act and in a suit to set aside the decision the court-fee payable is at the rate of 1/4 of the value of the subject matter of the suit, and not ad valorem on the amount claimed. AIR 1960 Raj 171 and 1967 Raj LW 209 Rel. on. Case law discussed. (Paras 21, 22)

Cases Referred : Chronological Paras

1967 Raj LW 209 = ILR (1966) 16 Raj	
1191	15, 17, 21
AIR 1960 Raj 171 = 1960 Raj LW 236	
	9, 17, 21
AIR 1957 Raj 277 = 1957 Raj LW 126	9
AIR 1947 Mad 275 = (1947) 1 Mad LJ	
105	10
AIR 1941 Pat 174 = 21 Pat LT 1019	11
AIR 1925 Pat 44 = 6 Pat LT 82	12

M. D. Calla, for Petitioner; D. S. Shishodia, Addl. Govt. Advocate, for Respondents.

ORDER :— This is a revision petition under Section 115, CPC against the order of the learned Addl. District Judge No. 2, Jodhpur dated March 15, 1973.

2. The plaintiff-applicant Kaloo Singh filed a suit against the Assistant Mining Engineer (Recovery) and the Mining Engineer, Mines and Geological Department, Jodhpur on 12-4-1971 before the learned District Judge, Jodhpur. The plaintiff prayed that the defendant is not entitled to recover the balance of the "theka" amount either under the provisions of the Rajasthan Land Revenue Act, or under the Rajasthan Public Demands Recovery Act, 1952. The plaintiff also prayed for issue of injunction restraining

*(Against order of Chandra Sekhar Goyal, Addl. Dist. J., No. 2 Jodhpur in C. O. No. 8 of 1973 D/- 3-3-1973.)

the defendants from effecting the recovery of the balance of the "theka" amount. On the pleadings of the parties, issues were struck by the learned District Judge.

3. Issue No. 6 reads as follows:

"Whether the court-fee paid by the plaintiff is insufficient?"

4. The case was transferred to the Court of the learned Additional District Judge No. 2, Jodhpur, who decided issue No. 6 on March 15, 1973. The learned Additional District Judge held that the court-fee paid by the plaintiff was insufficient, and he was directed to make good the deficiency in the court-fee within a month.

5. The plaintiff-applicant feeling aggrieved by the order of the learned Additional District Judge has filed the present revision petition.

6. On behalf of the plaintiff-applicant, it was contended that the court-fee paid by the plaintiff was sufficient in view of the provisions of Section 39 (2) of the Rajasthan Court-fees and Suits Valuation Act, 1961. It was also contended that when the representations filed on behalf of the plaintiff-applicant were rejected by the Assistant Mining Engineer such rejection amounted to a summary decision as envisaged in S. 39 (2) of the said Act. It was also contended that the word "decision" used in Section 39 (2) of the said Act deserves to be interpreted in the context in which it has been used. It was also contended that any decision by a revenue authority either under the Rajasthan Land Revenue Act or under the Rajasthan Public Demands Recovery Act pertaining to recovery of any amount as arrears of land revenue is subject to the decision of a civil suit, and as such, such a decision by the revenue authority shall only be a summary decision. It was also contended that even the decision to issue a notice for recovery of a certain amount as arrears of land revenue shall constitute a summary decision.

7. On behalf of the State, it was contended that the Assistant Mining Engineer (Recovery) did not constitute a Court and as such, the present civil suit filed by the plaintiff-applicant is totally misconceived. It was also contended that the order of the Assistant Mining Engineer for recovery of the arrears as land revenue does not amount to a summary decision and the suit, therefore, is per se not maintainable. It was further argued that at any rate the plaintiff should pay ad valorem court-fee on the amount claim-

ed by him. It was further contended that the suit filed by the plaintiff is a suit for declaration and injunction, and is not for setting aside a summary decision as envisaged in Section 39 (2) of the Rajasthan Court-fees and Suits Valuation Act, 1961. It was also contended that under the provisions of Section 257B of the Rajasthan Land Revenue Act the entire money has first to be deposited with the Department concerned, and thereafter a suit may be filed for setting aside the summary decision of the recovery and for refund of the amount, so deposited. It was also contended on behalf of the State that there is no decision much less a summary decision and that the plaintiff-applicant has not filed any copy of such summary decision. It was, therefore, contended on behalf of the State that the suit filed by the plaintiff is totally misconceived, and that it is not covered under the provisions of Section 39 (2) of the Rajasthan Court-fees and Suits Valuation Act, 1961. It was, therefore, contended that the plaintiff has been rightly directed by the learned Additional District Judge to pay ad valorem court-fee. It was also contended that there is no case for interference on the revisional side.

8. The respective contentions of the learned counsel for the parties have been considered and the record of the case carefully perused.

9. The learned counsel for the plaintiff-applicant relied on Kapoor Chand v. The State, 1960 Raj LW 236 = (AIR 1960 Raj 171), wherein it has been held that suit for cancellation of certificate under Section 20 of the Public Demands Recovery Act was in substance a suit for setting aside the decision of the Collector, which was that of a revenue Court, and the decision of the Collector was held to be a summary decision. In this case, this Court differentiated the decision taken in Samdu Khan v. The State of Rajasthan (1957 Raj LW 126 = AIR 1957 Raj 277).

10. Reliance was placed on Kallianikutti Amma v. Kunhilakshmi Amma AIR 1947 Mad 275, wherein it has been held that where a decree-holder institutes a suit under Order 21, Rule 63, Civil P. C. to set aside an order in favour of the claimant, the fact that to the claim to set aside such an order is added some other relief, for example, a declaration that mortgage and a deed of assignment in favour of the claimant are void as against the plaintiff, does not necessarily affect the substantial character of the suit and

the appropriate Article which applies to the suit is Article 17 (1) and not Article 17-A.

11. Reliance was placed on *Udaichand v. Firm Pannalal Champalal*, AIR 1941 Pat 174, wherein it was held that a suit under O. 21, R. 63 by the claimant who was defeated in proceedings under O. 21, R. 58, Civil P.C., for a declaration of his title and a permanent injunction restraining the defendant from taking delivery of possession of the suit property and preventing him from taking any illegal action to the detriment of the plaintiff falls within the purview of Sch. 2, Art. 17 (1), Court-fees Act. No ad valorem court-fee is necessary.

12. Reliance was placed on *Mahabir Prasad v. Shyam Behari Singh*, AIR 1925 Pat 44 holding that a consequential relief can be insisted upon only when the plaintiff will not get any redress by having merely a declaratory decree. For instance, when the property is in possession of the defendant, the plaintiff will not be allowed to seek merely a declaration of his title but must pray for recovery of possession as consequential relief. But where a mere declaration is sufficient to give the plaintiff full relief, a further declaration will be deemed to be redundant, and the fact that the plaintiff asked for a redundant relief will not alter the nature and scope of the suit and make the suit one for a declaration with consequential relief.

13. Reliance was placed on *Venkataramaiya's Law Lexicon*, 1971 Edition wherein the word "decision" has been explained as under:

"The word 'decision' is not a word of art. It is a word having broad connotation. It may include a decree or an order within the meaning of the provisions of the Code of Civil Procedure; it may also include an award in some cases. In some cases it may include neither of them. Whether it includes any one of them in sub-section (1) of Section 381 of the *Nagar Mahapalika Act* will depend not merely upon that expression, but upon its collocation."

14. In *Stroud's Judicial Dictionary of Words and Phrases*, the word "decision" has been explained as under:

"'Decision' is a popular, and not a technical word and means little more than a concluded opinion. It does not, by itself, amount to JUDGMENT or ORDER."

15. Reliance was also placed on *Purushottamdas v. The Collector, Jhunj-*

hunu, 1967 Raj LW 209, wherein it has been held that before the stringent provisions of this section can be properly called into application, the particular demand must fall within the four walls of Section 256 or Section 257, and where such a foundation is lacking, the provisions of Section 257-B cannot possibly be availed of. Where it is impossible to hold on the material which has been placed on this record that the demand notice issued against the petitioners falls under any clause of Section 256 there is no alternative but to allow this application and quash the order and the further proceedings by which the petitioners' objection repudiating their liability was turned down.

16. "Court" has been defined in Section 3 (ii) of the *Rajasthan Court-fees & Suits Valuation Act, 1961* as under:

"Court" means any Civil, Revenue or Criminal Court and includes a Tribunal or other authority having jurisdiction under any special or local law to decide questions affecting the rights of parties."

17. The plaintiff-applicant filed objections on March 25, 1971. The learned counsel for the plaintiff-applicant has not filed any certified copy of the order showing what action was taken by the Assistant Mining Engineer on that representation. The learned Addl. Government Advocate, when called upon, has shown the order which the Assistant Mining Engineer has passed. He has simply stated "disagree" on the margin of the objection petition. In *Kapoor Chand v. The State*, (AIR 1960 Raj 171), it was contended that issue of certificate amounts to a summary decision of a Revenue Court, and falls within the terms of Article 17 (1) of Schedule 2 of the Court-fees Act. The learned Divisional Bench held that the contention is well-founded, and the court-fee payable by the appellant is sufficient for the purposes of this appeal. In *Purushottamdas v. The Collector, Jhunjhunu*, (1967 Raj LW 209), this Court held that unless the demand falls within the four corners of Section 256 of the *Rajasthan Land Revenue Act*, the recovery proceedings are without jurisdiction. The decision of the Revenue Court for making recoveries of certain amount as land revenue is subject to a Civil suit as contemplated in sub-clause (3) of Section 257B. This right to institute a suit is further subject to a right as contained in Section 257-B (4). The learned Additional Government Advocate has, however, argued that the suit is prima facie barred by Section 257-B (3)

of the Rajasthan Land Revenue Act, as the amount due against the defaulter has not been deposited.

18. At the moment, we are only concerned to see whether the court-fee as paid by the plaintiff was sufficient, or not? Section 39 (2) of the Rajasthan Court-fees & Suits Valuation Act, 1961 reads as under:

"39 (2). In a suit to set aside any summary decision or order of a Civil or Revenue Court, if the subject-matter of the suit has a market value, fee shall be computed on one-fourth of such value, and in other cases, fee shall be payable at the rates specified in Section 45.

Explanation — For the purpose of this section, the Registrar of Co-operative Societies shall be deemed to be a Civil Court."

19. This section provided that in a suit to set aside any other summary decision or order of a Civil or Revenue Court, the court-fees payable shall be at the rate of 1/4 of the value of the subject-matter of the suit.

20. In Section 257A, it has been provided that the application, certificate, statement of account or other document referred to in sub-section (1) shall, for the purpose of recovery in accordance with the provisions of this chapter, be conclusive evidence of the existence of the arrear payable to the officer or authority signing the same, of the amount of such arrear and of the person who is the defaulter.

21. In *Purushottamdas v. The Collector, Jhunjhunu* (1967 Raj LW 209), it has been held that the demand must fall within the four walls of Section 256 or Section 257 of the Rajasthan Land Revenue Act. In view of these circumstances and keeping in view the ratio decidendi laid down in *Kapoor Chand v. The State*, (AIR 1960 Raj 171) and *Purushottamdas v. The Collector, Jhunjhunu* I have no hesitation in holding that the decision to make recovery tantamounts to a summary decision within Section 39 (2) of the Rajasthan Court-fees and Suits Valuation Act, 1961.

22. For the reasons stated above, the revision petition filed by the plaintiff-applicant is hereby allowed, and the order of the learned Additional District Judge under revision is hereby set aside. The court-fee paid by the plaintiff-applicant is found to be sufficient.

23. The State shall, however, be free to raise an objection about the maintainability of the suit as the plaintiff-

applicant (defaulter) has not first deposited the amount which was due against him as contemplated in sub-clause (3) of Section 257B of the Rajasthan Land Revenue Act. Looking to the facts and circumstances of this case, the parties are left to bear their own costs.

Revision allowed.

AIR 1976 RAJASTHAN 202

D. P. GUPTA, J.

Nathulal and others, Petitioners v. Union of India and others, Respondents.

Civil Writ Petn. Nos. 2446, 2400 and 2482 of 1974, D/- 22-4-1976.

(A) Motor Vehicles Act (1939), Section 68D (1) — Publication of Scheme of nationalisation — Requirements — Publication in newspaper of regional language.

The only requirement of sub-s. (1) of S. 68-D is that the proposed draft scheme of nationalisation should be published in the official Gazette and in not less than one newspaper in the regional language, circulating in the area or route which is proposed to be covered by the Scheme. Where in addition to publication in official Gazette, the scheme is published in a Hindi Daily having a wide circulation, the mere fact that it does not have a wide circulation in a particular village where the objector resides, will not be non-compliance with S. 68-D (1). What has to be considered in this connection is the question of wide circulation in the vast majority of towns and villages, which are situated around the route or portion thereof and mere lack of circulation in one village or a few villages is of no consequence in the matter. Similarly, the absence of knowledge of the regional language by one operator could have no effect on the validity of the publication of the draft scheme of nationalisation, as there is no requirement of law that the draft scheme should be published in the language which may be known to each one of the individual operators, who may be affected by the said draft scheme. AIR 1963 SC 640 Rel. on. (Paras 4 & 6)

(B) Motor Vehicles Act (1939), Sections 68-D (2) — Objections to Draft Scheme of nationalisation — Failure to raise in accordance with rules — Such objections cannot be entertained in a writ petition—(1) Rajasthan State Transport Services (Development) Rules, 1965,

GT/GT/C266/76/GGM

R. 6 (4)—(2) Constitution of India, Article 226 — Certiorari—Alternate remedy).

Where a person aggrieved by the publication of a scheme for nationalisation failed to prefer objections in respect of the draft scheme of nationalisation, and are rightly precluded from being afforded an opportunity of hearing under Section 68-D (2) in view of the provisions of sub-rule (4) of Rule 6 of the Rajasthan State Transport (Development) Rules, 1965 on account of their failure to file objections to the draft scheme of nationalisation at the relevant time, he is precluded from raising any objections about the validity of the approved Scheme before the High Court in the writ petitions under Article 226 of the Constitution of India. 1974 WLN (UC) 82 and 1965 Raj LW 340 Foli.

(Para 7)

(C) Motor Vehicles Act (1939), Section 68-D (3) — Publication of approved draft scheme for Nationalisation — Implementation — Order by R.T.A. curtailing other than the overlapping route in a permit — Order is illegal — Illegal part severable from rest of the order — Only the illegal part is liable to be set aside.

(Para 8)

Cases Referred : Chronological Paras

1974 WLN (UC) 82 7

1965 Raj LW 340 = ILR (1965) 15 Raj 804 7

AIR 1963 SC 640 = (1963) Supp (1) SCR 99 5

R. R. Vyas, for Petitioners; H. N. Calia, Deputy Govt. Advocate, R. N. Munshi, for Raj. State Road, Transport Corpn.

ORDER :— These three writ petitions arise out of similar facts and circumstances and similar questions of law are raised therein and as such I propose to dispose them of by a common order.

2. The petitioner in each one of the three writ petitions, was an existing operator, plying his vehicle on a non-temporary stage carriage permit on Asind-Deogarh route in the State of Rajasthan. The State Transport Undertaking, known as Rajasthan State Road Transport Corporation (hereinafter called as 'the Corporation') published a proposed scheme of nationalisation under Section 68-C of the Motor Vehicles Act (hereinafter referred to as 'the Act') in respect of Udaipur — Beawar via Kailashpuri, Delwara, Nathdwara, Kankroli, Gomti Daver-Kamlighat Choraha-Kamlighat, Deogarh, Barar, Bhim and Jasakhera route (hereinafter referred to as 'the notified route') and portions thereof. The proposed draft scheme of nationalisation was published by the Cor-

poration vide its notification dated January 3, 1973 in the Rajasthan Gazette Extraordinary dated January 6, 1973. By the aforesaid notification all persons affected by the proposed draft scheme of nationalisation were required to file objections, if any, before the Secretary to the Government of Rajasthan in the Transport Department, within thirty days of the date of the publication of the aforesaid notification in the Rajasthan Gazette. It is the admitted case of the parties that none of the three petitioners filed any objections in accordance with the aforesaid notification, within thirty days of the publication of the draft scheme of nationalisation in the Rajasthan Gazette or at any time even thereafter. The objections received in respect of the aforesaid draft scheme of nationalisation were thereafter considered by the Joint Legal Remembrancer No. 2, Government of Rajasthan, for and on behalf of the State Government, under Section 68-D (2) of the Act and the aforesaid proposed draft scheme of nationalisation was approved by him by order dated February 15, 1974. The approved scheme of nationalisation relating to the notified route was published in the Rajasthan Gazette dated February 16, 1974 under Section 68-D (3) of the Act. According to the aforesaid draft scheme and the approved scheme of nationalisation, the petitioners were to be excluded from plying their vehicles on the notified route or any portion thereof, as the scheme was one of total exclusion of private operators and it was provided therein that no person, whether plying his passenger vehicle on the whole or portion of the route specified in clause (2) of the Scheme or overlapping whole or any portion of such route, would be allowed to ply his passenger transport vehicle on the whole or any portion of the route or overlapping whole or any portion thereof. In other words, only the Corporation would be entitled to ply its passenger transport vehicles on the notified route or portions thereof. The Regional Transport Authority, Udaipur (hereinafter referred to as 'the R.T.A.') in pursuance of the aforesaid approved scheme of nationalisation, intimated to the petitioners by its order dated August 3, 1974 that the route of the permits of the three petitioners would stand curtailed from Deogarh to Bhim, a portion 35 Kilometres long, on the ground that it overlapped the notified route.

3. The petitioners have challenged in this Court, by means of separate writ

petitions, the aforesaid approved scheme of nationalisation relating to the notified route as well as the order passed by the R.T.A. curtailing the route of the petitioners' permits from Deogarh to Bhim, in pursuance of or in implementation of the approved scheme of nationalisation relating to the notified route. Learned counsel for the petitioners confined his submissions before me to two matters only.

4. The first submission made by the learned counsel was that the provisions of Section 68-D (1) of the Act were not complied with in their case as the petitioners did not receive any notice of the proposed scheme of nationalisation and thereby the aforesaid provisions of law as well as the principles of natural justice were violated. Section 68-C of the Act authorises the State Transport Undertaking to prepare a scheme of nationalisation in respect of any route or area and cause such scheme to be published in the Official Gazette and in such other manner as the State Government may direct. Sub-section (1) of Section 68-D provides that the proposed scheme of nationalisation prepared by the State Transport Undertaking shall be published in the Official Gazette of a State and in not less than one newspaper in regional language circulating in the area or route which is proposed to be covered by such scheme. It is further provided therein that any person already providing transport facilities by any means along or near the area or route proposed to be covered by the scheme of nationalisation or any association of such persons or local authorities or police authorities, within whose jurisdiction any part of the area or route proposed to be covered by the draft scheme of nationalisation lies, may file objections in respect of the proposed scheme of nationalisation before the State Government within thirty days of the publication of the draft scheme in the official Gazette. Rule 5 of the Rajasthan State Road Transport Services (Development) Rules, 1965 (hereinafter called 'the Rules') makes provision for the filing of objections by any person authorised under Section 68-D (1) of the Act, within thirty days of the date of publication of the draft scheme in the official Gazette of the State. It has also been provided that memorandum of objections shall be addressed to the Secretary to the Government of Rajasthan in the Transport Department and that a copy thereof shall be sent by the objector to the General

Manager of the Corporation. Sub-section (2) of Section 68-D of the Act makes provision for the consideration of the objections submitted in the aforesaid manner, by the State Government, after giving an opportunity of hearing to the objector or his representative and the representatives of the State Transport Undertaking and to approve or modify the scheme. Rule 6 of the Rules provides the procedure to be followed in respect of the hearing of objections, including the giving of notices to the persons concerned regarding the date fixed for hearing. Clause (4) of Rule 6 makes it clear that no objector shall be entitled to be heard by the State Government under Section 68-D (2) of the Act unless he has preferred objections in respect of the proposed scheme of nationalisation in accordance with the provisions of Rule 5. In the cases before me, the petitioners having failed to file any objections at all, they could not complain that they were not afforded an opportunity of hearing by the State Government. So far as the question of preferring the objections is concerned, the only requirement of sub-section (1) of Section 68-D is that the proposed draft scheme of nationalisation should be published in the official Gazette and in not less than one newspaper in the regional language, circulating in the area or route which is proposed to be covered by such draft scheme. In its reply the respondent Corporation has stated that the proposed scheme of nationalisation was published in the Rajasthan Gazette on January 6, 1973 under Section 68-C of the Act and objections were invited in respect thereof within thirty days of the date of publication of the proposed scheme of nationalisation in the official Gazette. It has been further stated on behalf of the Corporation that the proposed scheme of nationalisation was also published in the Hindi daily newspaper 'Navjyoti' dated January 6, 1973. The contention of the learned counsel for the petitioners was that the publication of the proposed scheme of nationalisation in the newspaper 'Navjyoti' was not sufficient compliance with the provisions of Section 68-D (1) of the Act, as the said newspaper did not have wide circulation in village Asind, in which the petitioners reside. It is common knowledge that the Hindi daily newspaper 'Navjyoti' is published from Jaipur in Rajasthan and has wide circulation in this State. It has not been denied by the petitioners that the aforesaid Hindi daily newspaper has wide circulation in Rajas-

than and in the area situated around or near the route running from Udaipur to Beawar. What has been argued by the learned counsel for the petitioners is only that the said newspaper did not have a wide circulation in the village Asind, of which the petitioners are resident. Merely on that basis alone, it cannot be held that the newspaper 'Navjyoti' does not have wide circulation in towns and villages situated around or near the route proposed to be covered by the draft scheme of nationalisation, namely Udaipur-Beawar route. What has to be considered in this connection is the question of wide circulation in the vast majority of towns and villages, which are situated around the route or portion thereof and mere lack of circulation in one village or a few villages is of no consequence in the matter. The contention of the learned counsel for the petitioners, in these circumstances, cannot be accepted that the principles of natural justice were violated or the provisions of Section 68-D (1) of the Act were ignored in these cases, inasmuch as the Corporation fully complied with the specific provisions relating to the publication of the draft scheme of nationalisation, by publishing the same in the official Gazette and in the daily Hindi newspaper 'Navjyoti', having wide circulation in the places situated near the route, which was proposed to be covered by the draft scheme of nationalisation. In the writ petition of Kishan Chandra, the petitioner's submission was that he only knew Sindhi and was not conversant with the Hindi language. The absence of knowledge of the regional language by one operator could have no effect on the validity of the publication of the draft scheme of nationalisation, as there is no requirement of law that the draft scheme should be published in the language which may be known to each one of the individual operators, who may be affected by the said draft scheme. What is required by law is that the scheme should be published in the official Gazette and in one newspaper published in the regional language and having wide circulation in the area or near the route which is proposed to be covered by the draft scheme of nationalisation. There can be no doubt that Hindi is the principal regional language of the area traversed by the Udaipur-Beawar route.

5. It is difficult to accept that the petitioners, who were providing transport facilities on Asind-Deogarh route for quite a long time and were plying their

vehicles on non-temporary stage carriage permits on the aforesaid route remained unaware of the publication of the proposed draft scheme of nationalisation. A similar objection relating to the publication of a scheme of nationalisation was taken before their Lordships of the Supreme Court in *Sobhraj Odharmal v. State of Rajasthan*, AIR 1963 SC 640 and their Lordships were pleased to observe as under in this connection:

"It is also manifest that he had to deal with operators of motor vehicles a class of persons — who in order to carry on efficiently their business have constantly to acquaint themselves with the State Government Gazette in which the Rules framed under the Act, the Schemes, notices and the directions which the Government issue for acquiring control over road transport are published as required by the Motor Vehicles Act.....It appears that the Legal Remembrancer was of the opinion that those who had not been personally served with individual notices sent by registered post had still notice that the proceedings was to commence on June 26, 1961. The inference raised by the Legal Remembrancer cannot be said to be based on no evidence. The High Court has also held that the Legal Remembrancer was satisfied about service of the notice on the objectors in accordance with law and that in proceeding to hear the objection the Legal Remembrancer acted according to law..... If the objectors were duly served and they failed to appear to press their objections before the Legal Remembrancer, they cannot seek to challenge the scheme after it is duly published and which by the statute is declared final."

6. It may also be pointed out here that not only a scheme of nationalisation and notices in connection therewith are published in the official Gazette but the applications for grant or renewal of a non-temporary stage carriage permits are also published in the official Gazette under the provisions of Section 57 (3) of the Motor Vehicles Act, read with R. 81 (b) of the Rajasthan Motor Vehicles Rules, 1951 and such publication, along with pasting of copies thereof on the notice board of the office of the Regional Transport Authority concerned, are considered as sufficient compliance with the provisions relating to the giving of notice of the dates by which representation in connection with such applications for grant or renewal of non-temporary stage carriage permits may be submitted and of

the dates which may be fixed for the consideration of such applications by the concerned Regional Transport Authority. Thus it is apparent that a person providing transport facilities by plying a stage carriage vehicle is expected to keep himself fully conversant with the State Gazette, in order to carry on his business in that particular area or on route on which he is plying his vehicle. I am, therefore, not impressed with the submission of the learned counsel for the petitioners that the petitioners or any one of them had no notice of the publication of the proposed draft scheme of nationalisation or that they were unable to file objections in respect thereof for any such reason. In so far as the hearing of objections is concerned, sub-rule (4) of Rule 6 of the Rules precluded the petitioners from taking part at the hearing before the State Government in respect of objections under Section 68-D (2) of the Act, because they did not prefer any objections in accordance with the Rules in respect of the proposed draft scheme and as such the petitioners cannot now complain that they were not given any opportunity of hearing by the State Government in respect of the draft scheme of nationalisation relating to the notified route.

7. Learned counsel for the petitioners sought to challenge the validity of the approved scheme of nationalisation in these proceedings before this Court. However, it may be observed that the petitioners having failed to prefer objections in respect of the draft scheme of nationalisation, they were rightly precluded from being afforded an opportunity of hearing by the Joint Legal Remembrancer, in view of the provisions of sub-rule (4) of Rule 6 of the Rules and for the very same reason, the petitioners on account of their failure to file objections to the draft scheme of nationalisation at the relevant time, are further precluded from raising any objections about the validity of the approved Scheme before this Court in the present writ petitions under Article 226 of the Constitution of India. In *Dharm Chand v. State of Rajasthan*, 1974 WLN (UC) 82 Hon'ble Joshi, J. took the same view and observed that in case a party having a right to file objections failed to avail of the said opportunity, it was not open to him subsequently to contest the scheme of nationalisation under Article 226 of the Constitution of India. I am in respectful agreement with the aforesaid observations. A similar view was also taken by

a Division Bench of this Court in *Sharma Roadways v. Sohanlal Soni*, 1965 Raj LW 340 wherein a person providing road transport facilities, who could have raised objections or made representations under sub-section (4) of Section 57 of the Act in connection with an application for the grant of a non-temporary stage carriage permit, published under Section 57 (3) of the Act, failed to make the necessary objections. The Division Bench made the following observations:

"We agree with the learned single Judge that Section 57 (4) makes it obligatory on the part of the person who wants to contest the application for permit, to make a representation in writing before the appointed date and furnish a copy thereof to the applicant, and if he fails to do so, his representation would not be considered by the Regional Transport Authority. This sub-sec. (4) provided a specific remedy to the petitioner and if he failed to avail of it, he was not entitled to file any writ application."

In my view the principle of the aforesaid case would govern the cases of the petitioners as well, inasmuch as the petitioners also did not file objections in respect of the draft scheme of nationalisation and having failed to do so, they were rightly precluded from raising any objection before the State Government at the time of hearing under Section 68-D (2) of the Act and as the petitioners failed to avail of the statutory remedy available to them in respect of the draft scheme of nationalisation, they are also not entitled to maintain any writ petition in this Court challenging the validity of the approved scheme of nationalisation, relating to the notified route.

8. The second submission made by the learned counsel for the petitioners is that the Asind — Deogarh route via Bhim and Tal Lasani on which the petitioners plied their vehicles, overlapped the notified route only for a short distance of 5 miles from Bhim to 'Mod', the point of bifurcation of the road leading to Tal Lasani and that the draft scheme of nationalisation proposed the curtailment of the route of the permits of the petitioners in so far as the said route overlapped the notified route, namely from Bhim to 'Mod'. Learned counsel argued that even if the petitioners did not prefer any objections then also the Joint Legal Remembrancer could only approve the draft scheme as proposed, in so far as it affected the rights and in-

terests of the petitioners and the Regional Transport Authority also, in pursuance of the final scheme of nationalization, was authorised to curtail the route of their permits only to the extent it was proposed to be done in the draft scheme, but the R.T.A. was not authorised to curtail the route of the permits of the petitioners from Deograh to Bhim, a distance of about 35 kilometres, while the route of the petitioners' permits overlapped the notified route for a distance of only five miles i.e. 8 kilometres from Bhim to 'Mod'. A perusal of the order of the Joint Legal Remembrancer approving the proposed draft scheme of nationalisation, for and on behalf of the State Government, shows that he only intended to approve the draft scheme in so far as it affected the rights of the petitioners of plying their vehicles over a portion of the notified route and the route of the petitioners' permits was to be curtailed only in so far as it overlapped the Bhim to 'Mod' portion of the notified route. The final scheme of nationalisation, which was subsequently published on February 16, 1974 after the order of Joint Legal Remembrancer was passed on February 15, 1974 also intended to affect the plying of the vehicles of the petitioners, in so far as the route of their permits overlapped a portion of the notified route. Thus the petitioners can have no grievance in this respect with regard to the order of the Joint Legal Remembrancer approving the draft scheme as well as in respect of the approved scheme of nationalisation relating to the notified route. However, it appears that while proceeding to implement the approved scheme of nationalisation, the Regional Transport Authority, Udaipur, instead of directing the curtailment of the route of the permits of the petitioners to the extent the same overlapped the notified route, erroneously ordered that Deogarh to Bhim portion of the route of the petitioners' permits would be curtailed. The aforesaid order of the Regional Transport Authority, Udaipur is not in consonance with the approved scheme of nationalisation, as published in the Rajasthan Gazette. Mr. Munshi, appearing for the Corporation was not unable to support the order of the R.T.A. directing the curtailment of the route of the petitioners' permits from Deogarh to Bhim. Mr. Munshi submitted that the Regional Transport Authority, Udaipur probably could not properly construe the order passed by the Joint Legal Remembrancer while approv-

ing the draft scheme of nationalisation. Mr. Calla, learned Deputy Government Advocate, was also unable to support the curtailment of the route of the petitioners' permits from Deogarh to Bhim, in pursuance of the aforesaid approved scheme of nationalisation. It appears that the Joint Legal Remembrancer, while approving the draft scheme of nationalisation relating to Udaipur-Beawar route, only directed that Asind-Deogarh route would be curtailed in so far as it overlapped the Deogarh — Bhim portion of the notified route. The Regional Transport Authority, Udaipur misconstrued the aforesaid order and committed an obvious error in directing that the route of the permits of the petitioners would be curtailed from Deogarh to Bhim, which is clearly in derogation of the order passed by the Joint Legal Remembrancer as well as the provisions of the approved scheme of nationalisation relating to the notified route. The route of the petitioners' permits was only intended to be curtailed from Bhim to 'Mod', in so far as the same overlapped the notified route. It is common ground between the parties that from the point of bifurcation called as 'Mod', the petitioners' buses did not traverse the same highway which was traversed by the vehicles plying on the notified route and therefore the route of the petitioners' permits could only be curtailed from the point called 'Mod' to Bhim. The order passed by the Regional Transport Authority, Udaipur and the notices issued to the petitioners on August 3, 1974 in pursuance thereof by the Secretary of the aforesaid Authority suffer from apparent error to the above extent. It is also not disputed that the illegal part of the order of the Regional Transport Authority, Udaipur is severable from the remaining part thereof, which still stands valid being in accordance with the approved scheme of nationalisation. It is, therefore, necessary to set aside that part of the order of the Regional Transport Authority, Udaipur and the notices issued by the Secretary of that Authority in pursuance thereof, in so far as they relate to the unlawful curtailment of the route of the petitioners' permits from Deogarh to 'Mod'.

9. The result of the foregoing discussion is that all the three writ petitions are partly allowed to the extent that the resolution of the Regional Transport Authority, Udaipur and the notices issued in pursuance thereof by the Secretary of the aforesaid Authority to the petitioners

dated August 3, 1974 curtailing the route of their permits namely Deogarh-Asind via Bhim and Tal Lasani route, from 'Mod' (the point of bifurcation of the road for going to Tal Lasani) to Deogarh is set aside. It is, however, made clear that the curtailment of the route of the permits of the petitioners from Bhim to the point 'Mod', referred to above, is valid and shall also remain effective. In the circumstances, the parties are left to bear their own costs.

Petitions partly allowed.

AIR 1976 RAJASTHAN 208

S. N. MODI, J.

Nathulal and another, Appellants v. Mangoo and another, Respondents.

Second Appeal No. 381 of 1967, D/-5-4-1976*.

(A) Limitation Act (1908), S. 75 — Loan payable in instalments — Default in payment of an instalment — Waiver of that default — What amounts to.

Where payment is made by the debtor specifically towards the satisfaction of a particular defaulted instalment, then acceptance of such payment by the creditor amounts to a waiver of that default and the creditor must be held that he has waived his rights which accrued to him on that default and the starting point of limitation will be from the next default if not waived. AIR 1955 Raj 188, AIR 1939 Pat 433 (FB) and AIR 1948 Nag 225 Relied on.

Held on facts that the plaintiffs waived the default clause and their suit was not barred under S. 75. (Paras 6, 8)

Cases Referred : Chronological Paras

AIR 1955 Raj 188 = ILR (1955) 5 Raj 671 6

AIR 1948 Nag 225 = ILR (1947) Nag 947 7

AIR 1939 Pat 433 = 20 Pat LT 443 (FB) 6

N. P. Gupta and G. P. Goyal, for Appellants; S. T. Porwal, for Respondents.

JUDGMENT :— This is a second appeal by the plaintiffs against the appellate judgment of the Senior Civil Judge No. 2, Gangapur City, dated April 28,

*(Against judgment and decree of S. S. Bhatnagar, Sr. Civil J. No. 2 Gangapur city in First Appeal No. 16 of 1966 D/-28-4-1968.

GT/GT/C263/76/VSS

1967, affirming the decree passed by the Munsiff, Karauli, dismissing the suit as time-barred.

2. The relevant facts giving rise to this appeal are that the plaintiff-appellants brought the suit for the recovery of Rs. 1,100/- as principal, and Rs. 484/- by way of interest, totalling to Rs. 1,584/- on March 28, 1962 on the basis of a "khata" dated Asoj sud 6, Samwat year 2015, corresponding to October 18, 1958, which is marked as Ex. 1. It was averred in the plaint that the defendants borrowed Rs. 3,000/- from the plaintiffs on October 18, 1958 with stipulation to repay the amount in 30 monthly instalments of Rs. 100/- each, and in default, it was agreed, that the amount shall be payable with interest at the rate of 24 per cent per annum in one lump sum. It was further averred by the plaintiffs that the defendants repaid on different dates Rs. 1,900/- towards the amount due to the plaintiffs and the plaintiffs waived their right to enforce the default clause mentioned in the "khata" and accepted 19 instalments of Rs. 100/- each paid by the defendants up to Baisakh sud 6, Samwat year 2017. Since the defendants committed default in payment of remaining 11 instalments and they did not pay the amount due to the plaintiffs despite notice, the plaintiffs brought the suit for Rs. 1,584/- as stated above. The defendant Ram Bilas did not put in his appearance and ex parte proceedings were taken against him. The suit was contested by defendant Mangoo who denied having executed "khata" Ex. 1 in favour of the plaintiffs. He also denied receipt of consideration. He also denied that the plaintiffs waived the default clause arising under "khata" Ex. 1. According to him, the suit was barred by time. On the pleadings of the parties, the following issues were framed,—

(1) Whether the defendants on 18-10-58 took a loan of Rs. 3,000/- in cash and executed "Rukka" in favour of the plaintiffs?

(2) Whether the plaintiffs got signatures on "Rukka" of defendant No. 1 by telling him that defendant No. 2 has taken a loan and he should sign it as an attesting witness and as such defendant No. 1 is not liable?

(3) Whether non-payment of instalment of Magh Samwat 2015 gave rise to cause of action on the same day to the plaintiffs to realise the amount in lump sum, and, thus, the suit is time barred?

(4) Relief?

The trial court held that the "khata"

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U. P. URBAN BUILDINGS REGULATION OF LETTING, RENT AND EVICTION) RULES (1972)

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WEST BENGAL MEDICAL AND DENTAL COLLEGES (REGULATION OF ADMISSION) RULES (1973)

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—S. 19 — Scope — Liability adjudicated upon by Claims Tribunal under Motor Vehicles Act falls outside scope of S. 19: Him Pra 75 B

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Revers. = Reversed in.

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(1974) 87 Mad LW 877 — Diss. AIR 1976 Mad 309.

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1971 Pun LJ 868 = 1971 Ren CR 439 — Over. AIR 1976 Punj 324.

(1971) Criminal Appeal No. 251 of 1970, D/- 7-4-1971 (Punj) — Revers. AIR 1976 SC 2042.

(1973) Criminal Appeal No. 256 of 1971, D/- 24-9-1973 (Punj) — Revers. AIR 1976 SC 2032 A.

(1974) 76 Pun LR 418 = 1974 Pun LJ 325 — Over. AIR 1976 Punj 310 A (FB).

ERRATA

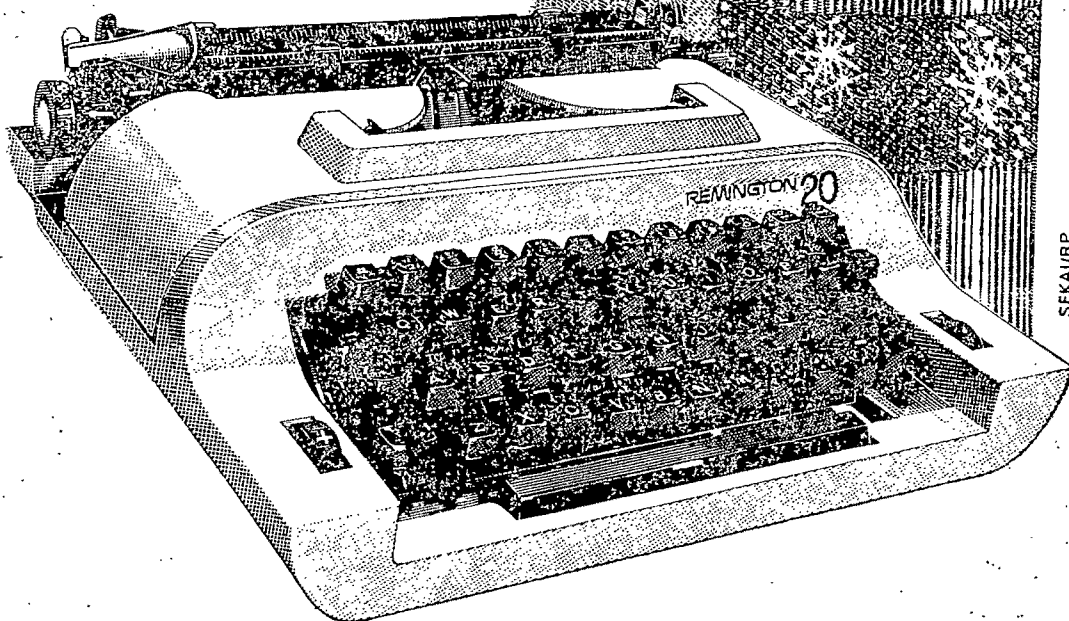
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Page 318, Col. 1, In Index Note (A), Line 5, Read ‘VII’ for the Figure ‘V’.

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2. Amendment of section 35.

In section 35 of the principal Act, for the words "two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following" the word: "two or more successive sessions, and if, before the expiry of the session immedi-

(Contd. on col. 2)

ately following the session or the successive sessions aforesaid" shall be substituted.

4. Substitution of new Schedule for Schedule IV.

For Schedule IV to the principal Act, the following Schedule shall be substituted, namely:—

"SCHEDULE IV

(See section 4)

COMPENSATION PAYABLE IN CERTAIN CASES

Monthly wages of the workman injured	Amount of compensation for—		Half-monthly payment as compensation for temporary disablement
	Death	Permanent total disablement	
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60	90	9,720	14,608
90	120	11,520	16,128
120	150	13,500	18,900
150	200	16,800	23,520
200	300	18,000	25,200
300	400	19,200	26,880
400	500	21,000	29,400
500	600	21,600	30,240
600	700	23,100	32,340
700	800	24,000	33,600
800	900	27,000	37,800
900	1000	30,000	42,000
			Half his monthly wages
			36.00
			42.00
			48.75
			60.00
			82.50
			100.00
			118.75
			135.00
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[27th May, 1976]

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1. Short title.

This Act may be called THE CONSTITUTION (FORTIETH AMENDMENT) ACT, 1976.

[*] Received the assent of the President on 27-5-1976. Act published in Gaz. of India; 27-5-1976 Part II-S. 1, Ext. P. 639.

For Statement of Objects and Reasons, see Gaz. of India; 21-5-1976, Part II S. 2 Ext. P. 835.

1976 Acts 15.

2. Substitution of new article for article 297.

For article 297 of the Constitution, the following article shall be substituted, namely:—

Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.

"297. (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament."

3. Amendment of the ninth schedule.

In the Ninth Schedule to the Constitution, after entry 124 and before the *Explanation*, the following entries shall be inserted namely:—

"125. Section 66A and Chapter IVA of the Motor Vehicles Act, 1939 (Central Act 4 of 1939).

126. The Essential Commodities Act, 1955 (Central Act 10 of 1955).

127. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Central Act 13 of 1976).

128. The Bonded Labour System (Abolition) Act, 1976 (Central Act 19 of 1976).

129. The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976 (Central Act 20 of 1976).

130. The Prevention of Publication of Objectionable Matter Act, 1976 (Central Act 27 of 1976).

131. The Levy Sugar Price Equalisation Fund Act, 1976 (Central Act 31 of 1976).

132. The Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976).

133. The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976 (Central Act 59 of 1976).

134. The Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act I of 1957).

135. The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (Bombay Act XCIX of 1958).

136. The Gujarat Private Forests (Acquisition) Act, 1972 (Gujarat Act 14 of 1973).

137. The Haryana Ceiling on Land Holdings (Amendment) Act, 1976 (Haryana Act 17 of 1976).

138. The Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Himachal Pradesh Act 8 of 1974).

139. The Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 (Himachal Pradesh Act 18 of 1974).

140. The Karnataka Land Reforms (Second Amendment and Miscellaneous Provisions) Act, 1974 (Karnataka Act 31 of 1974).

141. The Karnataka Land Reforms (Second Amendment) Act, 1976 (Karnataka Act 27 of 1976).

142. The Kerala Prevention of Eviction Act, 1966 (Kerala Act 12 of 1966).

143. The Thiruppuvaram Payment (Abolition) Act, 1969 (Kerala Act 19 of 1969).

144. The Sreepadam Lands Enfranchisement Act, 1969 (Kerala Act 20 of 1969).

145. The Sree Pandaravaka Lands (Vesting and Enfranchisement) Act, 1971 (Kerala Act 20 of 1971).

146. The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Kerala Act 26 of 1971).

147. The Kerala Agricultural Workers' Act, 1974 (Kerala Act 18 of 1974).

148. The Kerala Cashew Factories (Acquisition) Act, 1974 (Kerala Act 29 of 1974).

149. The Kerala Chitties Act, 1975 (Kerala Act 23 of 1975).

150. The Kerala Scheduled Tribes (Restriction on Transfer of Lands and Restoration of Alienated Lands) Act, 1975 (Kerala Act 31 of 1975).

151. The Kerala Land Reforms (Amendment) Act, 1976 (Kerala Act 15 of 1976).

152. The Kanam Tenancy Abolition Act, 1976 (Kerala Act 16 of 1976).

153. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 (Madhya Pradesh Act 20 of 1974).

154. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1975 (Madhya Pradesh Act 2 of 1976).

155. The West Khandesh Mehwasai Estates (Proprietary Rights Abolition, etc.) Regulation, 1961 (Maharashtra Regulation I of 1962).

156. The Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (Maharashtra Act XIV of 1975).

157. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 (Maharashtra Act XXI of 1975).

158. The Maharashtra Private Forests (Acquisition) Act, 1975 (Maharashtra Act XXIX of 1975).

159. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act, 1975 (Maharashtra Act XLVII of 1975).

160. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1975 (Maharashtra Act II of 1976).

161. The Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952).

162. The Rajasthan Colonisation Act, 1954 (Rajasthan Act XXVII of 1954).

163. The Rajasthan Land Reforms and Acquisition of Landowners' Estates Act, 1963 (Rajasthan Act 11 of 1964).

164. The Rajasthan Imposition of Ceiling on Agricultural Holdings (Amendment) Act, 1976 (Rajasthan Act 8 of 1976).

165. The Rajasthan Tenancy (Amendment) Act, 1976 (Rajasthan Act 12 of 1976).

166. The Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act, 1970 (Tamil Nadu Act 17 of 1970).

167. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1971 (Tamil Nadu Act 41 of 1971).

168. The Tamil Nadu Land Reforms (Fixation of Ceiling of Land) Amendment Act, 1972 (Tamil Nadu Act 10 of 1972).

169. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1972 (Tamil Nadu Act 20 of 1972).

170. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1972 (Tamil Nadu Act 37 of 1972).

171. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fourth Amendment Act, 1972 (Tamil Nadu Act 39 of 1972).

172. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Sixth Amendment Act, 1972 (Tamil Nadu Act 7 of 1974).

173. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fifth Amendment Act, 1972 (Tamil Nadu Act 10 of 1974).

174. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1974 (Tamil Nadu Act 15 of 1974).

175. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1974 (Tamil Nadu Act 30 of 1974).

176. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1974 (Tamil Nadu Act 32 of 1974).

177. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1975 (Tamil Nadu Act 11 of 1975).

178. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1975 (Tamil Nadu Act 21 of 1975).

179. Amendments made to the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951) by the Uttar Pradesh Land Laws (Amendment) Act, 1971 (Uttar Pradesh Act 21 of 1971) and the Uttar Pradesh Land Laws (Amend-

ment) Act, 1974 (Uttar Pradesh Act 34 of 1974).

180. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (Uttar Pradesh Act 20 of 1976).

181. The West Bengal Land Reforms (Second Amendment) Act, 1972 (West Bengal Act XXVIII of 1972).

182. The West Bengal Restoration of Alienated Land Act, 1973 (West Bengal Act XXIII of 1973).

183. The West Bengal Land Reforms (Amendment) Act, 1974 (West Bengal Act XXXIII of 1974).

184. The West Bengal Land Reforms (Amendment) Act, 1975 (West Bengal Act XXIII of 1975).

185. The West Bengal Land Reforms (Amendment) Act, 1976 (West Bengal Act XII of 1976).

186. The Delhi Land Holdings (Ceiling) Amendment Act, 1976 (Central Act 15 of 1976).

187. The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Goa, Daman and Diu Act 1 of 1976).

188. The Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 (Pondicherry Act 9 of 1974)".

THE COAL MINES (NATIONALISATION) AMENDMENT ACT, 1976

[Act No. 67 of 1976]*

[27 May, 1976]

An Act further to amend the Coal Mines (Nationalisation) Act, 1973.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE COAL MINES (NATIONALISATION) AMENDMENT ACT, 1976.

(2) Sections 2 and 3 of this Act shall be deemed to have come into force on the 29th day of April, 1976.

2. Insertion of new section 1A.

In the Coal Mines (Nationalisation) Act, 1973 (hereinafter referred to as the principal

[*] Received the assent of the President on 27-5-1976. Act published in Gaz. of India; 27-5-1976 Part II-S. 1 Ext. P. 707.
For Statement of Objects and Reasons, see Gaz. of India; 7-5-1976 Part II-S. 2; Ext. P. 833.

Act) after section 1, the following section shall be inserted, namely:—

Declaration as to expediency of Union control.

"1A. (1) It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation and development of coal mines to the extent hereinafter provided in sub-sections (3) and (4) of section 3 and sub-section (2) of section 30.

(2) The declaration contained in sub-section (1) is in addition to, and not in derogation of, the declaration contained in section 2 of the Mines and Minerals (Regulation and Development) Act, 1957."

3. Amendment of section 3.

In section 3 of the principal Act, after sub-section (2), the following sub-sections shall be inserted, namely:—

"(3) On and from the commencement of section 3 of the Coal Mines (Nationalisation) Amendment Act, 1976,—

(a) no person other than—

(i) the Central Government or a Government, company or a corporation owned, managed or controlled by the Central Government, or

(ii) a person to whom a sub-lease, referred to in the proviso to clause (a), has been granted by any such Government, company or corporation, or

(iii) a company engaged in the production of iron and steel, shall carry on coal mining operation, in India, in any form;

(b) excepting the mining leases granted before such commencement in favour of the Government, company or corporation, referred to in clause (a), and any sub-lease granted by any such Government, company or corporation, all other mining leases and sub-leases in force immediately before such commencement, shall in so far as they relate to the winning or mining of coal, stand terminated;

(c) no lease for winning or mining coal shall be granted in favour of any person other than the Government, company or corporation, referred to in clause (a);

Provided that the Government, company or corporation to whom a lease for winning or mining coal has been granted may grant a sub-lease to any person in any area on such terms and conditions as may be specified in the instrument granting the sub-lease, if the Government, company or corporation is satisfied that—

(i) the reserves of coal in the area are in isolated small pockets or are not sufficient for

scientific and economical development in a co-ordinated and integrated manner, and

(ii) the coal produced by the sub-lessee will not be required to be transported by rail.

(4) Where a mining lease stands terminated under sub-section (3), it shall be lawful for the Central Government or a Government, company or corporation owned or controlled by the Central Government to obtain, notwithstanding anything contained in sub-section (2), or in the proviso to sub-section (2) of section 3 of the Coal Mines (Taking Over of Management) Act, 1973, a prospecting licence or a mining lease in respect of the whole or part of the land covered by the mining lease which stands so terminated."

4. Amendment of section 30.

Section 30 of the principal Act shall be re-numbered as sub-section (1) of that section, and, after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely:—

"(2) Any person who engages, or causes any other person to be engaged, in winning or mining coal from the whole or part of any land in respect of which no valid prospecting licence or mining lease or sub-lease is in force, shall be punishable with imprisonment for a term which may extend to two years and also with fine which may extend to ten thousand rupees."

5. Repeal.

The Coal Mines (Nationalisation) Amendment Ordinance, 1976, is hereby repealed.

THE MARRIAGE LAWS (AMENDMENT) ACT, 1976

[Act No. 68 of 1976]*

[27th May, 1976]

An Act further to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title.

This Act may be called **THE MARRIAGE LAWS (AMENDMENT) ACT, 1976**.

[*] Received the assent of the President on 27.5.1976 Act published in Gaz. of India; 27.5.1976 Part II-S. 1, Ext. P. 711.

For Statement of Objects and Reasons, see Gaz. of India; 29.3.1976 Part II-S. 2, Ext. P. 780.

CHAPTER II

AMENDMENTS TO THE HINDU MARRIAGE
ACT, 1955

2. Amendment of section 5.

In the Hindu Marriage Act, 1955 (herein-after referred to as the Hindu Marriage Act), in section 5, for clause (ii), the following clause shall be substituted, namely:—

"(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;"

3. Amendment of section 9.

In section 9 of the Hindu Marriage Act,—

(a) in sub-section (1), the brackets and figure "(1)" shall be omitted and to that sub-section as so amended, the following *Explanation* shall be added, namely:—

"*Explanation.*—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

(b) sub-section (2) shall be omitted.

4. Amendment of section 10.

In section 10 of the Hindu Marriage Act, for sub-section (1) and the *Explanation* thereunder, the following sub-section shall be substituted, namely:—

"(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented."

5. Amendment of section 11.

In section 11 of the Hindu Marriage Act, after the words "presented by either party thereto", the words "against the other party" shall be inserted.

6. Amendment of section 12.

In section 12 of the Hindu Marriage Act,—

(a) in sub-section (1),—

(i) for clause (a), the following clause shall be substituted, namely:—

"(a) that the marriage has not been

consummated owing to the impotence of the respondent; or";

(ii) in clause (c), for the words "or fraud", the words "or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent" shall be substituted;

(b) in sub-section (2), in clause (b), in sub-clause (iii), for the words "the grounds for a decree", the words "the said ground" shall be substituted.

7. Amendment of section 13.

In section 13 of the Hindu Marriage Act,—

(a) in sub-section (1),—

(i) for clause (i), the following clauses shall be substituted, namely:—

"(i) has after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or";

(ii) for clause (iii), the following clause shall be substituted, namely:—

"(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or";

(iii) in clauses (iv) and (v), the words, "for a period of not less than three years immediately preceding the presentation of the petition," shall be omitted;

(iv) after clause (vii), the following *Explanation* shall be inserted, namely:—

"*Explanation.*—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such

party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”;

(b) in sub-section (1A), for the words “two years” in the two places where they occur, the words “one year” shall be substituted;

(c) in sub-section (2),—

(i) in clause (ii), for the word “bestiality”, the words “bestiality; or” shall be substituted;

(ii) after clause (ii) as so amended, the following clauses shall be inserted, namely:—

“(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.”.

8. Insertion of new sections 13A and 13B.

After section 13 of the Hindu Marriage Act as so amended, the following sections shall be inserted, namely:—

Alternate relief in divorce proceedings.

“13A. In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

Divorce by mutual consent.

13B. (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or

more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”.

9. Amendment of section 14.

In section 14 of the Hindu Marriage Act,—

(i) in sub-section (1) —

(a) for the words “unless at the date of the presentation of the petition three years have elapsed”, the words “unless at the date of the presentation of the petition one year has elapsed” shall be substituted;

(b) in the proviso,—

(1) for the words “before three years have elapsed”, the words “before one year has elapsed” shall be substituted;

(2) for the words “expiry of three years,” the words “expiry of one year” shall be substituted;

(3) for the words “expiration of the said three years,” the words “expiration of the said one year” shall be substituted;

(ii) in sub-section (2),—

(a) for the words “expiration of three years,” the words “expiration of one year” shall be substituted;

(b) for the words “said three years”, the words “said one year” shall be substituted.

10. Amendment of section 15.

In section 15 of the Hindu Marriage Act, the proviso shall be omitted.

11. Substitution of new section for section 16.

For section 16 of the Hindu Marriage Act, the following section shall be substituted, namely:—

Legitimacy of children of void and voidable marriages.

“16. (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not

a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12 any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

12. Substitution of new section for section 19.

For section 19 of the Hindu Marriage Act, the following section shall be substituted, namely:—

Court to which petition shall be presented.

"19. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

- (i) the marriage was solemnized, or
- (ii) the respondent at the time of the presentation of the petition, resides, or
- (iii) the parties to the marriage last resided together, or
- (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive."

13. Amendment of section 20.

In section 20 of the Hindu Marriage Act, in sub-section (1), for the words "and shall also state," the words and figures "and, except in a petition under section 11, shall also state" shall be substituted.

14. Insertion of new sections 21A, 21B and 21C.

After section 21 of the Hindu Marriage Act, the following sections shall be inserted, namely:—

Power to transfer petitions in certain cases.

"21A. (1) Where—

(a) a petition under this Act has been presented to a district court having jurisdiction by a party to marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State,

the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,—

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

Special provision relating to trial and disposal of petitions under the Act.

21B. (1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

Documentary evidence.

21C. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered."

15. Substitution of new section for section 22.

For section 22 of the Hindu Marriage Act, the following section shall be substituted, namely:—

Proceedings to be *in camera* and may not be printed or published.

"22. (1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

16. Amendment of section 23.

In section 23 of the Hindu Marriage Act,—

(a) in sub-section (1),—

(i) in clause (a), after the words "the petitioner", the brackets, words, letters and figures "[except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5]" shall be inserted;

(ii) in clause (b), the words, brackets, letter and figures "in clause (f) of sub-section (1) of section 10, or" shall be omitted;

(iii) after clause (b), the following clause shall be inserted, namely:—

"(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and";

(iv) in clause (c), for the words "the petition", the words, brackets and figures "the petition (not being a petition presented under section 11)" shall be substituted;

(b) to sub-section (2), the following proviso shall be added at the end, namely:—

"Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13."

(c) after sub-section (2) as so amended, the following sub-sections shall be inserted, namely:—

"(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court, passing the decree shall give a copy thereof free of cost to each of the parties."

17. Insertion of new section 23A.

After section 23 of the Hindu Marriage Act, the following section shall be inserted, namely:—

Relief for respondent in divorce and other proceedings.

"23A. In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

18. Amendment of section 25.

In section 25 of the Hindu Marriage Act,—

(a) in sub-section (1),—

(i) the words "while the applicant remains unmarried," shall be omitted;

(ii) for the words "and the conduct of the parties", the words "the conduct of the parties and other circumstances of the case" shall be substituted;

(b) in sub-section (3), for the words "it shall rescind the order", the words "it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just" shall be substituted.

19. Substitution of new sections for section 28.

For section 28 of the Hindu Marriage Act, the following sections shall be substituted, namely:—

Appeals from decrees and orders.

"28. (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

Enforcement of decrees and orders.

28A. All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced."

CHAPTER III**AMENDMENTS TO THE SPECIAL MARRIAGE ACT, 1954****20. Amendment of section 2.**

In section 2 of the Special Marriage Act, 1954 (hereinafter referred to as the Special Marriage Act), for clause (e), the following clause shall be substituted namely:—

"(e) "district court" means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Act;"

21. Amendment of section 4.

In section 4 of the Special Marriage Act, for clause (b), the following clause shall be substituted, namely:—

"(b) neither party—

- (i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
- (ii) though capable of giving a valid consent, has been suffering from mental disorder

of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity or epilepsy;"

22. Insertion of new section 21A.

In Chapter IV of the Special Marriage Act, after section 21, the following section shall be inserted, namely:—

Special provisions in certain cases.

"21A. Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu, Buddhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as creates a disability shall also not apply."

23. Amendment of section 22.

To section 22 of the Special Marriage Act, the following *Explanation* shall be added at the end, namely:—

"*Explanation.*—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

24. Amendment of section 23.

In section 23 of the Special Marriage Act, in sub-section (1), in clause (a), after the words, brackets and figure "sub-section (1)", the words, brackets, figure and letter "and sub-section (1A)," shall be inserted.

25. Amendment of section 24.

In section 24 of the Special Marriage Act, in sub-section (1), for the words "and may be so declared", the words "and may, on a petition presented by either party thereto against the other party, be so declared" shall be substituted.

26. Substitution of new section for section 26.

For section 26 of the Special Marriage Act, the following section shall be substituted, namely:—

Legitimacy of children of void and voidable marriages.

"26. (1) Notwithstanding that a marriage is null and void under section 24, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of

the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 25, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."

27. Amendment of section 27.

In section 27 of the Special Marriage Act, in sub-section (1),—

(a) for clauses (a) and (b), the following clauses shall be substituted, namely:—

"(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or"

(b) in clause (c), the proviso shall be omitted;

(c) for clauses (e) and (f), the following clauses shall be substituted, namely:—

"(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.— In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnor-

mally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment; or

(f) has been suffering from venereal disease in a communicable form; or"

(d) in clause (g), the words "for a period of not less than three years immediately preceding the presentation of the petition" shall be omitted;

(e) after clause (h), the following *Explanation* shall be inserted, namely:—

Explanation.—In this sub-section, the expression "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly;"

(f) the words "and by the wife on the ground that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality" occurring at the end shall be omitted;

(g) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) A wife may also present a petition for divorce to the district court on the ground,—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (or under the corresponding section 488 of the Code of Criminal Procedure, 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards."

28. Insertion of new section 27A.

After section 27 of the Special Marriage Act as so amended, the following section shall be inserted, namely:—

Alternate relief in divorce proceedings.

"27A. In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the ground mentioned in clause (h) of sub-section (1) of section 27, the court may, if it considers it just so to do having regard to the circumstances of the

case, pass instead a decree for judicial separation."

29. Amendment of section 28.

In section 28 of the Special Marriage Act, in sub-section (2), for the words, brackets and figure "On the motion of both the parties made not earlier than one year after the date of the presentation of the petition referred to in sub-section (1) and not later than two years", the words, brackets and figure "On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months" shall be substituted.

30. Amendment of section 29.

In section 29 of the Special Marriage Act,—

(i) in sub-section (1),—

(a) for the words "unless at the date of the presentation of the petition three years have passed", the words "unless at the date of the presentation of the petition one year has passed" shall be substituted;

(b) in the proviso,—

(1) for the words "before three years have passed", the words "before one year has passed" shall be substituted;

(2) for the words "expiry of three years", the words "expiry of one year" shall be substituted;

(3) for the words "expiration of the said three years", the words "expiration of the said one year" shall be substituted;

(ii) in sub-section (2),—

(a) for the words "expiration of three years", the words "expiration of one year" shall be substituted;

(b) for the words "said three years" the words "said one year" shall be substituted.

31. Amendment of section 30.

In section 30 of the Special Marriage Act, the words "and one year has elapsed thereafter but not sooner," shall be omitted.

32. Amendment of section 31.

For sub-section (1) of section 31 of the Special Marriage Act, the following sub-section shall be substituted, namely:—

"(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction—

(i) the marriage was solemnized; or

(ii) the respondent, at the time of the presentation of the petition resides; or

(iii) the parties to the marriage last resided together; or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive."

33. Substitution of new section for section 33.

For section 33 of the Special Marriage Act, the following section shall be substituted, namely:—

Proceedings to be *in camera* and may not be printed or published.

"33. (1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

34. Amendment of section 34.

In section 34 of the Special Marriage Act,—

(a) in sub-section (1), in clause (b), for the words "where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery," the words, brackets, letter and figures "where the petition is founded on the ground specified in clause (a) of sub-section (1) of section 27, the petitioner has not in any manner been accessory to or connived at or condoned the act of sexual intercourse referred to therein," shall be substituted;

(b) to sub-section (2), the following proviso shall be added at the end, namely:—

"Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (a), clause (e), clause (f), clause (g) and clause (h) of sub-section (1) of section 27."

(c) after sub-section (2) as so amended, the following sub-section shall be inserted, namely:—

"(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this

behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties."

35. Substitution of new section for section 35.

For section 35 of the Special Marriage Act, the following section shall be substituted, namely:—

Relief for respondent in divorce and other proceedings.

"35. In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground."

36. Amendment of section 37.

In section 37 of the Special Marriage Act,—

(a) in sub-section (1), for the words "and the conduct of the parties", the words "the conduct of the parties and other circumstances of the case" shall be substituted;

(b) in sub-section (3), for the words "it shall rescind the order", the words "it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just" shall be substituted.

37. Substitution of new sections for section 39.

For section 39 of the Special Marriage Act, the following sections shall be substituted, namely:—

Appeals from decrees and orders.

"39. (1) All decrees made by the court in any proceeding under Chapter V or Chapter VI shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 37 or section 38 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.

Enforcement of decrees and orders.

39A. All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced."

38. Insertion of new sections 40A, 40B and 40C.

After section 40 of the Special Marriage Act, the following sections shall be inserted, namely:—

Power to transfer petitions in certain cases.

"40A. (1) Where—

(a) a petition under this Act has been presented to the district court having jurisdiction by a party to the marriage praying for a decree for judicial separation under section 23 or for a decree of divorce under section 27, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for decree for judicial separation under section 23, or for decree of divorce under section 27 on any ground, whether in the same district court or in a different district court, in the same State or in a different State, the petition shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,—

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government,

as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

Special provision relating to trial and disposal of petitions under the Act.

40B (1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the court finds adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

Documentary evidence.

40C. Notwithstanding anything contained in any enactment to the contrary no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered."

39. Special provision as to pending cases.

(1) All petitions and proceedings in causes and matters matrimonial which are pending in any court at the commencement of the Marriage Laws (Amendment) Act, 1976, shall be dealt with and decided by such court—

(i) if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act;

(ii) if it is a petition or proceeding under the Special Marriage Act, then so far as may be, as if it had been originally instituted therein under the Special Marriage Act, as amended by this Act.

(2) In every petition or proceeding to which sub-section (1) applies, the court in which the petition or proceeding is pending shall give an opportunity to the parties to amend the pleadings, in so far as such amendment is necessary to give effect to the provisions of sub-section (1), within such time as it may

allow in this behalf and any such amendment may include an amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding as the case may be, for divorce.

THE MERCHANT SHIPPING (AMENDMENT) ACT, 1976

[Act No. 69 of 1976]*

[27th May, 1976]

An Act further to amend the Merchant Shipping Act, 1958.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called THE MERCHANT SHIPPING (AMENDMENT) ACT, 1976.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions.

2. Change of nomenclature of unberthed passenger ship and unberthed passenger.

In the Merchant Shipping Act, 1958 (hereinafter referred to as the principal Act), for the words "unberthed passenger ships", "an unberthed passenger ship", "unberthed passenger ship", "unberthed passengers", "an unberthed passenger" and "unberthed passenger", wherever they occur, the words "special trade passenger ships", "a special trade passenger ship", "special trade passenger ship", "special trade passengers", "a special trade passenger" and "special trade passenger" shall respectively be substituted.

3. Amendment of section 3.

In section 3 of the principal Act,—

(a) for clauses (27) and (28), the following clauses shall be substituted, namely:—

"(27) "pilgrimage" means pilgrimage to any holy place in the Hedjaz or to any other place declared by the Central Government to be a place of pilgrimage by notification in the Official Gazette;

[*] Received the assent of the President on 27-5-1976; Act published in Gaz. of India; 27-5-1976 Part II-S. 1, Ext. P. 727.

For Statement of Objects and Reasons, see Gaz. of India; 1-4-1976 Part II-S. 2, Ext. P. 813.

(28) "pilgrim ship" means a special trade passenger ship which makes a voyage to or from the Hedjaz, or, as the case may be, to or from any other place of pilgrimage declared as such by the Central Government in pursuance of clause (27), during the season of the pilgrimage and which carries pilgrims in a proportion of not less than one pilgrim for every one hundred tons of the gross tonnage of the ship;

(b) in clause (38), after sub-clause (i), the following sub-clauses shall be inserted, namely:—

"(ia) a special trade passenger ship safety certificate,

(ib) a special trade passenger ship space certificate,";

(c) after clause (47), the following clauses shall be inserted, namely:—

"(47A) "special trade" means the conveyance of large number of passengers by sea within prescribed sea areas;

(47B) "special trade passenger" means a passenger carried in special trade passenger ship in spaces on the weather deck or upper deck or between decks which accommodate more than eight passengers and includes a pilgrim or a person accompanying a pilgrim;

(47C) "special trade passenger ship" means a mechanically propelled ship carrying more than thirty special trade passengers;"

(d) clauses (51) and (52) shall be omitted.

4. Amendment of section 240.

In section 240 of the principal Act—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) A ship intended to carry special trade passengers between ports or places in India shall not commence a voyage from any port or place appointed under sub-section (1) of section 237, unless the master holds certificates to the effect mentioned in sections 241 and 242.

(1A) A ship intended to carry special trade passengers from or to a port or place in India to or from a port or place outside India shall not commence a voyage from any port or place appointed under sub-section (1) of section 237, unless the master holds—

(i) a passenger ship safety certificate;

(ii) an exemption certificate;

(iii) a special trade passenger ship safety certificate;

(iv) a special trade passenger ship space certificate; and

(v) a certificate referred to in section 242.;"

(b) in sub-section (2), for the words "unless the master holds the aforesaid certificates", the words, brackets, figures and letter "unless

the master holds the appropriate certificate for the voyage specified in sub-section (1), or as the case may be, in sub-section (1A)" shall be substituted.

5. Substitution of new section for section 241.

For section 241 of the principal Act, the following section shall be substituted, namely:—

Contents of certificate A.

"241. (1) The first of the certificates referred to in sub-section (1) of section 240 (hereinafter called certificate A) shall be in the prescribed form and contain such particulars as may be prescribed.

(2) In particular and without prejudice to the generality of the foregoing power, certificate A shall contain the following statements and particulars, namely:—

(i) that the ship is seaworthy;

(ii) that the ship is properly equipped, fitted and ventilated;

(iii) the number of special trade passengers the ship is certified to carry; and

(iv) such other particulars as may be prescribed.

(3) Certificate A shall remain in force for a period of one year from the date of issue or for such shorter period as may be specified therein."

6. Amendment of section 242.

In section 242 of the principal Act, for clause (c), the following clause shall be substituted, namely:—

"(c) that the master holds—

(i) a certificate of survey and certificate A; or

(ii) a passenger ship safety certificate accompanied by an exemption certificate, a special trade passenger ship safety certificate and a special trade passenger ship space certificate; or

(iii) a nuclear passenger ship safety certificate;"

7. Amendment of section 244.

In section 244 of the principal Act, for the proviso, the following proviso shall be substituted, namely:—

"Provided that he shall not cause a ship holding a valid certificate referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii) of clause (c) of section 242 to be surveyed unless, by reason of the ship having met with damage or having undergone alterations, or on other reasonable grounds, he considers it likely that she may be found unseaworthy or

not properly equipped, fitted or ventilated for the service on which she is to be employed."

8. Omission of heading below section 254.

The heading "*Special provisions relating to unberthed passenger ships*" occurring below section 254 of the principal Act shall be omitted.

9. Amendment of section 255.

In section 255 of the principal Act, after sub-section (2), the following sub-sections shall be inserted, namely:—

"(3) The master, owner or agent of any ship which is intended to sail on a voyage as a pilgrim ship from any port or place in India shall, before advertising such ship for the conveyance of pilgrims or offering to convey any pilgrim by such ship or selling or promising or permitting any person to sell a passenger ticket to any pilgrim for conveyance by such ship, supply to the officer appointed in this behalf (hereinafter referred to as the pilgrim officer) at the port or place from which the ship is to commence the voyage, and at each port or place in India at which she is to touch for the purpose of embarking pilgrims, full particulars as to the name, tonnage and age of the ship, the maximum number of passage tickets of each class to be issued, the maximum price of each class of passage tickets, the probable date on which the ship is to sail from that port or place, the ports, if any, at which she is to touch, the place of her destination, and the probable date of her arrival thereat.

(4) The master, owner or agent of the ship shall supply to the pilgrim officer, within three days from the date of demand, such further information in regard to the matters mentioned in sub-section (3) as that officer may in writing demand from him.

(5) (a) The master, owner or agent of the ship shall advertise at such port or place and in such manner as may be prescribed—

(i) the place of destination of the ship.

(ii) the price of each class of passage tickets which shall not be in excess of the price communicated to the pilgrim officer under sub-section (3), and

(iii) the provisional date of sailing from that port or place.

(b) The master, owner or agent of the ship shall also advertise the final date of sailing not less than fifteen days before such date.

(6) No. master, owner or agent shall—

(a) without reasonable cause, the burden of proving which shall lie upon him, fail or refuse to supply any particulars or informa-

tion which he is by or under this section required to supply or supply false particulars or information; or

(b) advertise any ship for the conveyance of pilgrims, or offer to convey pilgrims by any ship, or sell or promise or permit any person to sell passage tickets to pilgrims for conveyance by any ship, without having first supplied the particulars required by sub-section (3) and in accordance with the provisions of that sub-section (3); or

(c) advertise a price for passage tickets at the port place in excess of the price communicated to the pilgrim officer under sub-section (3); or

(d) offer to convey pilgrims by any ship from any port or place in India or sell or promise or permit any person to sell passage tickets to pilgrims for conveyance by a ship from any such port or place without having advertised as required by clause (a) of sub-section (5), the matters specified in that clause; or

(e) sell or permit any person to sell to any pilgrim any passage ticket at a price in excess of the price communicated to the pilgrim officer under sub-section (3)."

10. Amendment of section 256.

Section 256 of the principal Act shall be re-numbered as sub-section (1) of that section, and

(a) in sub-section (1) as so re-numbered, after the words "the certifying officer", the words "or such other officer as the Central Government may appoint in this behalf" shall be inserted;

(b) after sub-section (1) as so re-numbered, the following sub-section shall be inserted, namely:—

"(2) In either of the following cases, namely:—

(a) if after a pilgrim ship has departed or proceeded on her voyage any additional pilgrims are taken on board at a port or place within India appointed under this Part for the embarkation of pilgrims, or

(b) if a pilgrim ship upon her voyage touches or arrives at any such port or place, having previously received on board additional pilgrims at any port or place outside India, the master shall obtain a fresh certificate B from the certifying officer or such other officer as the Central Government may appoint in this behalf at that port or place, and shall make an additional statement specifying the number and the respective sexes of all the additional pilgrims."

11. Amendment of section 257.

In section 257 of the principal Act—

(a) in sub-sections (1) and (2), after the words "certifying officer", the words "or such other officer as the Central Government may appoint in this behalf" shall be inserted;

(b) after sub-section (2), the following sub-sections shall be inserted, namely:—

"(3) The master of every pilgrim ship departing or proceeding from any port or place in India shall sign a statement in duplicate in the prescribed form specifying the total number of all the pilgrims embarked and the number of pilgrims of each sex embarked and the number of the crew and such other particulars as may be prescribed and shall deliver both copies to the certifying officer or such other officer as the Central Government may appoint in this behalf at the port or place and such officer shall thereupon, after having first satisfied himself that the entries are correct, countersign and return to the master one copy of the statement.

(4) The master of every pilgrim ship arriving at any port or place in India at which it may be intended to discharge pilgrims, shall, before any pilgrims disembark, deliver a statement signed by him specifying the total number of all the pilgrims on board and the number of pilgrims of each sex and the number of the crew, and such other particulars as may be prescribed to the certifying officer or such other officer as the Central Government may appoint in this behalf at the port or place."

12. Amendment of section 258.

In section 258 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) The master of every pilgrim ship shall note in writing on the copy of the additional statement referred to in sub-section (2) of section 256 or of the statement referred to in sub-sections (3) and (4) of section 257, the date and supposed cause of death of any pilgrim who may die on the voyage and shall, when the pilgrim ship arrives at her port or place of destination or at any port or place where it may be intended to discharge pilgrims, and before any pilgrims disembark, produce the statement, with any additions made thereto,—

(a) where such port or place is in India, to the certifying officer or such other officer as the Central Government may appoint in this behalf;

(b) where such port or place is outside India, to the Indian consular officer."

13. Amendment of section 259.

In section 259 of the principal Act, after

sub-section (3), the following sub-section shall be inserted, namely:—

"(4) (a) Every pilgrim ship carrying pilgrims and crew not exceeding one thousand in number shall have on board a medical officer possessing such qualifications as may be prescribed, and, if the number of pilgrims and crew carried exceeds one thousand, a second medical officer similarly qualified and also in all cases such medical attendants as may be prescribed.

(b) A medical officer of every pilgrim ship shall perform such duties and functions, keep such diaries and submit such reports or other returns as may be prescribed.

(c) No medical officer or attendant on a pilgrim ship shall charge any pilgrim on such ship for his services."

14. Insertion of new sections 261A, 261B and 261C.

After section 261 of the principal Act, the following sections shall be inserted, namely:—

Bunks to be provided for passengers.

"261A. Every special trade passenger ship making a voyage the duration of which, in ordinary circumstances, may extend to seventy-two hours or more shall provide for each passenger on board a bunk of the prescribed size and particulars.

Space to be provided for passengers when bunks are not provided.

261B. Every special trade passenger ship making a voyage the duration of which, in ordinary circumstances, may not extend to seventy-two hours, shall provide space for each passenger at the prescribed scale.

Airing space to be provided for passengers.

261C. Every special trade passenger ship shall have reserved as airing space for the use of passengers on board, gratuitously by day and by night, so much of the upper deck as is not required for the airing space of the crew or for permanent structure:

Provided that the upper deck space so provided for passengers shall in no case be less than 0.37 square metre for each passenger."

15. Omission of section 263.

Section 263 of the Principal Act and the heading "*Special provisions regarding pilgrim ships*" occurring before that section shall be omitted.

16. Substitution of new section for section 264.

For section 264 of the principal Act, the following section shall be substituted, namely:—

Hospital accommodation.

"264. Every special trade passenger ship certified to carry more than one hundred passengers on a voyage the duration of which, in ordinary circumstances, may extend to forty-eight hours or more, shall provide on board a hospital offering such conditions relating to security, space, health and sanitation, and capable of accommodating such proportion of the maximum number of passengers the ship is certified to carry, as may be prescribed."

17. Omission of sections 255 to 269 and section 278.

Sections 265 to 269 (both inclusive) and section 278 of the principal Act shall be omitted.

18. Amendment of section 279.

In section 279 of the principal Act, in sub-sections (1) and (5), for the words, brackets, letter and figures "clause (b) of sub-section (3) of section 278", the words, brackets, letter and figures "clause (b) of sub-section (5) of section 255" shall be substituted.

19. Amendment of section 280

In section 280 of the principal Act, for the figures "278", in the two places where they occur, the figures "255" shall be substituted.

20. Amendment of section 282.

In section 282 of the principal Act—

(i) in clause (j), for the words and figures "sections 265 and 268", the word and figures "section 255" shall be substituted;

(ii) in clause (s), for the word and figures "section 278", the word and figures "section 255" shall be substituted.

21. Amendment of section 284.

In section 284 of the principal Act, after sub-section (2), the following proviso shall be inserted, namely :—

"Provided that different requirements may be specified for special trade passenger ships."

22. Amendment of section 299.

In section 299 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely :—

"(3) Where on receipt of a declaration of survey granted under Part VIII in respect of a special trade passenger ship or a pilgrim ship, the Central Government is satisfied that the ship complies with the provisions of this Act and the rules made thereunder relating to construction, life saving appliances and space requirements, it may in addition to the certificates referred to in sub-sections (1) and (2),

issue in respect of the ship a special trade passenger ship safety certificate and a special trade passenger ship space certificate."

23. Amendment of section 304.

In section 304 of the principal Act, —

(a) in sub-section (1) after the words "a passenger ship safety certificate", the words "or a special trade passenger ship safety certificate" shall be inserted;

(b) in sub-section (2), for the words "safety convention certificate", the words "passenger ship safety certificate or special trade passenger ship safety certificate" shall be substituted.

24. Amendment of section 307.

In section 307 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely :—

"(1) No Indian passenger ship shall proceed on a voyage from any port or place in India to any port or place outside India—

(a) if the ship is a ship, other than a special trade passenger ship, unless there is in force in respect of the ship either—

(i) a passenger ship safety certificate issued under section 299; or

(ii) a qualified passenger ship safety certificate issued under section 299 and an exemption certificate issued under section 302;

(b) if the ship is a special trade passenger ship, unless there is in force in respect of the ship the certificate referred to in sub-clause (i) of clause (a) or the certificates referred to in sub-clause (ii) of that clause and a special trade passenger ship safety certificate and a special trade passenger ship space certificate, being in each case a certificate which by the terms thereof is applicable to the voyage on which the ship is about to proceed and to the trade in which she is for the time being engaged."

25. Amendment of section 436.

In section 436 of the principal Act, in sub-section (2) in the Table,—

(a) after Serial No. 89 and the entries relating thereto, the following shall be inserted, namely :—

"89A	If a master, owner or agent contra-venes sub-section (6) of section 255.	255(6)	Fine which may extend to two thousand rupees."
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(b) after Serial No. 90 and the entries relating thereto, the following shall be inserted, namely :—

"90A (a) If medical officers and attendants are not carried on a pilgrim ship in accordance with clause (a) of sub-section (4) of section 259; or

(b) if a medical officer or attendant on a pilgrim ship contravenes clause (c) of sub-section (4) of section 259;

(c) Serial Nos. 92 and 93 shall be omitted.

26. Amendment of section 458.

In section 458 of the principal Act, in sub-section (3), for the words "two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following", the words "two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid" shall be substituted.

THE PHARMACY (AMENDMENT) ACT, 1976

(Act No. 70 of 1976)*

[27th May, 1976]

An Act further to amend the Pharmacy Act, 1948.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:

1. Short title and commencement.

(1) This Act may be called THE PHARMACY (AMENDMENT) ACT 1976.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

[*] Received the assent of the President on 27-5-1976; Act published in Gaz. of India, 27-5-1976, Part II-S. 1, Ext., p. 727.

For Statement of Objects and Reasons, see Gaz. of India 8-3-1975 Part II, S. 2, Ext. p. 692.

259(4) (a) The master, owner or agent shall be liable for each voyage made in contravention of clause (a) of sub-section (4) of section 259 to fine which may extend to three hundred rupees; (c) fine which may extend to two hundred rupees."

2. Amendment of section 2.

In section 2 of the Pharmacy Act, 1948 (hereinafter referred to as the principal Act),—

(a) for clauses (c), (d) and (e), the following clauses shall be substituted, namely:

(c) "Central Council" means the Pharmacy Council of India constituted under section 3;

(d) "Central Register" means the register of pharmacists maintained by the Central Council under section 15A;

(da) "Executive Committee" means the Executive Committee of the Central Council or of the State Council, as the context may require;

(e) "Indian University" means a University within the meaning of section 3 of the University Grants Commission Act, 1956 and includes such other institutions, being institutions established by or under a Central Act, as the Central Government may, by notification in the Official Gazette, specify in this behalf;

(b) for clauses (h), (i) and (j), the following clauses shall be substituted, namely:—

(h) "register" means a register of pharmacists prepared and maintained under Chapter IV;

(i) "registered pharmacist" means a person whose name is for the time being entered in the register of the State in which he is for the time being residing or carrying on his profession or business of pharmacy;

(j) "State Council" means a State Council of Pharmacy constituted under section 19, and includes a Joint State Council of Pharmacy constituted in accordance with an agreement under section 20;

(k) "University Grants Commission" means the University Grants Commission established under section 4 of the University Grants Commission Act, 1956.

3. Amendment of section 3.

In section 3 of the principal Act,—

(a) in clause (a), for the words "authority known as the Inter-University Board", the words "University Grants Commission" shall be substituted;

(b) in clause (b), for the word "three", the word "four" shall be substituted;

(c) for clause (f), the following clause shall be substituted, namely:—

"(f) a representative of the University Grants Commission and a representative of the All India Council for Technical Education";

(d) in clause (g), after the word "elected" the words "from amongst themselves" shall be inserted;

(e) in clause (h),—

(i) the words "either a registered medical practitioner or" shall be omitted;

(ii) for the proviso, the following proviso shall be substituted, namely:—

"Provided that for five years from the date on which the Pharmacy (Amendment) Act, 1976, comes into force the Government of each Union territory shall, instead of electing a member under clause (g), nominate one member, being a person eligible for registration under section 31, to represent that territory."

(iii) the *Explanation* appearing at the end shall be omitted.

4. Amendment of section 5.

In section 5 of the principal Act,—

(a) in sub-section (2), for the words "An elected President", the words "The President" shall be substituted;

(b) to sub-section (2), the following proviso shall be added, namely:—

"Provided that if his term of office as a member of the Central Council expires before the expiry of the full term for which he is elected as President or Vice-President, he shall, if he is re-elected or re-nominated as a member of the Central Council, continue to hold office as President or Vice-President for the full term for which he is elected to such office."

5. Amendment of section 7.

In section 7 of the principal Act, in sub-section (1), the words "other than a nominated President," shall be omitted.

6. Substitution of new section for section 8.

For section 8 of the principal Act, the following section shall be substituted, namely:—

Staff, remuneration and allowances.

"8. The Central Council shall—

(a) appoint a Registrar who shall act as the Secretary to that Council and who may also, if deemed expedient by that Council, act as the Treasurer thereof;

(b) appoint such other officers and servants as that Council deems necessary to enable it to carry out its functions under this Act;

(c) require and take from the Registrar, or any other officer or servant, such security for the due performance of his duties as that Council may consider necessary; and

(d) with the previous sanction of the Central Government, fix—

(i) the remuneration and allowances to be paid to the President, Vice-President, and other members of that Council,

(ii) the pay and allowances and other conditions of service of officers and servants of that Council."

7. Insertion of new section 9A.

After section 9 of the principal Act, the following section shall be inserted, namely:—

Other committees.

"9A. (1) The Central Council may constitute from among its members other committees for such general or special purposes as that Council may deem necessary and for such periods not exceeding five years as it may specify, and may co-opt for a like period persons, who are not members of the Central Council, as members of such committees.

(2) The remuneration and allowances to be paid to the members of such committees shall be fixed by the Central Council with the previous sanction of the Central Government.

(3) The business before such committees shall be conducted in accordance with such regulations as may be made under this Act."

8. Amendment of section 14.

In section 14 of the principal Act, after the words "shall be deemed", the words "subject to such additional conditions, if any, as may be specified by the Central Council," shall be inserted.

9. Insertion of new sections 15A and 15B.

After section 15 of the principal Act, the following sections shall be inserted, namely:—

The Central Register.

"15A. (1) The Central Council shall cause to be maintained in the prescribed manner a register of pharmacists to be known as the Central Register, which shall contain the names of all persons for the time being entered in the register for a State.

(2) Each State Council shall supply to the Central Council five copies of the register for the State as soon as may be after the first day of April of each year, and the Registrar of each State Council, shall inform the Central Council, without delay, all additions to, and other amendments in, the register for the State made from time to time.

(3) It shall be the duty of the Registrar of the Central Council to keep the Central Register in accordance with the orders made by the Central Council, and from time to time to revise the Central Register and publish it in the Gazette of India.

(4) The Central Register shall be deemed to be public document within the meaning of the Indian Evidence Act, 1872 and may be proved by the production of a copy of the Register as published in the Gazette of India.

Registration in the Central Register.

15B. The Registrar of the Central Council shall, on receipt of the report of registration

of a person in the register for a State, enter his name in the Central Register."

10. Amendment of section 17.

In section 17 of the principal Act, —

(a) in sub-section (1), the words "together with an abstract of its accounts" shall be omitted;

(b) in sub-section (2), for the words "copy or abstract", the words "or copy" shall be substituted.

11. Insertion of new section 17A.

After section 17 of the principal Act, the following section shall be inserted; namely:—
Accounts and audit

"17A. (1) The Central Council shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, in accordance with such general directions as may be issued and in such form as may be specified by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Central Council shall be audited annually by the Comptroller and Auditor-General of India or any person authorised by him in this behalf and any expenditure incurred by him or any person so authorised in connection with such audit shall be payable by the Central Council to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any person authorised by him in connection with the audit of the accounts of the Central Council shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General of India has in connection with the audit of Government accounts, and in particular, shall have the right to demand the production of books of accounts, connected vouchers and other documents and papers.

(4) The accounts of the Central Council as certified by the Comptroller and Auditor-General of India or any person authorised by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Council which shall forward the same with its comments to the Central Government."

12. Amendment of section 18.

In section 18 of the principal Act, in sub-section (2), —

(a) for clause (a) the following clause shall be substituted namely:—

"(a) the management of the property of the Central Council;"

(b) in clause (f),—

(i) for the word "Secretary"; the words "Registrar, Secretary" shall be substituted;

(ii) for the word "Treasurer", the words "Registrar or any other officer or servant" shall be substituted;

(c) after clause (f), the following clauses shall be inserted, namely:—

"(g) the manner in which the Central Register shall be maintained and given publicity;

(h) constitution and functions of the committees other than Executive Committee, the summoning and holding of meetings thereof, the time and place at which such meetings shall be held, and the number of members necessary to constitute the quorum."

13. Amendment of section 19.

In section 19 of the principal Act, —

(a) in clause (b), —

(i) for the word "two", the word "three" shall be substituted;

(ii) for the words "members of the pharmaceutical profession", the words "registered pharmacists" shall be substituted;

(b) in clauses (dd) and (e), for the words and figures "Drugs Act, 1940", the words and figures "Drugs and Cosmetics Act, 1940" shall be substituted;

(c) in the proviso, for the words "member of the pharmaceutical profession", the words "registered pharmacist" shall be substituted.

14. Amendment of section 21.

In section 21 of the principal Act, —

(a) in sub-section (1), in clauses (dd) and (e), for the words and figures "Drugs Act, 1940", the words and figures "Drugs and Cosmetics Act 1940" shall be substituted;

(b) in sub-section (3), —

(i) for the words "at least half", the words "more than half" shall be substituted;

(ii) for the words "members of the pharmaceutical profession", the words "registered pharmacists" shall be substituted.

15. Amendment of section 23.

In section 23 of the principal Act, —

(a) in sub-section (2), for the words "An elected President", the words "The President", shall be substituted;

(b) to sub-section (2), the following proviso shall be added, namely:—

"Provided that if his term of office as a member of the State Council expires before the expiry of the full term for which he is elected as President or Vice President, he shall, if he is re-elected or re-nominated as a member of the State Council, continue to hold office for the full term for which he is elected as President or Vice-President."

16. Insertion of new section 26A.

After section 26 of the principal Act, the following section shall be inserted, namely:—
Inspection.

"26A. (1) A State Council may, with the previous sanction of the State Government, appoint Inspectors having the prescribed qualifications for the purposes of Chapters III, IV and V of this Act.

(2) An Inspector may—

(a) inspect any premises where drugs are compounded or dispensed and submit a written report to the Registrar;

(b) enquire whether a person who is engaged in compounding or dispensing of drugs is a registered pharmacist;

(c) investigate any complaint made in writing in respect of any contravention of this Act and report to the Registrar;

(d) institute prosecution under the order of the Executive Committee of the State Council;

(e) exercise such other powers as may be necessary for carrying out the purposes of Chapters III, IV and V of this Act or any rules made thereunder.

(3) Any person wilfully obstructing an Inspector in the exercise of the powers conferred on him by or under this Act or any rules made thereunder shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one thousand rupees, or with both.

(4) Every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code."

17. Insertion of new section 32B.

After section 32A of the principal Act, the following section shall be inserted, namely:—

Special provisions for registration of displaced persons, repatriates and other persons.

"32B. (1) Notwithstanding anything contained in section 32 or section 32A, a State Council may permit to be entered on the register—

(a) the names of persons who possess the qualifications specified in clause (a) or clause (c) of section 31 and who were eligible for registration between the closing of the First Register and the date when the Education Regulations came into effect.

(b) the names of persons approved as "qualified persons" before the 31st December, 1969 for compounding or dispensing of medicines under the Drugs and Cosmetics Act, 1940 and the rules made thereunder;

(c) the names of displaced persons or repatriates who were carrying on business or profession of pharmacy as their principal means of livelihood in any country outside India for a total period of not less than five years from a date prior to the date of application for registration.

Explanation.—In this sub-section,—

(i) "displaced person" means any person who, on account of civil disturbances or the fear of such disturbances in any area now forming part of Bangla Desh, has, after the 14th day of April, 1957 but before the 25th day of March, 1971, left or has been displaced from, his place or residence in such area and who has since then been residing in India;

(ii) "repatriate" means any person of Indian origin who, on account of civil disturbances or the fear of such disturbances in any area now forming part of Burma, Sri Lanka or Uganda, or any other country has, after the 14th day of April, 1957, left or has been displaced from, his place of residence in such area and who has since then been residing in India.

(2) The provisions of clauses (a) and (b) of sub-section (1) shall remain in operation for a period of two years from the commencement of the Pharmacy (Amendment) Act, 1976."

18. Amendment of section 35.

In section 36 of the principal Act, in sub-section (1), in clause (e) of the proviso, for the words and figures "Drugs Act, 1940", the words and figures "Drugs and Cosmetics Act, 1940" shall be substituted.

19. Amendment of section 42.

In section 42 of the principal Act, in sub-section (1), after the existing proviso, the following proviso shall be added, namely:—

"Provided further that where no such date is appointed by the Government of a State, this sub-section shall take effect in that State on the expiry of a period of five years from the commencement of the Pharmacy (Amendment) Act, 1976."

20. Amendment of section 46.

In section 46 of the principal Act, in sub-section (2), after clause (f), the following clause shall be inserted, namely:—

"(ff) the qualifications, powers and duties of an Inspector,".

THE TARIFF COMMISSION**(REPEAL) ACT, 1976**

(Act No. 71 of 1976)*

[28th May, 1976]

An Act to repeal the Tariff Commission Act, 1951.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows :—

1. Short title and commencement.

(1) This Act may be called **THE TARIFF COMMISSION (REPEAL) ACT, 1976**.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint

2. Definitions.

In this Act, unless the context otherwise requires —

(a) "appointed day" means the date on which this Act comes into force;

(b) "Tariff Commission" means the Tariff Commission established under the Tariff Commission Act, 1951.

3. Repeal of Act 50 of 1951 and abolition of the Tariff Commission.

On the appointed day, the Tariff Commission Act, 1951 (hereinafter referred to as the principal Act), shall stand repealed, and the Tariff Commission shall cease to exist.

4. Consequential provisions.

(1) Any inquiry under section 12 of the principal Act, pending immediately before the appointed day shall, on the appointed day, terminate:

Provided that nothing contained in this sub-section shall be deemed to affect the powers of the Central Government to appoint a commission or other body to inquire into any matter to which any such inquiry is relatable.

(2) Where a commission or other body has been appointed to inquire into any matter under the proviso to sub-section (1), any information relating to any industry which has

been obtained by or on behalf of the Tariff Commission for the purpose of its functions under the principal Act, may, notwithstanding anything contained in section 22 of the principal Act, be made available by the Central Government to the commission or other body aforesaid for the purpose of the relevant inquiry:

Provided that the said commission or other body shall not in turn disclose any such information unless such disclosure is made with the previous consent in writing of the owner for the time being of the industry concerned and it is necessary for the purposes of the inquiry so to do;

Provided further that nothing in this sub-section shall apply to the disclosure of any such information for the purpose of—

(i) any legal proceeding which may be taken in pursuance of the findings of such a commission or other body, or

(ii) any report relating to any such proceedings.

(3) If any person discloses any information in contravention of sub-section (2), he shall be punishable on conviction with fine, which may extend to one thousand rupees, or with imprisonment for a term which may extend to six months or with both.

(4) Any thing, or any action, which ought to have been done or taken by the Tariff Commission before the appointed day with respect to the termination of service of its employees or with respect to any matter in relation thereto or arising therefrom, but not so done or taken by that Commission may, on and from the appointed day, be done or taken by the Central Government.

THE LIFE INSURANCE CORPORATION (MODIFICATION OF SETTLEMENTS) ACT, 1976.

(Act No. 72 of 1976)*

[29th May, 1976.]

An Act to provide for the modification of the settlements arrived at between the Life Insurance Corporation of India and their workmen.

[*] Received the assent of the President on 28-5-1976; Act published in Gaz. of India; 29-5-1976, Part II-S. 1, Ext. p. 747.

For Statement of Objects and Reasons, see Gaz. of India 29-5-1976, Part II-S. 2, Ext., p. 763.

[*] Received the assent of the President on 29-5-1976; Act published in Gaz. of India; 29-5-1976, Part II-S. 1, Ext., p. 745.

For Statement of Objects and Reasons, see Gaz. of India; 1-4-76 Part II S. 2, Ext. p. 817.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title.

This Act may be called THE LIFE INSURANCE CORPORATION (MODIFICATION OF SETTLEMENTS) ACT, 1976.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Corporation" means the Life Insurance Corporation of India established under section 3 of the Life Insurance Corporation Act, 1956;

(b) "salary" means basic pay and includes—

(i) special pay, if any;

(ii) dearness allowances; and

(iii) additional dearness allowance;

(c) "settlements" means.

(i) the settlement which was arrived at between the Corporation and their workmen on the 24th day of January, 1974, under section 18, read with clause (p) of section 2, of the Industrial Disputes Act, 1947; and

(ii) the settlement which was arrived at between the Corporation and their workmen on the 6th day of February, 1974, under section 18, read with clause (p) of section 2, of the said Act and in respect of the terms of which there was no approval as provided for in sub-clause (2) of clause 12 thereof.

3. Modification of settlements.

Notwithstanding anything contained in the Industrial Disputes Act, 1947, the provisions of each of the settlements, in so far as they relate to the payment of an annual cash bonus to every Class III and Class IV employee of the Corporation at the rate of fifteen per cent. of his annual salary, shall not have any force or effect and shall not be deemed to have had any force or effect on and from the 1st day of April, 1975.

THE BANKING AND PUBLIC FINANCIAL INSTITUTIONS LAWS (AMENDMENT) ACT, 1976

(Act No. 73 of 1976)*

[11th June, 1976]

An Act further to amend the Industrial Finance Corporation Act, 1948, the State Bank of India Act, 1955, the In-

dustrial Development Bank of India Act, 1954, and the Federal Rural Banks Act, 1976.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title

This Act may be called THE BANKING AND PUBLIC FINANCIAL INSTITUTIONS LAWS (AMENDMENT) ACT, 1976.

2. Construction of references.

Any reference in sections 3 (i), 4 (ii), 5 (i) and 6 (i) of this Act to the chairman or, as the case may be, vice chairman or managing director shall be construed as including a reference to the person holding office as such at the commencement of this Act.

CHAPTER II

AMENDMENTS TO THE INDUSTRIAL FINANCE CORPORATION ACT, 1948

3. Amendment of Act 15 of 1948.

In the Industrial Finance Corporation Act, 1948,—

(i) in section 10A, after sub-section (2), the following sub-section shall be inserted, namely:—

"(2A) Notwithstanding anything contained in sub-section (2), the Central Government shall have the right to terminate the term of office of the Chairman at any time before the expiry of the term specified in sub-section (2) by giving him notice of not less than three months in writing or three months' salary and allowances in lieu of such notice; and the Chairman shall also have the right to relinquish his office at any time before the expiry of the term specified in sub-section (2) by giving to the Central Government notice of not less than three months in writing."

(ii) in section 13, to sub-section (1), the following proviso shall be added, namely:—

"Provided that no person shall be removed from his office under this sub-section, unless he has been given an opportunity of showing cause against his removal."

CHAPTER III

AMENDMENTS TO THE STATE BANK OF INDIA ACT, 1955

4. Amendment of Act 23 of 1955.

In the State Bank of India Act, 1955,—

[*] Received the assent of the President on 11-6-1976; Act published in Gaz. of India, 11-6-1976, Part II-S. 1, Exs., p 779. For Statement of Objects and Reasons, see Gaz. of India; 24-5-1976, Part II-S. 2, Ext., p. 939.

(i) in section 19, in sub-section (1),—

(a) in clause (a), the words "and after consideration, of the recommendations made by the Central Board in that behalf" shall be omitted;

(b) in clause (b), for the words "by the Central Board with the approval of the Central Government", the words "by the Central Government in consultation with the Reserve Bank" shall be substituted;

(ii) in section 20,—

(a) in sub-section (1), for the words "The chairman and the vice-chairman", the words "The chairman, vice-chairman and each managing director" shall be substituted;

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

(1A) Notwithstanding anything contained in sub-section (1), the Central Government shall have the right to terminate the term of office of the chairman, vice-chairman or a managing director, as the case may be, at any time before the expiry of the term fixed under sub-section (1) by giving him notice of not less than three months in writing or three months' salary and allowances in lieu of such notice, and the chairman, vice-chairman or a managing director, as the case may be, shall also have the right to relinquish his office at any time before the expiry of the term so fixed by giving to the Central Government notice of not less than three months in writing."

(c) sub-section (2) shall be omitted;

(iii) in section 23, in clause (b), for the words "chairman and vice-chairman", the words "chairman, vice-chairman and a managing director" shall be substituted;

(iv) in section 24,—

(a) in sub-section (1), for the words "the chairman or the vice chairman", the words "the chairman, vice-chairman or a managing director" shall be substituted;

(b) sub-section (2) shall be omitted;

(c) in sub-section (6), the words, brackets and figure "or sub-section (2)" shall be omitted;

(v) in section 25, for sub-section (1), the following sub-section shall be substituted, namely:—

"(1) If the chairman, vice-chairman or a managing director is rendered incapable of discharging his duties by reason of infirmity or otherwise or is absent on leave or otherwise in circumstances not involving the vacation of his office, the Central Government may, in consultation with the Reserve Bank,

appoint another person to officiate in the vacancy."

(vi) in section 27, in sub-section (2),—

(a) for the words "as may be determined by the Central Board with the approval of the Central Government", the words "as may be determined by the Central Government," shall be substituted;

(b) the proviso shall be omitted;

(vii) in section 28, in sub-section (2),—

(a) for the words "as may be determined by the Central Board with the approval of the Central Government", the words "as may be determined by the Central Government," shall be substituted;

(b) the proviso shall be omitted;

(viii) in section 29, in sub-section (2),—

(a) for the words "as may be determined by the Central Board with the approval of the Central Government", the words "as may be determined by the Central Government," shall be substituted;

(b) the proviso shall be omitted.

CHAPTER IV

AMENDMENTS TO THE INDUSTRIAL DEVELOPMENT BANK OF INDIA ACT, 1964.

5. Amendment of Act 18 of 1964.

In the Industrial Development Bank of India Act, 1964 in section 6,—

(i) after sub-section (2), the following sub-section shall be inserted, namely:—

"(2A) Notwithstanding anything contained in sub-section (1), the Central Government shall have the right to terminate the term of office of the chairman or managing director, as the case may be, at any time before the expiry of the term specified under sub-section (2) by giving him notice of not less than three months in writing or three months' salary and allowances in lieu of such notice; and the chairman or managing director, as the case may be, shall also have the right to relinquish his office at any time before the expiry of the term specified under sub-section (2) by giving to the Central Government notice of not less than three months in writing."

(ii) after sub-section (3), the following sub-section shall be inserted, namely:—

"(3A) The Central Government may, at any time, remove the chairman or the managing director, as the case may be, from office;

Provided that no person shall be removed from his office, under this sub-section unless he has been given an opportunity of showing cause against his removal."

CHAPTER V

AMENDMENTS TO THE REGIONAL RURAL BANKS ACT, 1976.

6. Amendment of Act 21 of 1976.

In the Regional Rural Banks Act, 1976, in section 11,—

(i) after sub-section (1), the following sub-section shall be inserted, namely :—

"(1A) Notwithstanding anything contained in sub-section (1), the Central Government shall have the right to terminate the term of office of the Chairman at any time before the expiry of the period specified under sub-section (1) by giving him notice of not less than three months in writing or three months' salary and allowances in lieu of such notice; and the Chairman shall also have the right to relinquish his office at any time before the expiry of the period so specified by giving to the Central Government notice of not less than three months in writing."

(ii) for sub-section (4), the following sub-section shall be substituted, namely :—

"(4) The Central Government may, at any time, remove the Chairman from office :

Provided that no person shall be removed from his office, under this sub-section, unless he has been given an opportunity of showing cause against his removal."

THE ADDITIONAL EMOLUMENTS (COMPULSORY DEPOSIT) AMENDMENT ACT, 1976

[Act No. 74 of 1976]*

[11th June, 1976]

An Act to amend the Additional Emoluments (Compulsory Deposit) Act, 1974.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India, as follows :—

* Received the assent of the President on 11-6-1976. Act published in Gaz. of India; 11-6-1976 Part II-S. 1, Ext. p. 775.

For Statement of Objects and Reasons, see Gaz. of India; 4-5-1976, Part II-S. 2, Ext. p. 828.

1. Short title.

This Act may be called THE ADDITIONAL EMOLUMENTS (COMPULSORY DEPOSIT) AMENDMENT ACT, 1976.

2. Amendment of section 6.

In section 6 of the Additional Emoluments (Compulsory Deposit) Act, 1974 (hereinafter referred to as the principal Act), in clause (b) of sub-section (1), for the words "two years", the words "three years" shall be substituted.

3. Amendment of section 9.

In section 9 of the principal Act,—

(i) in sub-section (1),—

(A) for clause (b), the following clause shall be substituted, namely :—

"(b) in the case of an amount credited to the Additional Dearness Allowance Deposit Account,—

(i) for any period ending on the 30th day of June, 1976, in cash, at any time after the expiry of two years from the appointed day; and

(ii) for any period ending after the 30th day of June, 1976,—

(a) by crediting to the provident fund account of the employee, at any time after the expiry of a period of four years from the appointed day; if such employee is a subscriber to any provident fund;

(b) in cash, at any time after the expiry of a period of four years from the appointed day, in the case of an employee who is not a subscriber to any provident fund;"

(B) in the third proviso, for the words "either or both of the Deposit Accounts shall be repaid to him", the words "the Additional Wages Deposit Account shall be repaid to him in cash" shall be substituted;

(ii) in sub-section (2),—

(a) for the words "any Deposit Account", the words "any Additional Wages Deposit Account" shall be substituted;

(b) the words "or two years, as the case may be," shall be omitted;

(iii) after sub-section (2), the following sub-sections shall be inserted, namely :—

"(3) The aggregate amount credited to the Additional Dearness Allowance Deposit Account by or in relation to an employee for the period ending on the 30th day of June, 1976, shall, subject to the provisions of sub-section (5), be repaid, in cash, to the employee in five equal annual instalments commencing from the expiry of a period of two years from

the appointed day, together with interest due on the whole, or as the case may be, part of the amount of compulsory deposit which remains unpaid,

(4) The aggregate amount credited to the Additional Dearness Allowance Deposit Account by or in relation to an employee for the period commencing on the 1st day of July, 1976, and ending on the 5th day of July 1977, together with interest due on the whole, or, as the case may be, part of the amount of compulsory deposit which remains unpaid, shall, subject to the provisions of sub-section (5) be repaid to the employee in five equal annual instalments commencing on the 6th day of July, 1978 and each such instalment shall be credited to the provident fund account of the employee;

Provided that the employer shall not be required to make any contribution under the Employees' Provident Funds Act, 1952, or under any other law for the time being in force, in relation to the amounts so credited to the provident fund account of the employee:

Provided further that, in the case of the employees who do not subscribe to any provident fund, the aggregate amount so repayable shall be repaid in cash in five equal annual instalments commencing on the 6th day of July, 1978.

(5) On the superannuation, resignation or termination of employment of an employee, the whole of the amount standing to the credit of such employee in the Additional Dearness Allowance Deposit Account, shall be repaid,—

(a) in cash, in the case of any amount credited to the Additional Dearness Allowance Deposit Account for any period ending on the 30th day of June, 1976;

(b) in the case of any amount credited to the Additional Dearness Allowance Deposit Account for any period ending after the 30th day of June, 1976,—

(i) by crediting such amount to the provident fund account of such employee, if he is the subscriber of any such account, or

(ii) in cash, where such employee is not a subscriber to any provident fund.

Explanation.—For the purposes of this section, "provident fund" has the meaning assigned to it in section 2 (e) of the Provident Funds Act, 1925.

THE TEA (AMENDMENT) ACT, 1976

(Act No. 75 of 1976)*

[11th June, 1976]

An Act further to amend the Tea Act, 1953.

Be it enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows:—

1. Short title.

This Act may be called THE TEA (AMENDMENT) ACT, 1976.

2. Insertion of new Chapter IIIA.

After Chapter III of the Tea Act, 1953, the following Chapter shall be inserted, namely:—

'CHAPTER IIIA

MANAGEMENT OR CONTROL OF TEA UNDERTAKINGS OR TEA UNITS BY THE CENTRAL GOVERNMENT IN CERTAIN CIRCUMSTANCES.

Definitions.

16A. (1) In this Chapter, unless the context otherwise requires,—

(a) "authorised person" means the person or body of persons authorised, or appointed, by the Central Government under this Act to take over the management of any tea undertaking or tea unit;

(b) "company" means a company within the meaning of section 3 of the Companies Act, 1956;

(c) "district average yield" means the average yield of tea in the district in which one or more tea units are located, as published by the Board;

(d) "notified order" means an order notified in the Official Gazette;

(e) "tea undertaking" means an undertaking engaged in the production or manufacture, or both, of tea through one or more tea units;

(f) "tea unit" means a tea estate or garden, including a sub division thereof, which has a distinct entity for which accounts are kept and has a factory of its own for the production and manufacture of tea.

[*] Received the assent of the President on 11-6-1976. Act published in Gaz of India, 11-6-1976, Part II-S. 1, Ext., p. 783. For Statement of Objects and Reasons, see Gaz. of India, 31-5-1976, Part II-S. 2, Ext., p. 801.

(2) References to an industrial undertaking in such of the provisions of the Industries (Development and Regulation) Act, 1951, as apply to a tea undertaking or tea unit by virtue of the provisions of this Chapter, shall be construed as references to a tea undertaking or tea unit, as the case may be, and references in the Act aforesaid to any provision of that Act, as applicable to a tea undertaking or tea unit, in relation to which a corresponding provision has been made in this Act, shall be construed as references to such corresponding provision.

Power to cause investigation to be made in relation to a tea undertaking or tea unit.

16B. (1) Where the Central Government is of opinion in respect of a tea undertaking or a tea unit that—

(a) the tea undertaking or, as the case may be, the tea unit, has made losses in three out of five years immediately preceding the year in which such opinion is formed; or

(b) the average yield of the tea undertaking, or, as the case may be, the tea unit, during three years out of five years immediately preceding the year in which such opinion is formed, has been lower than the district average yield by twenty-five per cent., or more; or

(c) the persons owning the tea undertaking, or, as the case may be, the tea unit, have habitually made default in the payment of wages, or provident fund dues of workers and other employees, or rent of the land, or duties of excise, or such other dues as they are under an obligation to pay under any law for the time being in force; or

(d) the tea undertaking, or, as the case may be, the tea unit, is being managed in a manner highly detrimental to the tea industry or to public interest,

the Central Government may make, or cause to be made, a full and complete investigation into the affairs of the tea undertaking or, as the case may be, the tea unit, by such person or body of persons as it may appoint for the purpose.

(2) Where a company owning a tea undertaking is being wound up by or under the supervision of the Court and the business of such company is not being continued, the Central Government may, if it is of opinion that it is necessary, in the interests of the general public, and, in particular, in the interest of production, supply or distribution of tea, to investigate into the possibility of running or restarting the tea undertaking,

make an application to the Court, praying for permission to make, or cause to be made, an investigation into such possibility by such person or body of persons as that Government may appoint for the purpose; and, where such an application is made, the Court shall, notwithstanding anything contained in the Companies Act, 1956, or in any other law for the time being in force, grant the permission prayed for.

(3) The person or body of persons appointed to make any investigation under sub-section (1) or as the case may be, sub-section (2), shall have the same powers as are specified in section 18 of the Industries (Development and Regulation) Act, 1951.

Power of Central Government on completion of investigation.

16C. (1) If, after making or causing to be made any such investigation as is referred to in sub-section (1) of section 16B, the Central Government is satisfied that action under this section is desirable, it may issue such directions to the tea undertaking or tea unit concerned, as may be appropriate in the circumstances, for all or any of the following purposes, namely:—

(a) regulating the production of tea by the tea undertaking or, as the case may be, tea unit and fixing the standards of production;

(b) requiring the tea undertaking or, as the case may be, tea unit to take such steps as the Central Government considers necessary to stimulate the production, manufacture or plantation, of tea;

(c) prohibiting the tea undertaking or, as the case may be, tea unit from resorting to any act or practice which might reduce its production, capacity or economic value;

(d) controlling the prices, or regulating the distribution, of tea produced or manufactured by the tea undertaking or, as the case may be, tea unit.

(2) Where a case relating to any tea undertaking or tea unit is under investigation, the Central Government may issue, at any time, any direction of the nature referred to in sub-section (1) to the tea undertaking or the tea unit concerned and any such direction shall have effect until it is varied or revoked by the Central Government.

Power of Central Government to assume management or control of tea undertaking or tea unit in certain cases.

16D. (1) If the Central Government is of opinion that—

(a) a tea undertaking or tea unit, to which directions have been issued in pursuance of section 18C, has failed to comply with such directions, or the tea undertaking or, as the case may be, the tea unit, has made losses in three out of five years immediately preceding the year in which such opinion is formed; or

(b) the average yield of the tea undertaking, or, as the case may be, the tea unit, during three years out of five years immediately preceding the year in which such opinion is formed, has been lower than the district average yield by twenty-five per cent. or more; or

(c) the persons owning the tea undertaking, or, as the case may be, the tea unit, have habitually made default in the payment of wages, or provident fund dues of workers and other employees, or rent of the land, or duties of excise, or in the payment of such other dues as are obligatory under any law for the time being in force; or

(d) the undertaking, or, as the case may be, the tea unit, is being managed in a manner highly detrimental to the tea industry or to public interest.

the Central Government may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the tea undertaking or tea unit, as the case may be or to exercise in respect of the whole or any part of the tea undertaking or, as the case may be, tea unit, such functions of control as may be specified in the order.

(2) Any notified order issued under sub-section (1) shall have effect for such period, not exceeding five years, as may be specified in the order:

Provided that if the Central Government is of opinion that it is expedient in the public interest that any such notified order should continue to have effect after the expiry of the period of five years aforesaid, it may from time to time issue directions for such continuance for such period, not exceeding one year at a time, as may be specified in the direction, so, however, that the total period of such continuance (after the expiry of the said period of five years) does not exceed two years; and where any such direction is issued a copy thereof shall be laid, as soon as may be, before both Houses of Parliament.

(3) Any notified order issued under sub-section (1) shall have the same effect as if it were an order made under sub-section (1) of section 18A of the Industries (Development and Regulation) Act 1951, and the provisions

of section 18B of that Act shall apply accordingly.

(4) Notwithstanding anything contained in any law for the time being in force, no person, who ceases to hold any office by reason of the provisions contained in clause (a), or whose contract of management is terminated by reason of the provisions contained in clause (b) of section 18B of the Industries (Development and Regulation) Act, 1951, as applicable to a tea undertaking or tea unit by virtue of the provisions of sub-section (3), shall be entitled to any compensation for the loss of office or for the premature termination of his contract of management:

Provided that nothing contained in this section shall affect the right of any such person to recover from the tea undertaking or the tea unit, as the case may be, monies recoverable otherwise than by way of such compensation.

Power to take over tea undertaking or tea unit without investigation under certain circumstances.

16E. (1) Without prejudice to any other provision of this Act, if, from the documentary or other evidence in its possession, the Central Government is satisfied, in relation to a tea undertaking or tea unit, that—

(a) the persons in charge of such tea undertaking or tea unit have, by reckless investments or creation of incumbrances on the assets of the tea undertaking or tea unit, or by diversion of funds, brought about a situation which is likely to affect the production of tea manufactured or produced by the tea undertaking or tea unit, and that immediate action is necessary to prevent such a situation; or

(b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the tea undertaking or tea unit or for any other reason) and such closure is prejudicial to the concerned tea undertaking or tea unit and that the financial condition of the company owning the tea undertaking or tea unit and the plant and machinery of such tea undertaking or tea unit are such that it is possible to restart the tea undertaking or tea unit and such restarting is necessary in the interests of the general public,

it may, by notified order, authorise any person or body of persons to take over the management of the whole or any part of the tea undertaking or tea unit or to exercise in respect of the whole or any part of the tea

undertaking or tea unit such functions of control as may be specified in the order.

(2) On the issue of a notified order under sub-section (1) in respect of a tea undertaking or tea unit,—

(a) the provisions of sub-sections (2), (3) and (4) of section 16D, and the provisions of section 16G, shall apply to a notified order made under sub-section (1) as they apply to a notified order made under sub-section (1) of section 16D; and

(b) the provisions of sub-sections (3) and (4) of section 18AA of the Industries (Development and Regulation) Act, 1951, shall apply to the tea undertaking or tea unit, as the case may be, to the same extent as they apply to an industrial undertaking.

Contracts in bad faith, etc., may be cancelled or varied.

16F. Without prejudice to the provisions of section 18B of the Industries (Development and Regulation) Act, 1951, as applicable to a tea undertaking or tea unit, as the case may be, the person or body of persons authorised under section 16D, or, as the case may be, section 16E, to take over the management of a tea undertaking or tea unit may, with the previous approval of the Central Government, make an application to any court having jurisdiction in this behalf for the purpose of cancelling or varying any contract or agreement entered into, at any time before the issue of the notified order under section 16D or section 16E, between the tea undertaking or the tea unit and any other person; and the court may, if satisfied after due inquiry that such contract or agreement had been entered into in bad faith or is detrimental to the interests of the tea undertaking or tea unit, make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) that contract or agreement, and the contract or agreement shall have effect accordingly.

Application of Act 1 of 1955.

16G. (1) Where the management of a tea undertaking or tea unit owned by a company has been taken over by any person or body of persons authorised by the Central Government under this Act, then, notwithstanding anything contained in the said Act or in the memorandum or articles of association of such company,—

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed in a meeting of the shareholders of such company shall be given effect to unless approved by the Central Government;

(c) no proceeding for the winding up of such company or for the appointment of receiver in respect thereof shall lie in any court except with the consent of the Central Government.

(2) Subject to the provisions contained in sub-section (1), and to the other provisions contained in this Act, and subject to such other exceptions, restrictions and limitations; if any, as the Central Government may, by notification in the Official Gazette specify in this behalf, the Companies Act, 1956, shall continue to apply to such company in the same manner as it applied thereto before the issue of the notified order.

Power of Central Government to cancel notified order under section 16D or 16E.

16H. If, at any time, it appears to the Central Government on the application of the owner of a tea undertaking or tea unit or otherwise that the purpose of the order made under section 16D or section 16E, has been fulfilled or that for any other reason it is not necessary that the order should remain in force, the Central Government may, by notified order, cancel such order and, on the cancellation of any such order, the management or control, as the case may be, of the tea undertaking or tea unit, as the case may be, shall vest in the owner of that undertaking or unit.

Power of Central Government to authorise, with the permission of the Court, persons to take over management or control of tea undertakings or tea units.

16I. (1) If the Central Government is of opinion that there are possibilities of running or restarting a tea undertaking or tea unit in relation to which an investigation has been made under sub-section (2) of section 16B, and that such tea undertaking or tea unit should be run or restarted for maintaining or increasing the production, supply or distribution of tea, that Government may make an application to the Court by which the company owning such tea undertaking or tea unit has been ordered to be wound up, praying for permission to appoint any person or body of persons to take over the management of the tea undertaking or, as the case may be, tea unit, or to exercise in respect of the whole or any part of the tea undertaking or tea unit, such functions of control as may be specified in the application.

(2) Where an application is made under sub-section (1),—

(a) the provisions of sub-section (2) of section 18FA of the Industries (Development and Regulation) Act, 1951 shall apply to the tea undertaking or tea unit, as the case may be, subject to the modification that for the words "twelve years" occurring in the second proviso thereto, the words "two years" shall be substituted;

(b) the provisions of sub-sections (3) to (10) (both inclusive) of section 18FA of the Industries (Development and Regulation) Act, 1951 shall apply to the tea undertaking or tea unit referred to in sub-section (1), to the same extent as they apply to an industrial undertaking.

Power of Central Government to make certain declarations in relation to tea undertakings or tea units

16J. The Central Government may, if it is satisfied in relation to a tea undertaking, tea unit or any part thereof, the management or control of which has been taken over under section 16D or under section 16E or under section 16-I, that it is necessary so to do in the interests of the general public with a view to preventing fall in the volume of the production of tea, exercise in relation to such tea undertaking or tea unit or part thereof the same powers as are exercisable by it in relation to an industrial undertaking under section 18FB of the Industries (Development and Regulation) Act, 1951, and the said section and the Third Schedule referred to therein shall apply to a tea undertaking or tea unit accordingly.

Power of Central Government to call for Report on the affairs and working of a managed tea undertaking or tea unit.

16K. (1) Where the management or control of a tea undertaking or tea unit, as the case may be, has been taken over under S. 16D or under section 16E or under section 16 f, the Central Government may, at any time during the continuance of such management or control, call for a report from the authorised person on the affairs and working of the tea undertaking or tea unit, and in submitting the report the authorised person shall take into account the inventory and list of members and creditors prepared under section 16L.

(2) On receipt of the report submitted by the authorised person, the Central Government

may exercise all or any of the powers conferred on it by sections 13FD, 18FE and 18FF of the Industries (Development and Regulation) Act, 1951, to the same extent and subject to the same conditions, limitations or restrictions as are specified in the said sections, and the provisions of the said sections shall become applicable to a tea undertaking or tea unit, as the case may be.

Preparation of an inventory of the assets and liabilities and list of members and creditors of managed tea undertaking or tea unit.

16L. For the purposes of this Act, the authorised person shall, as soon as may be after taking over the management of a tea undertaking or tea unit, prepare a complete inventory of the properties, belongings, liabilities and obligations of such tea undertaking or tea unit, as the case may be, and a list of members and creditors of such tea undertaking or tea unit, in accordance with the provisions of section 18FG of the Industries (Development and Regulation) Act, 1951, and the said section shall apply to a tea undertaking or tea unit accordingly.

Bar of suits and other proceedings in relation to the tea undertakings or tea units.

16M. No suit or other legal proceedings shall be instituted or continued against a tea undertaking or tea unit in respect of which an order has been made under section 16D or section 16E, except with the previous permission of the Central Government or of any officer authorised by that Government in this behalf.

Rules made under Act 65 of 1951 to apply.

16N. Until any rule is made in relation to any matter referred to in this Chapter, the rules made by the Central Government under the Industries (Development and Regulation) Act, 1951, in relation to such matter shall, as far as may be, apply, to the extent they are not repugnant to any provision of this Act or any rule made thereunder and references in such rules to the provisions of that Act shall be construed accordingly.

THE DISTURBED AREAS (SPECIAL COURTS) ACT, 1976

(Act No. 77 of 1976)*

[11th June, 1976]

An Act to provide for the speedy trial of certain offences in certain areas and for matters connected therewith.

Enacted by Parliament in the Twenty-seventh Year of the Republic of India as follows :—

1. Short title, extent and commencement.

(1) This Act may be called THE DISTURBED AREAS (SPECIAL COURTS) ACT, 1976

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different States or for different parts thereof.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "Code" means the Code of Criminal Procedure, 1973;

(b) "disturbed area" means an area declared as a disturbed area under section 3;

(c) period of disturbance, in relation to a disturbed area, means the period during which it is to be a disturbed area for the purposes of section 3;

(d) "scheduled offence" means an offence specified in the Schedule being an offence forming part or arising out of, or connected with, any such disturbance as is referred to in section 3;

(e) "Special Court" means a Special Court constituted under section 4;

(f) words and expressions used but not defined in this Act, and defined in the Code shall have the meanings respectively assigned to them in the Code.

3. Declaration of an area as disturbed area.

(1) Where a State Government is satisfied that—

(i) there was, or

(ii) there is,

in any area within a State extensive disturbance of the public peace and tranquillity, by reason of differences or disputes between

members of different religious, racial, language or regional groups or castes or communities it may, by notification in the Official Gazette, declare such area to be a disturbed area.

(2) A notification issued under sub-section (1) in respect of any area shall specify the period during which the area shall, for the purposes of this section, be a disturbed area and where the State Government is satisfied that there was such disturbance of public peace and tranquillity as is referred to in sub-section (1) in that area from any date prior to the issue of such notification the period specified in the notification may commence from that date :

Provided that—

(a) no period commencing from a date earlier than three months before the date of publication of the notification shall be specified therein; and

(b) so much of the period specified in such notification as is subsequent to the date of publication of the notification shall not, in the first instance, exceed three months but the State Government may amend such notification to extend such period from time to time by any period not exceeding three months at any one time if in the opinion of the State Government there continues to be in such area such disturbance of public peace and tranquillity as is referred to in sub-section (1) :

Provided further that where the State Government is satisfied that there is no longer such disturbance of public peace and tranquillity as is referred to in sub-section (1) in such area, it shall amend the notification issued under that sub-section in respect of that area to limit the period specified therein (whether originally or by amendment under the preceding proviso) accordingly.

4. Constitution of Special Courts.

(1) The State Government may for the purpose of providing speedy trial of scheduled offences committed in disturbed areas; by notification in the Official Gazette constitute as many Special Courts as may be necessary in or in relation to such disturbed area or areas as may be specified in the notification.

(2) A Special Court shall consist of a single judge who shall be appointed by the High Court upon a request made by the State Government.

Explanation.—In this sub-section, the word "appoint" shall have the meaning given to it in the *Explanation* to section 9 of the Code.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless—

[*] Received the assent of the President on 11.6.1976. Act published in Gaz. of India; 11.6.1976 Part II S. 1, Ext. p. 805.

(a) he is qualified for appointment as a judge of a High Court, or

(b) he has, for a period of not less than one year, been a Sessions Judge or an Additional Sessions Judge.

(4) Notwithstanding anything contained in sub-section (3), a person shall not be eligible for being appointed as, and for being, a Judge of a Special Court in any State after he has attained the age at which Sessions Judges in that State have to retire from service.

5. Jurisdiction of Special Courts:

(1) Notwithstanding anything contained in the Code or any other law, a scheduled offence committed in any disturbed area at any time during the period during which it is a disturbed area shall be triable, whether during or after such period, only, by the Special Court constituted in or in relation to the disturbed area in which the offence has been committed.

(2) When trying any scheduled offence, a Special Court may also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with the scheduled offence.

6. Procedure and powers of Special Courts.

(1) Every scheduled offence shall be cognizable.

(2) A Special Court may take cognizance of any scheduled offence,—

(a) where under the Code such offence is an offence triable exclusively by a Court of Session, upon its being committed to it under section 209 of the Code as if the Special Court were a Court of Session;

(b) in any other case, upon a police report of the facts together with a certificate from the public prosecutor to the effect that the offence is triable exclusively by the Special Court.

(3) Where a scheduled offence is an offence triable exclusively by a Court of Session under the Code, a Special Court shall have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for trial before a Court of Session.

(4) Where a scheduled offence is an offence which is punishable with imprisonment for a term exceeding three years but which, according to the provisions of the Code, is not an offence triable exclusively by a Court of Session, a Special Court may on taking cognizance of the offence perform the func-

tions of a Magistrate under section 207 of the Code and thereafter try such offence so far as may be in accordance with the procedure prescribed in the Code for trial before a Court of Session as if the Special Court were a Court of Session and the case had been committed to it for trial under the provisions of the Code.

(5) Where a scheduled offence is punishable with imprisonment for a term not exceeding three years or with fine or with both, a Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263 to 265 of the Code, shall so far as may be, apply to such trial :

Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try it summarily, the Special Court shall recall any witnesses who may have been examined and proceed to rehear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation to a Special Court as they apply to and in relation to a Magistrate :

Provided further that in the case of any conviction in a summary trial under this section it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding two years.

(6) A Special Court may, with a view to obtaining the evidence of any person suspected to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence, and to every other person concerned whether as principal or abettor in the commission thereof and any pardon so tendered shall, for the purposes of section 308 of the Code, be deemed to have been tendered under section 307 thereof.

7. Power to transfer cases to regular courts.

Where, after taking cognizance of any offence, a Special Court is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try the case, transfer the case for trial to any court having jurisdiction under the Code and the court to which the case is transferred may proceed with the case as if it had taken cognizance of the offence.]

"QUIT NOTICE IN RENT CONTROL PROCEEDINGS"

(By : A. R. PRABHU, B.Sc., M.L., Advocate, Ernakulam)

The article "Quit Notice v. Rent Control Acts" by Shri Shankar Bhat reported in A I R 1976 Journal 49 and the one that appeared in 1976 Ker L T Journal 50 by Shri K.S. Rajamony bring useful information to the profession on this debatable question. My attempt is to approach this question from an altogether different angle. The recent decision by the highest court of our land reported in A I R 1976 S C 869 brought substantial relief to the owners of the buildings who seek eviction of their tenants on any one of the grounds enlisted under Section 11 of our Act (2 of 1965).

Though the lengthy discussion by Shri Bhat, throws much light upon the subject and the relevant authorities on it, some of the reasons urged by him, do not appear to be good for a reconsideration of the decision by Supreme Court in *Venkateswara Rao v. Venkata Ramana*, A I R 1976 S C 869 for more than one reason. The Supreme Court has in this case carefully analysed the earlier Supreme Court decision in *Mangilal's case* A I R 1965 S C 101 and made a distinction on the facts available in that case, which was purely a proceedings for ejectment through an ordinary civil suit under the general law, where the provisions of the Transfer of Property Act will be clearly attracted and applied. The statement by Shri Bhat at page 51, last paragraph, deserves comments. Shri Bhat's hasty conclusion that "the resultant position is not sound jurisprudence" is not warranted. It is also not made clear, how "the judiciary has given to the lessor a right which the legislature has not" and why. The Supreme Court has only expressed its view on the point on the basis of certain established principles and that is quite within the power of the Court. If the legislature is not happy over the position, it cannot be said it is helpless to overcome it by necessary amendments of the statute as it does every time.

It is seen that Shri K. S. Rajamony is in favour of the view that a quit notice is not a condition precedent to seek eviction of a tenant under the provisions of a special and self contained Code, like our Rent Act. I agree with my friend, for my own reasons in addition to his.

→ The first aspect which I would like to focus upon is that the general principles for Special legislation are that the legislature is aware of the relevant statutes governing the subject

upon which it decides to legislate and the sufficiency of the provisions therein and it is with the object of departing from the available statutory provisions and with a view to provide and bring to the subject by incorporating additional and new provisions in the intended legislation. If this is true, it is upto the legislature to clearly express its intention in lucid and unambiguous language employed in the statute and not to give any room for conflicting views. It is very easy to do so. This aspect becomes more important when we find that after the unusual and long delay to get the final decision from the highest court, the litigants are told that the proceedings are either maintainable or not for not giving a quit notice before the law was set in motion. This is shocking and startling at a point of time when the parties have already exhausted their 'means' after going to all the forums available under the statute. In this context, I may not be deviating from the main stream if I suggest that it is only just and proper to reduce the number of courts through which the parties to the Rent Control Proceedings should pass. Why not the legislature think of it and amend the law? Why not we have only two courts, Rent Controller's Court and High Court? As the Rent Controller, is a fact finding tribunal, the findings of the Rent Controller should be confirmed by the High Court, unless it is shown that it is not proper, regular or legal as provided in Section 20 of the Act. All the powers under Section 20 may be given to the High Court, over and above the powers under Section 115 of the Code of Civil Procedure. This will save and avoid delay of several years by avoiding two intermediate courts, the Appellate Authority and the District Court (Revisional Court).

Now, coming to the main question of quit notice, I view the matter in a different aspect. Section 11 enlists the grounds upon which alone a tenant can be evicted and the non obstante clause therein shows that if the landlords prove any one of the grounds, the Court shall pass an order for eviction. There is nowhere in the Act any indication as to a quit notice being made a mandatory pre-requirement, unlike in the T. P. Act. If so why should we read into the statute (Rent Act) a provision from the T. P. Act (S. 106)? It is absolutely unreasonable to say that the provisions in the Rent Control Act are, in addition to those in the T. P. Act and that Legislature

did not intend to take away the privilege of a tenant to get a quit notice under the T. P. Act. Why should it be viewed like this? How can we take it for granted that the Legislature wanted to discriminate against the tenants alone in this regard? When the Rent Control Legislation takes away or abridges several valuable and property rights of the landlords why not we think that there is nothing wrong if the tenant is not given a mere right of getting a quit notice which is nothing but a handle to bring in technical objections regarding the validity or otherwise of the notice? The object of a notice to quit should be to give a reasonably prior information to the tenants. Further, it would be, reading into the statute an additional condition for getting eviction of the tenant, when the statute itself does not do so. Our Rent Act is also a self-contained code and wherever the Legislature wanted to make provisions regarding notice, it has clearly expressed it (See Section 2(b) Proviso and see also Section 11 (4) (i) Proviso). Therefore it is for the Legislature to see that necessary amendment is made if really it wanted to give this right to the tenant to get a quit notice under the provisions of a quite different statute (T. P. Act) and not to leave this point in a confused condition to invite conflicting views and debates. This can be achieved by adding

a proviso to Section 11 of the Act to the effect that before seeking eviction a tenant should be given a quit notice of a specified period. It is also notable that this question has become much more difficult after the pronouncement of the Supreme Court decision reported in AIR 1976 S C 869 and Kerala High Court is now called upon to hold whether or not the Kerala Buildings (Lease and Rent Control) Act is a complete Code (self-contained) by itself and whether a Quit Notice is a condition precedent for seeking eviction of a tenant. The prior rulings of the Court have to be reconsidered and it is known that the matter is being recommended by two single Judges to be heard by a Division Bench and in its turn the Division Bench has expressed its view to have it heard by a Full Bench, so that there may be a final pronouncement on the matter.

To conclude this short discussion I would appeal that it is high time for the State Legislature to clarify the position by a simple amendment if it really wanted to make available to a tenant a right to get a notice to quit. It is also desirable to amend the statute if it does not want to confer such a right upon the tenant, by appropriate explanation, in the statute, so that much time and energy can be saved.

"MAKING JUSTICE SPEEDY, EFFECTIVE AND SUBSTANTIAL"

By: The Hon'ble Sri Justice C. KONDAIAH, (Judge, Madhya Pradesh High Court.)

The prime intendment of our Constitution is to constitute India into a sovereign Democratic Republic and to secure to all its citizens Justice, Social, Economic and Political. By virtue of entry 3 in the State List of the Seventh Schedule read with Articles 245 and 246 of the Constitution, the State Legislature is competent to make laws on this subject and invest the Courts constituted by it with power and jurisdiction to try every Cause and matter that can be dealt with by a Court of civil or criminal jurisdiction. The State as a whole is governed by law. The State speaks through Legislature, acts through Executive and administers justice through Courts. The powers, functions and duties of the three wings of the State, viz.—Legislature, Executive and Judiciary, have been defined in the Constitution itself and each is independent in its sphere. The end and aim of all the three institutions is the establishment of a welfare State. Administration of justice is one of the functions of the State and Justice, of necessity, is to be

administered through the medium of the Courts and tribunals.

The term 'Justice' is not defined under the Constitution or in any statute. The concept and content of 'Justice' has been very aptly and succinctly stated by an American jurist, Hans Kelsen, thus :

"Justice is social happiness. It is happiness guaranteed by a social order. The happiness that a social order is able to assure cannot be happiness in a subjective-individual sense; it must be happiness in an objective-collective sense, that is to say, by happiness we must understand the satisfaction of certain needs, recognised by the social authority, the law-givers, as needs worthy of being satisfied, such as the need to be fed, clothed, housed and the like."

There is an inseparable nexus or connection between justice and equality. The core of

justice is exclusion of arbitrariness otherwise called ungrounded discrimination. The general principle governing rights and duties is that of equality. 'Injustice', said Aristotle (following Plato), 'arises when equals are treated unequally, and also when unequals are treated equally.' Justice is of wide connotation to take in social justice, political justice, economic justice, legal justice etc; but what we are now concerned with is legal justice. Justice consists in the ordering of human relations in accord with broad principles applied uniformly and impartially to one and all. Justice has to be administered by Courts and tribunals according to law and procedure.

'Justice' and 'law' are relative terms. Law is never static and need not be static. Laws may vary from place to place, from country to country and from time to time, depending upon the people, their social, economic and political conditions and the pattern of the established Government. Laws must be progressive and must vary along with changes in the social economic and political life in the society and be consistent with the times. The concept of 'justice' has to be interpreted in accordance with the changing circumstances that prevail. The Courts and tribunals must, as far as possible, interpret the law in accord with the intentment and object of the legislation without laying much stress on the technicalities. It is the substance and spirit of the law but not the letter of the law that should be the guideline for the Courts and the tribunals in the discharge of their sacred duty of administering justice. The ultimate object of Courts being to do real and substantial justice to the parties who appear before them, the law constitutional, statutory, procedural or judge-made is only a means or instrument to arrive at the truth of the cause and do justice but not an end in itself. Justice must not only be done; it must be seen to be done. A Court of law is a temple of justice where people go with the hope and belief that justice will be done to them. Justice must be done within a reasonable time as justice delayed is justice denied. However, it should not be hustled, for hustled justice is no justice.

With the death of laissez-faire doctrine, the State came to concern itself with the welfare of its individual members and its business has enormously increased. The Courts with the existing pattern of structure and with the rigidity of their procedures could not cope up with the modern and multifarious functions of the 20th century state. That is why administrative law came into vogue and the modern services which the modern state is called upon to undertake are required to be administered

through administrative authorities, administrative tribunals and public corporations upon whom judicial and quasi-judicial powers have been conferred. There is a massive increase in crime and other phenomena of social instability which are mainly attributable to the waning influence of the family, religion, human values, good conduct and character and other non-legal agencies of social control. The laws in force are voluminous and many; neither the law-makers nor the members of the legal profession exactly know what are all the laws that govern the people. I shall now state some of the factors contributing to arrears in courts and suggest some remedies to make the administration of justice speedy, effective and substantial:

(1) Hurried and ill-drafted statutes and orders on diverse topics enacted by the law makers, to some extent, contribute to the inflow of cases in courts. Many of the defects in legislation can be avoided, if they are made after making due and proper publicity of the proposed bills and laws and after ascertaining the enlightened public opinion and in particular, the opinion of the legal profession which consists of lawyers and judges. Laws must always be simple and effective but not cumbersome and the language employed must be simple but not ambiguous and complex. Proper implementation of the laws in force by the Executive is needed before thinking of enacting new laws.

(2) A congenial atmosphere for the adjustment or compromise of causes may be created by the State from the village level. Arbitration wherever possible and in particular, compulsory arbitration in small and petty cases should be provided for. It would save the precious time of the courts.

(3) The present courts constituted under the British model have only ears to hear about the truth of the cause but no eyes to see the truth. Truth can be easily known and found out at the lowest rung, i.e., village level, through the establishment of Nyaya Panchayats which may be empowered to dispose of small and petty cases. Provision may, however, be made for appeals to the courts from the decisions of Nyaya Panchayats.

(4) Administration of justice is different and distinct from administrative justice. Administration of justice, in its traditional sense, deals with adjudication primarily of private rights, whereas administrative justice with public interest while dealing with the individual rights. The procedure in the former one is not speedy and cheap though effective in a way.

But on the other hand, administrative justice is speedy, cheap and effective. Increasing the number of administrative authorities and tribunals and investing them with powers to dispose of special types of cases will reduce the inflow of cases in the regular courts of law.

(5) The procedural delays in the disposal of causes in courts can be avoided, if suitable amendments are brought out to the Procedure Codes.

(6) The delays in disposal of causes in courts are of two types: (i) Court system delay otherwise known as systematic delay which accounts for the period commencing from entering the cause into court's docket till it is taken up for trial or hearing, due to lengthy procedures prescribed and the various processes through which a case has to pass before it becomes ripe for hearing, i.e. receiving, checking, indexing, issuance of process, effecting due service, getting the record printed or typed etc., (ii) Delays due to professional courtesy of lawyers towards each other and lawyers vis-à-vis the courts. Traditional court proceedings have to be suitably modified to enable the court to speedily and satisfactorily dispose of the causes.

(7) Convening of pre-trial conference of the lawyers concerned with the case, will improve the ensuing trial by eliminating surprise, sharpening the issues and increasing the litigants' mutual knowledge of the case. The object and effort of this formal conference is to round the case into shape and improve its presentation at the trial or hearing.

(8) Time limit shall be fixed for disposal of causes in the statutes themselves.

(9) Instead of lengthy oral arguments, the counsel may furnish well in advance written arguments, in courts and in particular, the appellate and revisional courts after serving copies of the same on the other side counsel. Specific permission may be obtained from the court in appropriate cases to raise new points which were not raised in the written arguments. Unnecessary adjournments must be avoided and the bar and the court must co-operate with each other.

(10) The state must look to the timely creation of adequate number of Courts to cope up with the work-load and timely appointment of judges and presiding officers of Court. The selection of judicial officers must be on grounds of merit, ability and character keeping in view social justice and apportioning a proper and adequate number of posts to the weaker

sections. The personality, character, integrity, industry and learning of the personnel that man the judiciary would have a tremendous impact and bearing on speedy justice and at the same time qualitative justice. Equally important is adequate, contented and efficient staff in all Courts to make the cases ready and implement the orders passed with promptitude.

(11) Much of the precious time of the presiding officers of civil Courts is consumed by call work. The entrustment of call work to the Sheristadar or Head Clerk in civil Courts will save lot of Court's time for trial work.

(12) A strong, independent, efficient and disciplined bar with good traditions and co-operative spirit is essential for speedy, satisfactory and effective disposal of the causes before the Courts. The members of the bar have a responsibility and duty to correctly advise the parties who approach them at the stage of institution of a proceeding or in the course of a proceeding, which course would certainly accelerate and ensure proper and amicable settlement or adjustment of causes in a great number of cases. They should discourage false and frivolous litigation.

Quality of justice is no less important than speedy justice. As stated by Maurice Rosenberg, an eminent jurist: "It is as much a part of judicial responsibility to administer the Courts effectively as to decide the cases wisely." Too much work for few judges will not solve the problem. However, the undue pre-occupation with problems of delay should not lead to widespread adoption of expediting gimmicks which would certainly impair the judicial calibration and affect the quality of justice for the purpose of the so-called quick disposal. We must find the means either to reduce the inflow of cases drastically, or to augment present adjudicating resources in a very substantial way.

The percentage of illiteracy in our country is high and a large number of people are backward economically and socially. Most of the people, if I may say so, are ignorant and are not aware of their legal rights. The Government as well as intellectuals and associations including the bar associations must make genuine effort and endeavour in all possible ways to popularise the various legal rights of the people and also the relevant and material constitutional provisions. This equally applies to the popularisation of the duties of citizen. As a citizen must not only be vigilant of his rights but he must also be conscious of his corresponding duties.

Lastly, it is not out of context to state that the State has a duty and responsibility to ensure that justice is administered not only substantially, effectively and speedily but cheaply. Courts have to be established in the rural areas so as to be within the reach of the poor and common man. The cost of litigation should be minimised. The lowering of present rates of court fees requires consideration by the State. Justice should be made equally available to one and all including the poor. The day when every citizen, irrespective of his status, position or riches, feels assured that he can get justice in a Court of law in spite of his opponent's position, money and status, must be

considered to be a red letter day for the country. The state as well as the members of the bar associations should think it their duty to serve the poor litigants in all possible ways. The state may also consider the advisability of raising a permanent fund for the benefit of poor and needy litigants and advancement of their interest and to help them in vindicating their legal rights.

Justice administered in Courts of law and quasi-judicial and administrative tribunals must be real, substantial, speedy, effective and cheap and the State and all those concerned must strive their best to achieve the same.

"IS HUSBAND'S INCAPACITY TO WORK OR TO PROVIDE MONEY FOR HOME A CRUELTY?"

By : JUSTICE LISHAR SINGH MEHTA, Jaipur (Rajasthan)

Section 10(1)(b) of the Hindu Marriage Act, 1955, provides that either party to a marriage, whether solemnised before or after the commencement of the Act, may present a petition to the District Court praying for a decree of judicial separation on the ground that the other party has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

2. The law on the interpretation of the word 'cruelty' is gathered from decided cases and Courts in India have mostly accepted and adapted to conditions in India the principles underlying the judge-made law, on the subject, in England. The accepted legal meaning in England as also in India of the expression 'cruelty' has been the conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger : Vide *Russell v. Russell*, (1897) A. C. 395.

3. The legal conception of 'cruelty' comprises two distinct elements—firstly, the ill-treatment complained of, and, secondly, the resultant danger or apprehension thereof. The language of clause (b) of sub-section (1) of section 10 of the Hindu Marriage Act, 1955, is comprehensive enough to include cases of physical as also mental cruelty and cases where both the elements are present. Where physical violence is proved, the test laid down in the section cannot present any particular difficulty.

4. The cases of mental cruelty deserve serious thought. It was formerly viewed that actual physical harm or reasonable apprehension thereof was the prime ingredient of the matrimonial offence. The earlier cases of cruelty dealt in the main with acts of physical violence and were little concerned with motive or intention.

In *Dysart v. Dysart*, (1844) 1 Rob. Eccl. at page 116 Dr. Luchington said :

"It is for me to consider the conduct itself and its probable consequences; the motive and causes cannot hold, the hand of the Court unless the wife be to blame which is a wholly different consideration."

5. The above doctrine now stands repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. Conception of legal cruelty undergoes changes according to the changes and advancement in social concepts and standard of living. Cruelty by words, by talk, or by conduct other than violence, may be cruelty none-the-less and possibly may be more dastardly than the cruelty of blows. *Kelly v. Kelly*, (1861-73) All. E. R. 297, is the leading case in England, which propounded that if force, whether physical or moral, is systematically exerted against a wife with the view of bending her to the husband's authority in such a manner, to such a degree, and during such length of time, as to break down her health and render a serious

malady imminent, it is legal cruelty which entitles the wife to a judicial separation. Abuse, harsh language and conduct of that kind may well be cruelty provided it causes either injury to health or reasonable apprehension thereof. Karminski, J. said in (1954) 3 All. E. R. 159, *Eastland v. Eastland*, at page 162 :

"Since *Kelly v. Kelly* there can be no doubt that this Court can find cruelty notwithstanding the complete absence of any blow or act of violence. Nagging will suffice, if persistent."

6. Failure on the part of the husband to give to the wife sufficient money for household and other expenses and refusal to pay for the goods ordered on the credit will not according to the decision in *Eastland v. Eastland* (Quoted *supra*) amount to cruelty. In that case the wife petitioned for divorce on the ground of her husband's cruelty alleging that he treated her with meanness over money matters and had consistently refused to make her any or any sufficient allowance for household necessities or for other purposes; that he had mismanaged his financial affairs and run into debt, leaving her to deal with his creditors; that he had refused to make any allowance for food or other purposes and had told her to order goods on credit but had refused to pay for the goods until the creditors pressed for payment, well knowing that she suffered humiliation and distress by reason thereof The Probate, Divorce and Admiralty Court held that the husband was not shown to have treated the wife with cruelty, as his conduct, though deplorable, was not directed against or aimed at the wife. Again, in *Kaslefsky v. Kaslefsky* (1950) 2 All E R 398, Denning L. J. held that :

"Gross neglect or chronic discord is not yet a ground for divorce.....If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. That is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled."

7. The above dictum of Karminski J. and Lord Denning L. J. has not been approved in

the majority decision of the House of Lords in *Gollins v. Gollins* (1963) 2 All E R 966. In *Gollins's case* the parties were married in 1946 and there were two daughters of the marriage, born in 1947 and 1949. The husband ran into debt, sold his farm and bought a house on mortgage, which he transferred, subject to the mortgage, to his wife, who had given or lent him considerable sums to maintain the family. The wife ran this house as a guest house. The husband did little or nothing to help her. He could have obtained paid employment but did not. He was incorrigibly and inexcusably lazy, but the evidence did not show any wish on his part to harm the wife, nor was he aggressively unkind to her. Creditors of the husband tried to make the wife pay, and she did pay some of his debts. His refusal to try to help her or to earn money worried her and made her ill. On her complaint Ludlow Justices made a matrimonial order on the ground of her husband's persistent cruelty. On April 5, 1962 the Divisional Court of the Probate, Divorce and Admiralty, (1962) 2 All E R 366, held that the husband's conduct did not amount to cruelty. On October 26, 1962, the Court of Appeal reversed the decision of the Divisional Court : (1962) 3 All E R 897. The husband appealed to the House of Lords, which, in a majority decision, held that as the husband did no work, provided no money, had debts and pressing creditors and left the wife to support the household, whereby her health deteriorated, the wife had made out a case of persistent cruelty and made good her charge of cruel treatment.

8. However useful fictions may have been in the past, they seem to be both unnecessary and confusing in the realm of cruelty. So, now, the settled law on the subject is that the husband's desire to keep the wife or lack of intention to drive her out is irrelevant. Section 10 (i) (b) of the Hindu Marriage Act, 1955, says nothing about physical or intentional cruelty. If without just cause or excuse the husband or the wife persists in doing things which he or she will probably not tolerate, and which no ordinary person will tolerate, it will amount to cruelty. If, for instance, the husband is lethargic, does no work, parasitical, selfish or callous, provides no money for the household or refuses to undertake paid employment to meet household expenses, he, on the ground of cruelty, is likely to meet the same fate as Gollins did in England.

"R. R. Dalavai v. The State of Tamil Nadu, A. I. R. 1976 S. C. 1559 (July)."

By : ANIRUDH PD. SINGH, M. A., LL. M., LL. B. (*Gold Medal*) Lecturer, Faculty of Law, University of Gorakhpur, Gorakhpur.

The recent unanimous pronouncement of the Supreme Court of India in *R. R. Dalavai v. State of Tamil Nadu*, pronounced on seventh of May 1976 presents a landmark in the Indian federalism. The applicant in this case challenged the power of the Government of the Tamil Nadu to grant of pension to Anti-Hindi agitators. He also questioned the power of the State Government to make payments from the consolidated fund of the State Exchequer. The applicant took the strong and right plea that the Pension Scheme of the Tamil Nadu State violated the spirit and letter of the Article 351 of the Constitution of India which deals with the directive for development of the Hindi language. Article 351 imposes the duty on the Union Government to promote the spread of the Hindi language to develop it so that it may serve as a medium of expression for all the elements of the composite culture of our country. The appellant argued very impressively and rightly that the agitators who brought about violence and broke the law were honoured by the pension scheme of the State.

The Madras High Court upheld the state action pointing out that the state legislature had control over the purse and that in the view of the State legislature, the agitators against Hindi fought for a cause. It is humbly submitted that the Court could not appreciate the real issue. Though the agitators fought for a cause the cause was condemnable and anti-national. It is matter of great satisfaction, however, that the Supreme Court of India appreciated the real issue involved and set aside the decision of the High Court in appeal. The appeal against the decision of Madras High Court was heard by three Judges bench of the Supreme Court, consisting of Mr. Chief-Justice A. N. Ray, Mr. Justice H. M. Beg and Mr. Justice Jaswant Singh. The unanimous decision of the Court was pronounced by the Chief-Justice himself. The Court appreciated the role of State in a federation and speaking through the Chief Justice very impressively and correctly observed :

"In our opinion the pension scheme formulated by the Tamil Nadu Government contains the vice of disintegration and fomenting fissiparous tendencies. If any State will be engaged in exciting emotion against Hindi or any other language such provocation has to be nipped in the bud because these are anti-national and anti-democratic tendencies."

The Supreme Court further found that the scheme of pension had not received the legislative sanction and the Government by an executive order could not authorise payment of pension scheme. Consequently the Court declared both the scheme and budget sanction unconstitutional.

This unanimous decision of the highest Court of the land makes it sufficiently clear that national unity and integrity of India are of prime importance. The Judiciary is not ready to allow any encouragement by any state to anti-national and fissiparous tendencies. Indian federation has *sui generis* language problem. The diversity in languages is clear from the Linguistic Survey of India, which states that there are in all one hundred and seventy-nine languages and five hundred and forty-four dialects in this country. However, it is evident from the constituent Assembly debates and the linguistic survey also that Hindi is a language which is spoken by the largest number of people in the country. That is why the Constitution of India while naming 14 languages in the Eighth Schedule to the Constitution declared Hindi to be the *lingua franca* for India. The Constitution itself made an arrangement for 15 years' transitional period providing English to serve as official language in addition to Hindi. It envisaged that in the meantime, Hindi should be developed, spread and strengthened to replace English.

As the 15 years' time prescribed by the Constitution for the continuance of English as the official language was coming to an end, there was an agitation on the part of the non-Hindi speaking people for extension of the said period by legislation. In satisfaction of this public demand the Parliament enacted Official Language Act, 1963 which extended the period of English to operate as official language in addition to Hindi. No time limit was fixed. The Act was amended in 1967 which received the Presidential assent on 8 January, 1968. Subsequently on 18 January 1968 the Parliament passed a resolution for the purpose of accelerating the spread and development of Hindi and for the purpose of taking effective steps to implement 3 language formula.

The main purpose of the Official Language (Amendment) Act and the resolution is to provide a machinery for the smooth and quick

transition from English to Hindi as an official language. There has been continuous conflict between the Hindi and non-Hindi speaking states with regard to language policy. While the Hindi speaking states are anxious to quicken the transition from English to Hindi, the non-Hindi speaking states want both the languages to continue as official language till all the states agree. However, one thing is clear that there is state obligation to respect all the sister-languages in general and Hindi as national language in particular. Article 351 clarifies that Hindi is aimed at achieving the status of link language throughout the territory of India.

The present is the age of co-operative fede-

ralism, in which the centre and the states are not competitors but co-operators. It requires mutual understanding, due deference, interdependence and co-operation between the centre and the states. No activity encouraging any disrespect either of any sister-Indian Language or national language should be encouraged by the states. In this respect, the decision of the Supreme Court condemning the encouragement of disintegrating and fissiparous tendencies is of paramount importance. The decision strengthens the unifying forces in the Indian federation where two opposite forces centripetal and centrifugal are continuously at work. The decision is of imminent importance and everlasting value in a multi-lingual federation like ours.

REVIEWS

THE URBAN LAND (CEILING AND REGULATION) ACT 1976. The West Bengal Land Taxation Act 1976. By Amarendranath Mukherjee, M.A., LL.M., Lecturer, Regional Training Institute Customs & Central Excise; Late Lecturer in Law, Burdwan University, District and Sessions Judge and Judge, City Civil and Sessions Court (Retd.) Nirmal Law Syndicate, 89, Mahatma Gandhi Road, Calcutta. Pp. (XVI), (152) — (84), Price, Rs. 16.

The Urban Land (Ceiling and Regulation) Act 1976 imposes a ceiling on the holding of vacant land by a person in certain urban agglomerations specified in Schedule 1 of the Act, regulates the transfer of urban property stated above, and restricts the plinth area of dwelling units to be constructed to 30029 metres in certain categories of the urban agglomerations. Besides the text of the Act the slender Volume under review contains the Urban Land (Ceiling and Regulation) Rules 1976 in English as well as Hindi. Commentary on each section of the main Act, the West Bengal Land Act, with introduction and notes, and an appendix containing useful notes and draft petitions on important provisions of the Urban Land Ceiling Act; as well as a Table of cases and Index.

2. The Urban Land (Ceiling and Regulation) Act 1976 is a definite step towards full socialism. The Estates Acquisition Acts of different States attempted after Independence to rid the country of the vestiges of British Feudalism, but they failed to achieve their purpose on account, it is held, of Judicial interference and the niceties of the law. The present Act has therefore been put on

the statute book by the Government of India for the benefit of all the States. Some of them have already adopted it and others may follow suit in due course. If implemented properly and in the correct spirit, it would prove to be a piece of social revolution in a region where the Rule of Law is still considered supreme.

R.S.S.

SUPREME COURT ON CRIMINAL JURISPRUDENCE — DIGEST OF SUPREME COURT CASES, 1968 to March 1976 by Shri S. M. Pisolkar, B.Sc., LL.B., District & Sessions Judge, Maharashtra State. With a Foreword by Justice G. N. Vaidya, Judge, Bombay High Court. Pp. IX and 108 and XX. Price Rs. 7.

It is hard to exaggerate the importance of a thorough grasp of the principles of criminal jurisprudence for an advocate desirous of making headway in his profession in Criminal Courts of the country. There is also no gain-saying that those who have to deal with criminal law in this country can hardly escape from studying what the Supreme Court has laid down about the basic laws of Indian Criminal Jurisprudence.

Brief, yet comprehensive, the work before us, entitled "Supreme Court on Criminal Jurisprudence", is a digest of Supreme Court cases from 1968 to March 1976. The Digest is divided into five parts and deals with important topics on Appreciation of Evidence, Evidence Act, Penal Code and Criminal Procedure Code. Nothing of importance seems to have been left out of this digest, the selected rulings on each topic having been given.

About 375 Supreme Court Cases have been digested in this handy book. The Table of Cases alphabetically arranged has been given at the end and the cases have been cited in the digest by their serial numbers in the Table.

This lucidly and clearly written and moderately priced book, coming from an author who was once a busy practising advocate, Public Prosecutor and who is now a District and Sessions Judge, is bound to be useful to the members of the profession, judges and practitioners alike.

R.S.K.

LAW RELATING TO COMPANY DEPOSITS. By R. S. Gae, Senior Advocate, 1976 Edition. Eastern Book Company, 34 Lalbagh, Lucknow, pp. XII & 201 Price, Rs. 25/-

The regulation of Company deposits, with emphasis on protection of depositors' interests, became necessary in order to safeguard the interests of an average investor. With this end in view sections 58A and 58B, were inserted in the Companies Act, 1956 by the Companies (Amendment) Act, 1974 and rules were made under the Companies (Acceptance of Deposits) Rules 1975. They provide for the insertion of an advertisement in newspapers showing the management personnel and the financial position of the Company. The present publication explains briefly the relevant provisions of the Company and other laws applicable in the matter, so that an ordinary depositor may safeguard his interests before making any deposit with a company.

2. The book deals with the necessity for the provisions of sections 58A and 58B of the Companies Act and the Companies (Acceptance of Deposit) Rules 1975, and explains the various provisions of the law including penalties for their contravention. It examines all the Rules in detail and explains their effect from the point of view of the ordinary investor. It is worthy of note that there are two separate chapters in the book devoted to restrictions on dividends, a subject closely related to Company deposits and income tax provisions relating to company deposits. The book explains in a simple and lucid manner the provisions of the law relating to restrictions on dividends and points out their effect on Company deposits. Regarding income tax law, it explains how in spite of several disincentives to company deposits imposed by law such deposits continue to be an attractive form of investment with the public. Finally, he makes practical suggestions for the amendment of the Companies Act and the Rules made under it, with a view to removing the practical difficulties and plugging the loopholes in the Act. There are five appen-

dices giving relevant extracts from the related Acts and Rules, including the press-release by the Reserve Bank entitled, "Report of the Study Group on Non-banking Companies. Reserve Bank accepts main Recommendations". The book contains a table of cases and Index.

3. The book is a comprehensive study of the legal and practical aspects of the law relating to company deposits, and it should be of great help to company executives, chartered accountants, Lawyers, and the public generally.

R.S.S.

V. MITTER'S POLICE DIARIES, STATEMENTS, Reports, Investigation, Prosecution, Identification, Interrogation, Confessions, Emergency, Surveillance, Security, Police Organisations, Firearms, Discipline, Duties of Police Officers, Successful Prosecution in Court & Remedies thereof. Revised by the Hon'ble Sri Justice B. Malik, Chief Justice, Allahabad High Court (retired), assisted by a Board. 7th Edition. In two volumes. Vol. I 1976. Law Publishers, Sardar Patel Marg, P.B. 77, Allahabad. Pp. XXVIII & 536. Price Vol. I Rs. 40, Vol. 2 Rs. 50/-.

Subsequent to the publication of the sixth edition of this book in the Police and Magisterial Code series in 1970, the Code of Criminal Procedure 1898 was repealed and replaced by the Code of Criminal Procedure 1973, which brought about important changes in the law. This necessitated thorough rechecking of the matter contained in this work, much obsolete matter having to be excised and many paragraphs rewritten, modified, and enlarged. The corresponding sections of the old Code have also been given in the commentary along with the provisions of the new Code.

2. Judicial precedents laid down by the High Courts and the Supreme Court have multiplied, and the case law has had to be brought up-to-date. Several new topics have been introduced under suitable headings, as would be clear from the synopsis of each chapter. The book deals with the investigation of crime, powers of the police, first information report, information in non-cognisable cases, investigation into cognisable cases, procedure, investigation, examination of witnesses, interrogation, hints for evaluation of evidence, use of statement before police, and case diaries. The scope of the last chapter on "Search and Seizure" has been considerably enlarged, particular attention being paid to special laws like the Income-tax Act, the up-to-date legal position being made very clear. Relevant provisions of MISA 1971 and COFEPOSA 1974 have been given, with case law. A dependable guide for-

the legal profession, the Magistrate, and the Police.

R.S.S.

THE LAW OF CARRIERS IN INDIA: (Exhaustive Commentary and up-to-date Indian and Foreign Case-law on the Carriers Act, 1865 with Forms and Precedents on the Subject) with Carriers' Liability under the Indian Penal Code. By A. B. Gandhi of the Middle Temple. Bar-at-law, Advocate. Second Revised Edition, April 1976. Milan Law Publishers, 15/2, Navjivan Society, Bhadkamkar Marg, Bombay. Pp. xxi & 238. Price Rs. 25/-.

This second edition of Mr. Gandhi's book has been thoroughly revised, and new matter like Freight Forwarders, Carrier of Passengers and Special Stipulations as to fire during the journey are added. The main provisions of the International Convention for Carriage of Goods by Road 1956 have been summarised though India is not a party to the Convention. The Rules framed by the Indian Banks Association for the Bank Approved Transporters have also been given, with specimen forms. Indian cases reported in the last three or four years have not been many, and the author has therefore added more English cases on the subject so as to make the treatment as complete as possible.

2. The Law of Carriers is a part of Mercantile Law. Like the Law of Contract, it is part of the Common Law of England as adopted in India with a few modifications here and there. Persons who carry goods or passengers by land, water or air are the Carriers. Among the land carriers, the Railways are governed under Indian Railways Act, 1890 (See the author's *Liability of Railways as Carriers in India*, and the road transport vehicles under the Carriers Act, 1865). Due to the development of road transport, road carriers have of late become very important.

3. The Carriers Act, 1865 has been framed on the lines of the English Carriers Act, 1830, and the commentary on each of the eleven sections of the Act is preceded by an useful synopsis. The book deals also with the criminal liability of the carriers under the Indian Penal Code. An appendix reproduces the English Carriers Act, 1830, and there are also special forms of forwarding note and lorry receipt and a general form of goods forwarding note. The table of cases and the general index add to the usefulness of the Volume.

R.S.S.

THE URBAN LAND (CEILING AND REGULATION) ACT, 1976 (with The Urban Land (Ceiling and Regulation) Rules, 1976). By A. B. Gandhi Bar-at-Law. Advocate, Milan Law Publishers, 15/2 Navjivan Society, Lamington Road, Bombay, pp. 208, Rs. 12/-.

With rapidly increasing urbanisation and unsatiable hunger for the land there has been an acute concentration of land in the hands of a few in urban areas. The Urban Land (Ceiling and Regulation) Act, 1976, which received the President's assent on 17th February, 1976 came into force with effect from that day. Since the Act prohibits any transfer of excess land between the day the bill was introduced (in Parliament i. e. 28.1.1976 the appointed day) and passing of the Act on 17th February, 1976, it is retrospective in effect. The Act came in force immediately in about 12 States mentioned in S. 1 (3) and in all the Union territories at once.

2. The Act provides for imposition of a ceiling on both ownership and possession of vacant land in urban agglomerations (S. 4), the ceiling being on a graded basis according to the classification of the urban agglomerations; acquisition of the excess vacant land by the State Government with powers to dispose of the vacant land to subserve common good (S. 10), payment of an amount for the acquisition of the excess vacant land, in cash and in bonds (Ss. 11, 14), granting exemptions in respect of certain specific categories of vacant land (Ss. 19, 20), regulating the transfer of vacant land within the ceiling limit (Ss. 25, 30), regulating the transfer of urban or urbanizable land with any building for a period of 10 years from the commencement of the Act or the construction of the building, whichever is later (S. 27) restricting the plinth area for the construction of future residential buildings (S. 25) and for other procedural and miscellaneous matters.

3. The work before us is a section-wise commentary on the subject. There has been little time for the case law to be built around the subject. The author has, therefore, made use of analogous case law in dealing with certain topics. The provisions of the Act have been explained in a simple and lucid language by dividing the sections under relevant headings. The book includes rules made under the Act and the notifications issued by the State Governments.

4. The book should prove useful not only to the lawyers but also to the general public.

R.S.K.

COMMENTARIES ON THE URBAN LAND (CEILING AND REGULATION) ACT 1976. With Rules and Regulations. By Justice B. Malik, Chief Justice, Allahabad High Court, (Retd.) and Jagdish Lal, B.A., LL.B. 1976 Law Publishers, Sardar Patel Marg, Allahabad; Pp. viii & 766. Price Rs. 55/-.

The Urban Land (Ceiling and Regulation) Act, 1976 provides for the imposition of a ceiling on vacant land in urban agglomerations, for the acquisition of such land in excess of the ceiling limit, for regulating the construction of buildings on such lands and matters connected with it, with a view to preventing the concentration of Urban land in the hands of a few persons and speculating and profiteering in it, and with a view to bringing about an equitable distribution of land in urban agglomerations to subserve the common good. The Act covers 47 sections and two schedules, and contains provisions relating to ceiling on vacant land, the regulation of transfer and use of urban property, and deals with miscellaneous matters such as the powers of the competent authority, their jurisdiction and Tribunal's jurisdiction in special cases, returns and reports, offences and punishments, and cognisance of offences. Four classes of urban agglomerations have been recognised by the Act, viz. Class A (Ceiling limit 500 square metres), Class B (Ceiling limit 1000 sq. metres), Class C (1500 sq. metres), and Class D (Ceiling limit 2000 sq. metres). The return of excess vacant land has to be filed within a prescribed period.

2. In this book an attempt has been made to collect from several judicial pronouncements of the various High Courts and Supreme Court the meanings and definitions of various words, phrases and expressions used in other Acts according to the context of those Acts. The Rules and Notifications under this Act have been printed in the Appendix, and an exhaustive index at the end of the book provides easy reference.

R.S.S.

SURVEY, SEARCH AND SEIZURE UNDER THE INCOME TAX LAW (April 1976, Edition). By Ram Niwas Lakhota, M. Com., LL.B., Advocate and Tax Consultant, Formerly Senior Income Tax Officer (I. R. S.). Asha Publishing House, Lakhota Niket, Lovelock Place, Calcutta. Pp. xv & 173. Price, Rs. 24/-.

In this book an attempt is made to educate the income-tax payers as well as others about the latest provisions of the Income-tax Act in the matters of Survey and other matters connected with it. The Survey operations recently

conducted by the Department in Bombay, Calcutta, Delhi and other important towns have revealed various activities of the assesseees connected with unaccounted income and tax evasion. The increased power of Survey granted to Income-tax authorities by an amendment effected by the Taxation Laws (Amendment) Act, 1975 is wide enough to cover all defaulting assesseees and to compel them to maintain proper books of account and to keep no cash, stock or other valuable things that are not duly accounted for. When any ceremony or function takes place it is necessary to account properly, for all types of expenditure connected with it, for the authorities are now empowered to institute an inquiry forthwith.

2. All the relevant provisions of the Income-Tax Law relating to searches and seizures, as amended by the Taxation Laws (Amendment) Act, 1975 have been thoroughly explained, together with upto date case law and suitable case references. Income-tax officials have been given increased powers of search and seizure, and recent income-tax raids emphasise the need for strict compliance with the official notices and requirements. The book deals with the dynamic scope of income-tax survey, survey of business premises, of posh residential areas and ownership flats, of marriage functions and social parties, enquiry into hotel and club bills, reasons for search and seizure, procedure and provisional assessment. The remedies against search and seizure and release of retained assets are also covered. Besides an Index of cases, there is also a useful subject index.

3. The book should be of great use to the assesseees and their representatives, including advocates, Chartered accountants, and tax experts. Lucidly written, it should greatly assist in the day-to-day handling of income-tax matters.

R.S.S.

SRINIVASAN'S HINDU LAW OF PARTITION AND INCOME TAX LAW. Revised by Mr. Justice D. D. Seth (Retd.) and Mr. Justice S. C. Manchanda (Retd.) 2nd Edition, revised by the Hon'ble Dr. B. Malik, Chief Justice, Allahabad High Court (Retd.), assisted by an Editorial Board. 1976 Delhi Law House, Allahabad. Pp. xlvii & 584. Price Rs. 55.

Partition converts joint property into separate title and possession and, in a Hindu undivided family, has an impact on the incidence of taxation. As the subject-matter of this book is partition of Hindu Undivided Families and Income-tax law, the broad principles of partition under the Income-tax Act, 1961 are explained; the provision in this regard is

embodied in section 171 of the Act. Chapter 1 deals with partition under Hindu law in general (Sections 96 to 116), and in the other two chapters the author examines partition under income-tax law, Wealth-tax, Gift-Tax and Estate Duty Acts. He deals with the physical division of property to claim benefit under Income Tax Law, and partial partition and its advantages along with various connected matters, and covers various modes and phases of partition as affected by inter-connected provisions including taxation and Hindu Law. The synopsis given at the head of each Section and Chapter is very elaborate and highly useful.

2. Under Income-tax law, enquiry by the I.T.O., must follow the claim of partition. The partition of immovable property can only be effected by dividing the property by metes and bounds, but the rejection of a partition claim can raise many problems for the assesses. The Taxation Laws (Amendment) Act, 1975 has introduced several amendments in the I.T. Act 1961 and they have been duly noted in this book. Certain amendments have been made in the Finance Act, 1976 as well as the Wealth Tax Act and the Gift Tax Act, all of which have been appended in the book. The relevant provisions of the Gold Control Act, 1968 have also been given as they have an impact on the ownership of gold coins and ornaments. Similarly some provisions from the Urban Land (Ceiling and Regulation) Act, 1976 have also been included for general guidance. In order to clarify several important points, passages from judicial pronouncements have been reproduced where necessary. With its table of cases and index, the book should be of value to chartered accountants, income-tax practitioners and others.

R.S.S.

NORTH EASTERN REGION LOCAL ACTS of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh (Civil, Criminal, Labour, Revenue and Taxation). With Rules, Regulations, Orders Commentary and up-to-date Case-law. By Vijay Kumar Dewan, Advocate, Gauhati High Court. Vol. 1. Assam Acquisition of land for Flood Control and Prevention of Erosion Act, 1955 to Civil Supplies Rules (Meghalaya) 1975. With a foreword by the Hon'ble Sri Justice M. C. Pathak, Chief Justice, Gauhati High Court, Orient Law House, P. B. 94, Opposite High Court, Allahabad 1976. Pp. xxiv and 784. Price Rs. 69 per volume (available only in sets of five volumes).

In this first attempt to bring together the important laws in force in the North Eastern Region, care has been taken to make it up-to-date, with appropriate notes including case law. A separate list of the Acts and Rules to be printed in subsequent volumes is given at the beginning of this volume. More than eighty Acts and Rules are given in the present volume; the projected five volumes will contain about three hundred and eighty of these Acts and Rules.

2. The State of Meghalaya was empowered to effect adaptations and modifications of the existing laws and in consequence, it adopted certain Central Acts and Rules of which a separate list is provided in this volume, as well as the Central Acts adopted and made applicable in Nagaland. There is also a separate list of the Bengal Regulations, Regulations under the Government of India Act, 1870, and the Bengal and Assam Acts in force in Nagaland. All the Rules and Acts in force in Manipur and Tripura as well as Mizoram and Arunachal Pradesh are given. The Bar and the Bench should find this and other volumes in the series quite useful.

R.S.S.

LEGISLATION AND CASES ON UNTOUCHABILITY AND SCHEDULED CASTES IN INDIA: By G. S. Sharma, Allied Publishers Private Ltd., 13/14 Asaf Ali Road, New Delhi, 1975; Pp. 157. Price Rs. 20/-.

The Working Group on Law and Social Change of the Indian Council of Social Science Research felt it would be helpful if the scattered material on legislation and case law relating to Scheduled Castes in India was brought together and printed in one small volume, with a brief introduction. And the book before us is the result. This project relates to material collected from the States of Andhra Pradesh, Assam, Bihar, Kerala, Madhya Pradesh, Tamil Nadu, Maharashtra, Karnataka, Orissa, Punjab, Rajasthan and Uttar Pradesh and West Bengal. The material is presented in two parts. The first part contains the constitutional provisions and other relevant enactments. The scheme followed in this part is to outline a classification on the lines of the main provisions of the Untouchability (Offences) Act, 1955. Thus after giving the main provisions of this Act, references have been noted to similar provisions in other Acts. Important statutory provisions which are different from those of the Untouchability (Offences) Act have also been given in detail. The Orders and Rules under the Constitution, Reservations under various Acts, and the protection of interests are also covered.

2. The second part arranges the case law material on the basis of the classification arrived at through a study of the cases. In view of the size of the publication it has not been possible to give verbatim extracts of judgments in every case. The cases are grouped into cases interpreting the meanings of different terms, cases on the constitutionality or validity of the enactments, and of the action taken under them, reservation, elections, and miscellaneous. The majority of the post-Independence cases decided by the Supreme Court and the High Courts are centered on the political reservations for the Scheduled Castes.

3. The book includes an index of cases which is perhaps capable of improvement.

R.S.S.

INDIAN PRESS PROBLEM 3. By B. Radha-krishnamurti, B.A., B.L., Advocate Supreme Court, Indian Law House, 5-43-12, Brodipat, Guntur, 1976. Pp. xix & 295. Price Rs. 25.

The present work deals with journalism and allied topics, with particular reference to the freedom of speech and expression guaranteed by the Indian Constitution. It covers the Copyright Act 1957. The Press Council of India (which has since been abolished), the Press and Registration of Books Act 1867, the Delivery of Books and Newspapers (Public Libraries) Act 1954, and the Working Journalists (Conditions of Service and Miscellaneous Provisions) Act 1955. The last mentioned Act defines a "Working Journalist" as a person whose principal avocation is that of a journalist and who is employed as such in any newspaper establishment, and includes an editor, leader-writer, news editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, newsphotographer, and proof reader. In an appendix to the book relevant extracts are given from the Constitution of India, the Contempt of Courts Act 1971, the Indian Penal Code, the Code of Criminal Procedure, the Indian Official Secrets Act 1923, Prize Competitions Act 1955, Defence and Internal Security Act and Rules 1971, and the Code of Ethics for Journalist and Newspapers.

2. The author examines the provisions made in respect of freedom of the Press in the Constitutions of different countries. In the Indian Constitution, according to Article 19 clause (1) (a), all citizens shall have the right to freedom of speech and expression. This is qualified by clause (2), which authorises legislation restricting such freedom in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality, con-

tempt of Court, defamation, and incitement to an offence. This volume touches many important topics, refers to many statutes, and cites many decided cases, Indian and foreign. It carries a table of cases cited and an index. It should be useful not only to the lawyer and politician but also to the general reader.

R.S.S.

ABORTION LAW IN INDIA: PAST AND PRESENT: By S. R. Singh, and R. K. Raizada, foreword by Prof. Luke T. Lee. Project Consultant: Dr. M. L. Sharma. Family Planning Association of India, Haryana Branch, Bal Vikas Bhawan, 630 Sector 16-D, Chandigarh. 1976. Pp. xxii and 171. Price Rs. 30; \$ 6.

This study on abortion law in India was undertaken in pursuance of the recommendations of the "Regional Youth Seminar on Population Questions" convened by the Family Planning Association of India, Haryana Branch, in 1974. It was thought that the Branch should take up certain projects on socio-legal problems relating to population control.

2. The passing of the Medical Termination of Pregnancy Act 1971 has legalised what was till recently a crime, but no study seems to have come out so far on the impact of the Act as a health or population control measure. This project was therefore undertaken to examine the social, legal and medical aspects of the Act.

3. The project aims at focussing the attention of social scientists and jurists on the different aspects of the working of the Act. Its advantages and shortcomings have been examined and relevant comparative studies made. The study covers the reported case law and conducted original research in cases which have not been reported in any of the law reports.

4. The book deals with the Hindu and Muslim points of view, miscarriage and the penal law, the Constitution and the M. T. P. Act, the M. T. P. Rules and their working. It covers abortion laws and practices in other countries and menstrual regulation (M. R.) as an alternative to abortion, and arrives at certain conclusions and makes suitable suggestions. The study deals with the abortion issue from the historical, religious and cultural perspectives, and tries to open public debate and discussion on the questions raised by it. Besides the bibliography and index, the book carries a table of cases and a table of reports and statutes.

R.S.S.

**Re : Needed : Positivist — Natural Law Rapprochement in India,
A. I. R. 1976 (June) Journal, Pp. 34-39.**

Sir,

In the June, 1976 issue of All India Reporter, a perceptive article entitled : "Needed : Positivist — Natural Law Rapprochement in India" (Pp. Journal 34-39) by Shri Anirudh Prasad Singh has appeared. Needless to say that it provokes thinking.

2. Actuated by the Positivist - Natural Law approach of the author, I have been impelled to offer below a few of my comments which, if you deem proper, you may publish in the A. I. R.

3. While the pros and cons discussed by the author both for a positive Law as well as Natural Law are unexceptionable, and he has supported his views by citing well-known authorities, I am afraid the conclusion drawn by him at the end brings the position to Square No 1. After all, it is now a well-known fact that under our Constitution, three organs, viz., Legislature, Executive and Judiciary had been conceived. According to the thesis of the author, only two are now in active plane viz. Legislature and Judiciary as Legislature encompasses within its scope Executive also in view of the overwhelming majority of one party in the Parliament and State Legislatures. Thus, the tussle or tug-of-war, if one may be permitted the expression, is going on at present between these two wings or organs and without meaning to be disrespectful, one is compelled to the conclusion that the field at the moment is with the Legislature.

4. What further shape constitution takes is difficult to envisage at present, especially when Swaran Singh Committee's Report is actively under discussion at the moment. However, it is presumed that the author was fully aware of the setting up of the above Committee when he was writing and, therefore, could not have been oblivious to the winds of change that are now clearly blowing on the horizon. The powers of Judiciary are going to be drastically curtailed or restricted under the proposed dispensation and hence the analysis of the author would lose much of its relevance in the changed context. In view of this, I feel (and I have already sent this suggestion to

the Prime Minister's Secretariat in view of her appeal in the Press to Intellectuals, Lawyers, Jurists, etc., to offer their suggestions regarding the changes that may be made in the Constitution) that a fourth limb or organ now requires to be conceived. This, I propose, should be a *Standing Committee for Review of the Constitution* composed of eminent Legislators, Parliamentarians, Policy-makers, Public Affairs people, Jurists, Lawyers, Intellectuals, Analysts, and Writers, etc. This Standing Committee will not only provide the co-ordinating link between the three organs but will also oversee their functioning (insofar as constitutional provisions are concerned) and harmonize their respective roles in cases of conflict, etc., so that they all function in unison. I quote below an excerpt from the said letter of mine to the Prime Minister's Secretariat :

"In its wisdom and in its pragmatic approach, through conventions and usage, the Standing Committee for Review of the Constitution can not only help the various contesting parties understand each other's point of view and difficulties but can also bring about a smooth transition and change without acrimony and bitterness and can at the same time convince an ordinary elector and other members of the public as well as other friendly nations that no violent change is being sought or wrought in our body-politic. In any case there will then be no such writings as "Constitution-Debased and Defiled".

5. The above views of mine are being sent to you as I consider them to be of a scientific nature only and not politically motivated. Being a Government Servant, I have only clarified the above position under the Rules of the Government of India.

Yours truly,

A. K. Malhotra

Assistant Director,
Labour Bureau,
Ministry of Labour,
Government of India,
"Cleremont",
SIMLA-171004.

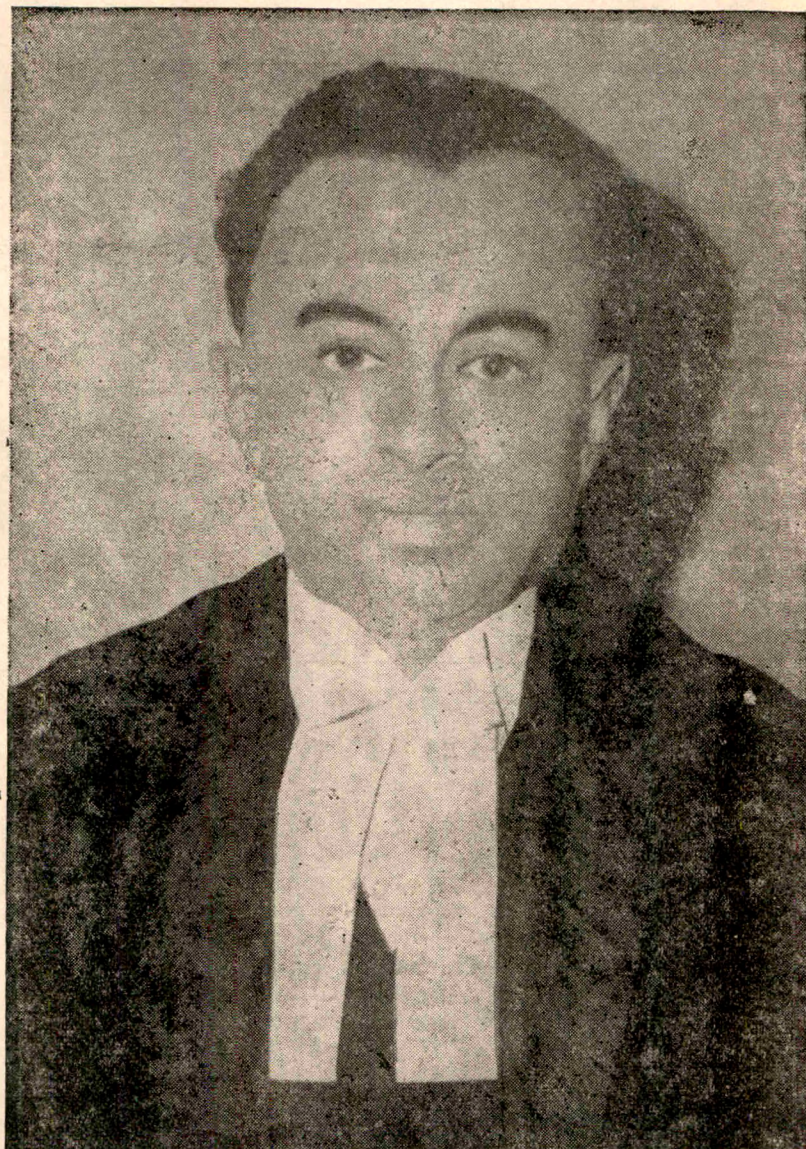
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Dated 8th August,
1976

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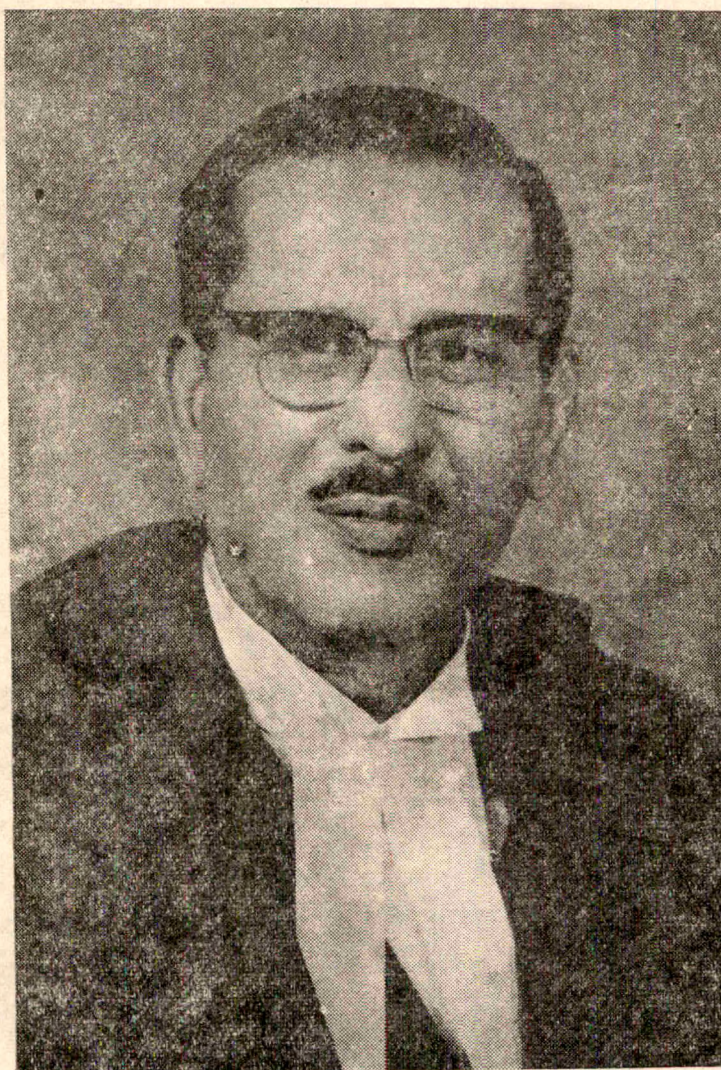
THE URBAN LAND (CEILING AND REGULATION) ACT, 1976. (With Rules and Comparative Study of Karnataka State Act No. 36 of 1975). By Shri G. H.

Kulkarni, B.A., LL.B., Advocate, and Shri P. V. Dhareshwar, B.Sc., M.A., LL.B., Advocate, 246; Ranade Road, Tilakwadi, Belgaum, Pp. xvi-120, Price Rs. 10/-.

R.S.K.



The Hon'ble Mr. Justice
D. M. CHANDRASHEKHAR,
Judge, Allahabad High Court.



The Hon'ble Mr. Justice
KRISHNA BALABH NARAYAN SINGH
Chief Justice, Patna High Court.

June 1, 1958 to December 31, 1965 is justified.

33. So far as the demand for royalty at 5% of F. O. R. price of coal for the period prior to June 1, 1958 — the date on which the 1957 Act came into force — is concerned, we are of opinion that it is not justified in view of the fact that Rule 41 of the Mineral Concession Rules, 1949 applied only to contractual leases envisaged by Chapter IV of the said Rules (which were made inter alia for regulating the grant of mining leases in respect of any mineral) and not to the statutory leases which came into existence as a result of the deeming provision embodied in Section 10 of the Bihar Land Reforms Act. This view is in accord with the decision of this Court in Chhatu Ram's case (1968) 2 SCR 881 = (AIR 1969 SC 177) (supra) where dealing with R. 40 of the Mineral Concession Rules, 1949 which relates to the period of lease, Shah, J. who delivered the judgment of the Court observed that the rule manifestly applied to grants made by the Government and had no application to statutory leases arising by reason of Section 10 of the Bihar Land Reforms Act. We, therefore, find ourselves in complete agreement with the High Court that the claim for royalty for the period prior to June 1, 1958, is wholly unfounded and cannot be supported.

34. So far as the demand for royalty for the period beginning with June 1, 1958 and ending with December 31, 1965 is concerned, we are of the opinion that no exception can be taken to the view expressed in this behalf by the High Court in its judgment under appeal. This becomes abundantly clear from a close scrutiny of Section 30-A (supra) of the 1957 Act, the provisions whereof may usefully be recalled at this stage. Before examining, however, Section 30-A, it would be profitable to advert to Section 9 (supra) of the Act. This section, it would be seen consists of three parts. Sub-section (1) casts a liability on the holder of a mining lease granted before June 1, 1958 — the date of the commencement of the Act — to pay royalty in respect of any mineral removed by him from the leased area after that date at the rate for the time being specified in the Second Schedule, notwithstanding anything contained in the instrument of lease or in any law in force on the aforesaid date of the commencement of the Act. Sub-section (2) makes also the holder of

a mining lease granted on or after June 1, 1958 liable to pay royalty in respect of any mineral removed by him from the leased area at the rate for the time being specified in the Second Schedule. Sub-section (3) empowers the Central Government to amend the Second Schedule and enhance or reduce the rate of royalty in respect of any mineral by issue of a notification subject to the restriction contained in the proviso to this sub-section. Section 30-A which, as is evident from its opening words, has an overriding effect on the other provisions of the Act affords a temporary protection from applicability of Section 9 (1) and Section 16 (1) of the Act not only to the leases granted before October 25, 1949, but also to the statutory leases which came into existence as a result of the operation of Section 10 (1) of the Bihar Land Reforms Act and replaced the former category of leases subsisting immediately before the date of vesting in the State of the estates or tenures on the publication of the notifications under Sections 3 and 3-A of the Bihar Land Reforms Act. This conclusion irresistibly flows from the words "or in relation to" occurring in Section 30-A of the 1957 Act after the words "shall not apply to" and before the words "mining leases granted before the 25th day of October, 1949". The aforesaid words which are of great significance enlarge the scope of Section 30-A and bring within the umbrella of its protection the mining leases granted before October 25, 1949 as also the statutory leases which sprang up in their place by virtue of the legal fiction contained in Section 10 (1) of the Bihar Land Reforms Act on the vesting in the State of the estates or tenures. As expressly ordained by sub-sections (1) and (2) of Section 10 of the Bihar Land Reforms Act, not only the holder of a statutory lease had to be the same as the holder of a subsisting lease for the remainder of the term of that lease but the terms and conditions of the statutory lease had also mutatis mutandis to be the same as the terms and conditions of the subsisting lease i.e. the original lease except to the extent mentioned in sub-section (2). Thus the statutory lease being inextricably linked up with the aforesaid subsisting lease which it replaced as a result of the aforesaid provisions of the Act came within the purview of Section 30-A of the 1957 Act. The interpretation sought to be placed by the appellants on the phraseology of Section 30-A of the 1957 Act cannot be ac-

cepted as it would unduly restrict and limit the scope of that section and defeat the object which it was intended to effectuate viz. to mitigate the rigour of liability for payment of royalty under Section 9 of the 1957 Act at the rate specified in the Second Schedule in respect of the coal removed from the leased area after the commencement of the Act. If as contended by the appellants, the protection envisaged by Section 30-A is restricted to the leases granted before October 25, 1949, Section 30-A would be rendered nugatory because on the coming into being of the statutory leases as a result of Section 10 (1) of the Bihar Land Reforms Act, there would hardly be left any mining lease to which Section 30-A of the 1957 Act would be applicable. Thus there can be no room for doubt that the Legislature intended that Sec. 30-A of the 1957 Act should cover the aforesaid statutory leases as well. It will be apposite in this connection to refer to the following statement of objects and reasons given in the Bill which sought to introduce Section 30-A in the 1957 Act with retrospective effect which can be usefully resorted to for ascertaining the true scope of Section 30-A and the extent of the protection afforded by it:—

"..... It is considered that these changes will have numerous undesirable consequences. The areas covered by these mining leases are principally in West Bengal and Bihar and they account for as much as 80 per cent of the total coal production in the country. The royalties paid on this coal vary over a wide range but are generally much below the rate per ton prescribed in the Second Schedule. A sudden and uniform increase of these royalties is likely to have an unsettling effect on the industry and may retard the programme of coal production under the Second Five Year Plan"

35. Thus the above discussion makes it crystal clear that the statutory mining leases in respect of coal which sprang up under Section 10 (1) of the Bihar Land Reforms Act also acquired a temporary immunity from the applicability of Sections 9 (1) and 16 (1) of the Act until the Central Government came out with a notification making the said provisions applicable with or without modification to these leases. Accordingly, we have no hesitation in holding in agreement with the High Court that the further demand for royalty for the second

period indicated above cannot also be sustained.

36. For the foregoing reasons, we find no force in these appeals which are dismissed. In the circumstances of the case, the parties are left to pay and bear their own costs of these appeals.

Appeals dismissed.

AIR 1976 SUPREME COURT 1986

(From: (1970) 1 Mad LJ 19)

A. N. RAY, C. J., M. H. BEG,
R. S. SARKARIA, P. N.
SHINGHAL AND JASWANT
SINGH, JJ.

S. Narayan Iyer, Appellant v.
The Union of India and another,
Respondents.

Civil Appeal No. 325 of 1970,
D/- 30-4-1976.

(A) Constitution of India, Article 226 — Writ petition challenging telephone rates as unjust and unreasonable — Not maintainable — (Telegraph Act (1885) S. 7).

The Courts have no jurisdiction under Article 226 to go into reasonableness of Telephone Tariff Rates. These rates are decided as policy matter in fiscal planning. There is legislative prescription of rates. Rates are a matter for legislative judgment and not for judicial determination.

(Para 7)

There are three principal reasons why the writ petition is incompetent and not maintainable. First, when any subscriber to a telephone enters into a contract with the State, the subscriber has the option to enter into a contract or not. If he does so, he has to pay the rates which are charged by the State for installation. A subscriber cannot say that the rates are not fair. No one is compelling one to subscribe. Second, Telephone Tariff is subordinate legislation and a legislative process. Under Telegraph Act, S. 7 empowers the Central Government to make rules inter alia for rates. These rules are laid before each House of Parliament. The rules take effect when

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they are passed by the Parliament. Third, the question of rates is first gone into by the Tariff Enquiry Committee. The Committee is headed by non-officials. The Tariff rates are placed before the House in the shape of Budget proposals. The Parliament goes into all the Budget proposals. The rates are sanctioned by the Parliament. The rates, therefore, become a legislative policy as well as a legislative process.

(Para 6)

Mr. K. S. Ramamurthy, Sr. Advocate, (M/s. K. Jayaram and R. Chandrashekhar, Advocates with him), for Appellant; Mr. L. N. Sinha Solicitor General of India, (M/s S. N. Prasad and Mr. Girish Chandra, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

RAY, C. J.:— This appeal is by certificate from the judgment dated 28 March 1969 of the High Court of Madras. The question in this appeal is whether the appellant in a writ petition can challenge the telephone rates and charges and obtain any relief in that behalf.

2. The appellant is a retired District Manager (Telephones), Madras. He filed a writ petition in the High Court for a writ of prohibition, directing the General Manager (Telephones), Madras to forbear from enforcing the revised Telephone Tariff as per the Indian Telegraph Amendment Rules, 1966. Under the rules, the rental and call charges were increased by 50 per cent and Trunk call charges by about 30 to 35 per cent. The petitioner alleged that the telephone system is a public utility service and not a Revenue earning establishment and the charges can be only in the nature of a fee which must be commensurate with the cost of rendering the service. The petitioner further alleged that the loss incurred by the Government in another establishment service is not a legitimate ground for raising telephone rates.

3. The trial Court held that Telephone Tariff was unjust and unreasonable. The trial Court allowed the writ petition.

4. The High Court on appeal held that the High Court could not interfere with the Tariff. The High Court said that the principle upon which public utility rates regulation as has developed in the United States is not applicable here in our country.

5. It should be said at the outset that there was some discussion in the judgment on Article 19 but counsel for the appellant properly abandoned any reference to Art. 19. The appellant's contentions are three. First, the expression "rates" in Section 7 (2) of the Indian Telegraph Act means rates which are to be determined should be fair, just and reasonable from the point of view of both the consumer and the producer. Second, the Court has jurisdiction to determine whether the rates fixed by the Government are reasonable. Third, the rates are increased expressly for the purpose of off-setting the losses in the Post and Telegraph Services. If a proper allocation is made according to proper commercial accounting it will be found that there is a wrongful deduction of crores of rupees as revenue expense and unlawful debit. These errors in the accounting have resulted in reducing the profits earned by the Telephones.

6. There are three principal reasons why the writ petition is incompetent and not maintainable and the appeal should fail. First, when any subscriber to a telephone enters into a contract with the State, the subscriber has the option to enter into a contract or not. If he does so, he has to pay the rates which are charged by the State for installation. A subscriber cannot say that the rates are not fair. No one is compelling one to subscribe. Second, Telephone Tariff is subordinate legislation and a legislative process. Under Indian Telegraph Act, Section 7 empowers the Central Government to make rules inter alia for rates. These rules are laid before each House of Parliament. The rules take effect when they are passed by the Parliament. Third, the question of rates is first gone into by the Tariff Enquiry Committee. The Committee

is headed by non-officials. The Tariff rates are placed before the House in the shape of Budget proposals. The Parliament goes into all the Budget proposals. The rates are sanctioned by the Parliament. The rates, therefore, become a legislative policy as well as a legislative process.

7. The Courts have no jurisdiction under Article 226 to go into reasonableness of rates. These rates are decided as policy matter in fiscal planning. There is legislative prescription of rates. Rates are a matter for legislative judgment and not for judicial determination.

8. The appeal is dismissed. There will be no order as to costs.
Appeal dismissed.

AIR 1976 SUPREME COURT 1988

(From: Allahabad)*

Y. V. CHANDRACHUD AND V. R. KRISHNA IYER, JJ.

M/s. Tirlok Singh and Co., Appellant v. District Magistrate, Lucknow and others, Respondents.

Civil Appeal No. 1093 of 1975, D/- 23-3-1976.

(A) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Ss. 12 (4) and 16 — U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, (1972), R. 8 — 'Notifying the vacancy' — District Magistrate obtaining report from Rent Control Inspector and directing the vacancy to be notified — Order passed without affording a hearing to tenants is not illegal — Writ petition against that order is premature — Alternative remedies are available under the Act. (Constitution of India, Article 226.)

It is unnecessary for the District Magistrate acting as a Rent Controller to hear the landlord or the tenants as the case may be before notifying the vacancy because under the scheme of the U. P. Rent Act, an order notifying the vacancy does

no injury and causes no prejudice to the interests of any party. A notification of the vacancy is a step-in-aid of an order of allotment or release and it is only when such an order of allotment or release is passed that the landlord or the tenant, as the case may be, can have a grievance. Orders of allotment and release are, in the first instance, reviewable by the District Magistrate himself and an order passed by the District Magistrate under Section 16 is appealable under S. 18.

(Paras 8, 10)

The Act thus contemplates successive opportunities being afforded to persons whose interests are likely to be affected by any order passed by the District Magistrate. Putting it briefly, an order notifying the vacancy can be objected to and the objection has to be decided after considering the evidence that the objector or any other person concerned may adduce. Secondly if an order of allotment or release is passed under Section 16, followed upon the notification of a vacancy, the aggrieved person can file a review application. Thirdly, as against an order passed under Section 16, there is a right to appeal under Section 18. (Para 12)

Therefore, the writ petition against an order of the District Magistrate directing the vacancy to be notified is premature in the sense that it does not affect the interest of the tenants (in the instant case) in the particular premises.

(Para 13)

M/s. S. C. Malik, S. K. Mehta, K. R. Nagaraja and P. N. Puri, Advocates, for Appellant; Mr. S. T. Desai, Sr. Advocate and Mr. N. L. Verma, Advocate with him, for Respondent Nos. 2 and 3.

Judgment of the Court was delivered by

CHANDRACHUD, J.:— This appeal by special leave raises a short, though important question under the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 13 of 1972.

2. Respondents 2 and 3 filed an application under Section 16 (1) (b) of the Act for the 'release' of certain residential premises of which

*(Writ Petn. No. 673 of 1974, D/- 7-8-1974—(All.—L. B.)).

the appellants claim to be their tenants. Respondent 1, acting as a Rent Controller, directed a Senior Inspector to inspect the premises and make a report. Accordingly, the Senior Inspector inspected the premises and submitted a report on April 9, 1974 stating: "After hearing the parties it would be proper to take further action." The Senior Inspector seems to have found that the premises were in occupation of 3 persons two of whom claimed to be partners of the appellant-firm M/s. Tirlok Singh and Co. On receipt of the report respondent 1 passed the impugned order, "Let the vacancy be notified", admittedly without granting any hearing to the appellants.

3. On May 23, 1974 the appellants filed a writ petition in the High Court of Allahabad challenging the aforesaid order on the ground that it was passed in violation of the principles of natural justice. Pending admission of the writ petition the High Court stayed further proceedings consequent on the order. On August 7, 1974, a Division Bench of the High Court rejected the writ petition summarily, with a brief speaking order. It felt that the writ petition was premature and that the proper remedy for the appellants was to approach respondent 1 under Section 16 (5) (a) of the Act for review of the order directing that the vacancy be notified.

4. In April, 1975 the appellants filed a petition for special leave in this Court against the order of the High Court but during the pendency of that petition, respondent 1 issued a notice to the appellants stating that the release application filed by respondents 2 and 3 would be taken up for hearing on May 19. On May 21, 1975 respondent 1 passed a release order and, though moved in that behalf by the appellants, refused to stay further proceedings. On May 30, 1975 the appellants filed an appeal against the release order to the District Judge, Lucknow who has stayed further proceedings. That appeal is pending.

5. The narrow question for determination is whether the order passed by respondent 1 on May 20,

1974 directing that the vacancy be notified is illegal for the reason that it was passed without affording a hearing to the appellants. This question incidentally involves an inquiry into the correctness of the view expressed by the High Court that the writ petition filed by the appellants was premature.

6. It is necessary for a proper appreciation of the controversy involved in this appeal to understand the scheme of the U. P. Rent Act, 13 of 1972. Chapter III entitled "Regulation of Letting" provides by Section 12 (1) that a landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if (a) he has substantially removed his effects therefrom, or (b) he has allowed it to be occupied by any person who is not a member of his family, or (c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere. By Section 12 (4), any building or part of a building which a landlord or a tenant has ceased to occupy shall be deemed to be vacant. By Section 13, where a landlord or a tenant ceases to occupy a building no person can occupy it otherwise than under an order of allotment or release passed under Section 16. Section 15 imposes an obligation on every landlord to give notice of the vacancy to the District Magistrate whenever a building falls vacant.

7. Section 16 which deals with allotment and release of vacant buildings provides by sub-section (1) (a) that the District Magistrate may by order require the landlord to let any vacant building to any person specified in the order, to be called an allotment order. Section 16 (1) (b) empowers the District Magistrate to pass a release order directing that the whole or any part of such building may be released in favour of the landlord. By reason of Sec. 16 (2), no release order can be passed under Section 16 (1) (b) unless the District Magistrate is satisfied that the building is required by the landlord bona fide for occupation by himself or any member of his family or

for any of the purposes specified in the sub-section. By Section 16 (5) (a), where the landlord or any other person claiming to be a lawful occupant of the building comprised in the order of allotment or release satisfies the District Magistrate that such an order was not made in accordance with clause (a) or clause (b) of Section 16 (1), the District Magistrate may review the order. If the District Magistrate on review sets aside or modifies the order of allotment or release, he is empowered under Section 16 (5) (b) to put the applicant, if already evicted, back into possession. Section 18 which provides for an appeal against an order of allotment or release says that any person aggrieved by an order of allotment or release passed under Section 16 may prefer an appeal to the District Judge. If the order of allotment or release is varied or rescinded by the District Judge, the District Magistrate under Sec. 18 (2) has the power to place the parties back in the position which they would have occupied but for such order.

8. A study of these provisions shows the untenability of the appellant's contention as regards the illegality of the order passed by respondent 1. Chapter III of the U. P. Rent Act casts an obligation both on the landlord and the tenant to intimate a vacancy to the District Magistrate. A vacancy is to be deemed to have occurred in the circumstances specified in Section 12. On the intimation of a vacancy or otherwise, the District Magistrate may under Section 16 pass either an order allotting the premises to a person specified by him or he can release the vacancy in favour of the landlord on being satisfied that he requires the premises for the purposes mentioned in Section 16 (2). The Act does not provide for a hearing at the stage when the District Magistrate passes an order of allotment or release. But any person aggrieved by such an order is entitled under Section 16 (5) (a) to ask the District Magistrate to review his order. If, in the meanwhile, any person in possession of the premises has been evicted, the District Magistrate has the power, if he sets aside

or modifies the order of allotment or release, to put the applicant back in possession. Further an order passed under Section 16 is appealable under Section 18 which means that a person aggrieved by an order of allotment or release has at least a two-fold opportunity to challenge an order affecting his interest.

9. The order dated May 20, 1974 passed by respondent 1 to the effect "let the vacancy be notified" is not by itself and without more calculated to injure or affect the appellant's interest. As a sequel to that order and after the High Court rejected the appellants' writ petition, respondent 1 served a notice on the appellants stating that the proceeding would be taken up for hearing on May 19, 1975. The release order was eventually passed on May 21 after hearing the appellants and they have filed an appeal against that order before the District Judge who is entitled to examine the legality and propriety of the order.

10. Thus, in the first place, it was unnecessary for respondent 1 to hear the appellants before notifying the vacancy because under the scheme of the U. P. Rent Act, an order notifying the vacancy does no injury and causes no prejudice to the interests of any party. A notification of the vacancy is a step-in-aid of an order of allotment or release and it is only when such an order of allotment or release is passed that the landlord or the tenant, as the case may be, can have a grievance. Orders of allotment and release are, in the first instance, reviewable by the District Magistrate himself and an order passed by the District Magistrate under Section 16 is appealable under Section 18.

11. A reference to the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 would be relevant and useful in this behalf. Rule 3 (1) called "Ascertainment of Vacancy" enjoins the District Magistrate, before making an order of allotment or release in respect of any building which is alleged to be vacant, to obtain a report from the Rent Control Inspector. Under Rule 8 (2), the Inspector is required to inspect the building as

far as possible in the presence of the parties and submit the report to the District Magistrate after eliciting the necessary facts. Rule 8 (2) requires that the conclusion contained in the inspector's report must be posted on the notice board of the District Magistrate's office for the information of the general public. This is what is meant by "notifying the vacancy" and this explains the order passed by the District Magistrate: "Let the vacancy be notified". The existence of the vacancy, by being displayed on the District Magistrate's notice board, is notified to the general public in order that persons interested in the allotment of the vacancy may apply to the District Magistrate in that behalf. Under Rule 8 (2), an order of allotment can be passed not before the expiration of 3 days from the date on which the vacancy is notified and if in the meantime any objection is received, not before the disposal of such objection under Rule 8 (3), an objection to the notification of the vacancy has to be decided after considering any evidence that the objector or any other person may adduce.

12. The Act thus contemplates successive opportunities being afforded to persons whose interests are likely to be affected by any order passed by the District Magistrate. Putting it briefly, an order notifying the vacancy can be objected to and the objection has to be decided after considering the evidence that the objector or any other person concerned may adduce. Secondly, if an order of allotment or release is passed under Section 16, following upon the notification of a vacancy, the aggrieved person can file a review application. Thirdly, as against an order passed under Section 16, there is a right of appeal under Section 18.

13. The High Court was therefore right in expressing the view that the appellants' writ petition was premature. The writ petition was premature in the sense that the order impugned thereby did not affect the appellants' interest in the particular premises. The appellants have since filed an appeal against the order of release to the District Judge

and that appeal is pending. That is the proper forum for adjudicating on the rival claims of the appellants on one hand and respondents 2 and 3 on the other.

14. The appeal is accordingly dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 1991

(From: Himachal Pradesh)

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Kakoo, Appellant v. The State of Himachal Pradesh, Respondent.

Criminal Appeal No. 375 of 1975, D/- 27-2-1976.

(A) Penal Code (1860), S. 376 — Rape on a child of two years by appellant who was hardly 13 years of age — Sentence — An inordinately long prison term is sure to turn him into an obdurate criminal — Sentence of four years' R. I. reduced to one year's R. I. with a fine of Rs. 2000.

(Paras 4 and 5)

Kohli, for Appellant.

Judgment of the Court was delivered by

SARKARIA, J.:— Kakoo, aged 13 years, was convicted for committing rape on a child of two years and was sentenced to four years' rigorous imprisonment. His conviction has been maintained by the High Court of Himachal Pradesh. Kakoo appeals to this Court by special leave granted under Article 136 of the Constitution, limited to the point of sentence.

2. Mr. Kohli, appearing for the appellant submits that if the main object of punishment is to reform the prisoner and to reclaim him to society, the prolonged detention of the minor appellant in the company of hardened criminals would surely be subversive of that object. It is stressed that at the time of commission of the crime the appellant was only 13 years of age and the best way of reforming this child delinquent is to put him back under the supervision of his father subject to the execution of a bond by the latter for his son's good behaviour for

a certain period. In the alternative, it is urged, that the sentence be reduced to the imprisonment already undergone, with the imposition, if at all, of a little fine. Reference has also been made to Sections 82 and 83 of the Penal Code to bring out the point that in the matter of crime and punishment, a child offender is not to be treated in the same manner as a mature adult.

3. Learned counsel for the State however, stoutly opposes any reduction in the sentence. Stress has been laid on the grisly manner in which the crime was committed. It is pointed out that the appellant was so persistent in his shameless nefarious act that he had virtually to be dragged away from the helpless baby victim, he put up a fierce struggle with the mother of the victim when she tried to secure him.

4. While the sordid features of the case, including the sadistic manner in which the crime was committed by their instinctive reaction tend to steel the heart of law for a sterner sentence, we cannot overlook the stark fact that at the time of commission of the offence, the appellant was hardly 13 years of age. An inordinately long prison term is sure to turn him into an obdurate criminal. In the case of child offenders, current penological trends command a more humanitarian approach. Under the Penal Code, an infant under seven is conclusively presumed to be incapable of committing crime. At this age he is not endowed with any discretion to distinguish right from wrong (S. 82). Even a child between seven and twelve who may not have attained sufficient maturity of understanding to entertain a criminal intent (*doli incapax*), is presumed to be incapable of committing an offence (Section 83). In several States of India enactments have been passed to treat juvenile offenders or child delinquents differently in the matter of crime and punishment. We are told that there is no such enactment in force in Himachal Pradesh.

5. Taking into account all the circumstances of the case, we are of opinion that the ends of justice will

be served by reducing the sentence of the appellant to one year's rigorous imprisonment and a fine of Rupees 2,000/-, and in default of payment of fine, to suffer six months' further rigorous imprisonment. The appellant shall be detained separately from adult prisoners. He should preferably be detained in a Reformatory School, if any, for the said period. The fine, if realised, shall be paid as compensation to Shrimati Parmeshwari Devi, the mother of the victim baby.

Order accordingly.

AIR 1976 SUPREME COURT 1992

(From: Bombay)*

M. H. BEG AND P. K. GOSWAMI,
JJ.

Munir Sayed Ibna Hussain, Appellant v. The State of Maharashtra and another, Respondents.

Criminal Appeal No. 191 of 1971,
D/- 12-11-1975.

(A) Criminal P. C. (1898), S. 421 — Summary rejection of appeal — Duty of High Court — Case involving arguable points — Should not be dismissed summarily without giving reasons — (Constitution of India, Article 141).

The power of summary rejection of a criminal 1st appeal under Section 421 should be only exercised when the Court is satisfied, from a perusal of the judgment as well as the record, that there is absolutely no reasonable possibility of its success for the reasons mentioned in the order. In cases where there are arguable points, the High Court should give its grounds and reasons in support of its decision to reject summarily on some absolutely clinching ground. AIR 1953 SC 282, AIR 1974 SC 274, AIR 1973 SC 1222 and AIR 1973 SC 243, Ref. (Practice of Bombay High Court in not giving reasons when summarily dismissing criminal appeals which lie both on questions of fact and law, disapproved.) (Paras 2, 3)

*(Criminal Appeal No. 683 of 1971,
D/- 15-7-1971—(Bom.)).

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In any case, the law having been declared by the Supreme Court it is the duty of the Bombay High Court to act in accordance with Article 141 of the Constitution and to apply it by giving proper reasons to justify whatever be its view.

(Para 4)

(B) Constitution of India, Article 136 — Appeal by special leave — Dismissal of appeal in limine by High Court without giving any reasons — Order set aside and appeal remanded for disposal according to law.

(Para 5)

Cases Referred: Chronological Paras
 AIR 1974 SC 274 = (1974) 3 SCC 404 = 1974 Cri LJ 330 3
 AIR 1973 SC 243 = (1973) 3 SCC 299 = 1973 Cri LJ 284 3
 AIR 1973 SC 1222 = (1973) 1 SCC 702 = 1973 Cri LJ 993 3
 AIR 1953 SC 282 = 1953 SCR 809 = 1953 Cri LJ 1127 3

M/s. Ramamurthi and Co., (R. K. Garg, S. C. Agarwal and V. J. Francis, Advocates), for Appellant; Mr. B. D. Sharma (C. A.), for No. 1; Mr. Vineet Kumar, for No. 2, for Respondents.

Judgment of the Court was delivered by

BEG, J.:— The allegations, on questions of fact raised in the appeal now before us, were quite unusual. The judgment of a Division Bench of the High Court of Bombay in Criminal Appeal No. 683 of 1971 in respect of co-accused Syed Ali Naki Bade Hasan, who was acquitted on 25-2-1972, shows the nature of allegations made by the prosecutor in this case. On those allegations, it became necessary to consider whether the accused, who had been put on trial together with six others, was actually in possession of a hotel. The appellant claimed to be the owner of a hotel of which Jagannath, complainant, was said to be the manager. The case of the Manager was that he had been forcefully dispossessed by the accused and that certain properties belonging to him and others, including some money, were mis-appropriated by the accused. Therefore, the appellant and five others were charged under Section 395, Indian Penal Code as well as under Section 452 read with Sec. 34,

I. P. C. According to the accused, Shri Jagannath and his brother, the complainant, were only licencees. However, these are questions relating to the merits of a case in which the trial Court had acquitted accused numbers 3 to 8 and the High Court acquitted accused No. 2. The appeal of the only remaining accused No. 1 who is the appellant before us by special leave was, however, rejected in limine by the High Court without giving any reasons for the rejection.

2. There is a whole catena of cases which have come up here from the Bombay High Court in which this Court has consistently disapproved of the practice followed by the Bombay High Court of not giving reasons when exercising its power of summary dismissal of criminal appeals which lie both on questions of fact and law. In other High Courts, such appeals are automatically admitted. In any case, it is not possible for this Court to exercise its powers satisfactorily without giving an appellant, who may have an arguable case an opportunity of first presenting his case to the High Court and getting a decision from it.

3. The power of a summary rejection of a criminal 1st appeal, even though it is exercisable under the provisions of Section 421, Criminal Procedure Code, should, in our opinion, be only exercised when the Court is satisfied, from a perusal of the judgment as well as the record, that there is absolutely no reasonable possibility of its success for the reasons mentioned in the order. In a case such as the one now before us, it cannot be said that there are no such arguable points that, after the High Court had an opportunity of fully considering both sides of the case, it must necessarily dismiss the appeal. At least, in such cases, where there are arguable points, the High Court should give its grounds and reasons in support of its decision to reject summarily on some absolutely clinching ground. This Court has laid down the duty upon the High Court to record reasons. (See: *Mush-tak Hussain v. The State of Bombay*, 1953 SCR 809 = (AIR 1953 SC 282) *Krishna Vithu Suroshe v. State of Maharashtra*, (1974) 3 SCC 404 =

(AIR 1974 SC 274) Mustaq Ahmed Mohmed Hussain v. State of Gujarat, (1973) 1 SCC 702 = (AIR 1973 SC 1222); Kapurchand Kesrimal Jain v. State of Maharashtra, (1973) 3 SCC 299 = (AIR 1973 SC 243).

4. It is difficult to believe that judgments of this Court have neither come to the knowledge of the Bombay High Court nor were cited on behalf of the appellant. In any case, the law having been declared by this Court it is the duty of the Bombay High Court to act in accordance with article 141 of the Constitution and to apply it by giving proper reasons to justify whatever be its view.

5. Accordingly, we allow the appeal and set aside the order of the High Court rejecting the appeal summarily and order that the case will be treated as admitted for regular hearing of both sides by the Bombay High Court and disposed in accordance with the law.

Appeal allowed.

AIR 1976 SUPREME COURT 1994

(From: Andhra Pradesh)*

A. C. GUPTA AND S. MURTAZA
FAZL ALI, JJ.

K. Ramachandra Reddy and another, Appellants v. The Public Prosecutor, Respondent.

Criminal Appeal No. 143 of 1975,
D/- 5-5-1976.

(A) Evidence Act (1872), S. 32 — Dying declaration — Admissibility — Factors on which Court must be satisfied — Conviction solely on its basis — When permissible. Criminal Appeal No. 583 and CMP. Nos. 102-103 of 1975, D/- 18-2-1975 (Andh. Pra), Reversed.

The dying declaration is undoubtedly admissible under Section 32 and not being a statement on oath so that its truth could be tested by

*(Criminal Appeal No. 583 and C. M. P. Nos. 102-103 of 1975, D/- 18-2-1975—(Andh. Pra.)).

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cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person, yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. (Para 6)

A dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. AIR 1958 SC 22, Rel. on. (Para 6)

One of the important tests of the reliability of a dying declaration is

that the person who recorded it must be satisfied that the deceased was in a fit state of mind. AIR 1972 SC 1776, Rel. on. (Para 6)

Held: Having regard to the surrounding circumstances, it would be extremely unsafe to place any reliance on the dying declaration and to found the conviction of the appellants on its basis, particularly in view of the conduct of the deceased in not making any disclosure regarding the occurrence on the three previous occasions when he had a full and complete opportunity to name his assailants and in view of the omission by the Magistrate in not putting a direct question to the deceased regarding the mental condition of the injured when he was satisfied that the injured was suffering from severe pain and was not able to speak normally. Criminal Appeal No. 583 and CMP Nos. 102-103 of 1975, D/- 18-2-1975 (Andh. Pra.), Reversed.

(Paras 10, 11, 12)

(B) Criminal P. C. (1898), S. 423
— Appeal against acquittal — Appreciation of evidence by High Court — Held as two views of the evidence were reasonably possible, High Court was in error in disturbing finding of acquittal. AIR 1974 SC 606, Followed. Criminal Appeal No. 583 and CMP Nos. 102-103 of 1975, D/- 18-2-1975 (Andh. Pra.), Reversed.

(Para 13)

Cases Referred: Chronological Paras

AIR 1974 SC 606 = (1974) 3 SCR 9 = 1974 Cri LJ 479 13
AIR 1972 SC 1776 = (1971) 3 SCC 767 = 1972 Cri LJ 828 6, 11
AIR 1970 SC 1566 = (1971) 1 SCR 599 = 1970 Cri LJ 1415 6
AIR 1962 SC 439 = 1962 Supp (1) SCR 104 = 1962 (1) Cri LJ 479 6
AIR 1958 SC 22 = 1958 SCR 552 = 1958 Cri LJ 106 6, 12

Mr. D. Mookherjee, Sr. Advocate, Mr. A. V. V. Nair, Advocate with him, for Appellants; Mr. P. Ram Reddy Sr. Advocate and Mr. P. Parameshwara Rao, Advocate with him, for Respondent.

The Judgment of the Court was delivered by

FAZL ALI, J.:— Five accused persons, namely, accused No. 1 K. Ramachandra Reddy, No. 2 Manne

Sreehari, No. 3 Prabhakar Reddy, No. 4 Sudhakara Reddy and No. 5 Bhaskar Reddy were put on trial in the Court of First Additional Sessions Judge, Nellore under Sections 147, 148, 302/149 and 302/34, I. P. C. for having caused the murder of the deceased Venugopala Reddy resident of Rachakandrika village of Nellore District. The learned Sessions Judge after recording the evidence of the prosecution and hearing the arguments rejected the entire prosecution case and held that the prosecution had miserably failed to prove the case against any of the accused and he accordingly acquitted all the five accused by his judgment dated July 25, 1973. The State of Andhra Pradesh thereafter filed an appeal under Section 417 of the Code of Criminal Procedure against the order of acquittal passed by the learned Additional Sessions Judge, Nellore. The appeal was heard by a Division Bench of the Andhra Pradesh High Court which reversed the order of acquittal passed by the learned Sessions Judge only in respect of accused Nos. 1 and 2 and convicted them under Section 302/34, I. P. C. and sentenced them to imprisonment for life. The acquittal of the other accused Nos. 3 to 5 was confirmed by the High Court. The two appellants namely K. Ramachandra Reddy and Manne Sreehari to be referred to hereafter as Accused Nos. 1 and 2 respectively have filed the present appeal in this Court under Section 2A of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act of 1970.

2. A perusal of the judgment of the High Court clearly reveals that the learned Judges have not accepted the major part of the evidence adduced by the prosecution in support of the case against the accused and have founded the conviction of the accused Nos. 1 and 2 solely on the basis of Ext. P-2 a dying declaration alleged to have been made by the deceased Venugopala Reddy at Dr. Ramamurthi Nursing Home before a Magistrate the next day after he is said to have been assaulted. The High Court on a careful reading of the dying declaration held that it was a truthful version of the manner in which the

deceased was assaulted by the accused and as the deceased had made a full disclosure to a Magistrate in the presence of a Doctor who had testified to the fact that the deceased was in a fit state of mind to make a statement there was no reason to disbelieve the dying declaration which the High Court believed to be genuine and true.

3. The arguments of the learned counsel for the appellants naturally centered round the reliability of Ext. P-2 the dying declaration recorded by the Magistrate at the Nursing Home. Appearing for the appellants Mr. Debabrata Mookerjee submitted two propositions before us:

(1) that the High Court in reversing the acquittal of the appellants completely overlooked the principles laid down by this Court that the High Court ought not to interfere with an order of acquittal in appeal without displacing the reasons given and the circumstances relied upon by the trial Court and certainly not in a case where two views are possible; and

(2) that the High Court failed to consider the suspicious circumstances under which the dying declaration was made which went to show that it was not a voluntary or true disclosure by the deceased but was the result of tutoring and prompting by his relations.

4. On the other hand Mr. Ram Reddy the senior standing counsel for the State of Andhra Pradesh submitted that the High Court was fully justified in relying upon the dying declaration which was both true and voluntary and whose correctness had been testified by the Magistrate and the Doctor. The learned counsel also relied on some other evidence in order to corroborate the genuineness of the dying declaration.

5. Before examining the contentions raised by counsel for the parties, it may be necessary to give a re'sume' of the prosecution case shorn of its (un?)essential details. It appears that there was serious political rivalry between Bhaskar Reddy A-5 and the deceased Venugopala Reddy over the election of the local Panchayat Committee known as Samithi.

It appears that some allegations of misappropriation of public funds having been made against accused No. 5 Bhaskar Reddy the deceased displaced him from the Presidentship of the Panchayat Samithi in a meeting called a few days before the death of the deceased where Bhaskar Reddy was not invited. This is supposed to have provided an immediate provocation for the accused to have attacked the deceased. According to the prosecution the deceased had gone to his Petrol Pump in Tada Bazar and after sunset was leaving for his village through the main highway and after having traversed about half a mile when he reached the place of occurrence situate near the mango grove he was surrounded by the five accused who pounced upon him and assaulted him with stones, knives and sticks. Venugopala fell down and the accused ran away after assaulting him. P. Ws. 5 and 6 who were keeping watch over the mango grove were attracted to the scene of occurrence by the cries of the deceased and P. W. 5 was sent by P. W. 6 to the village Rachakandrika to call the relations of the deceased. The errand entrusted to P. W. 5 having been executed P. W. 1 the son of the deceased and P. W. 2 his cousin arrived at the spot and found the deceased in a sitting posture being attended to by P. W. 6 with a large number of injuries on his person. In fact it would appear from the post mortem report that the deceased had sustained as many as 48 injuries on his person. It is further alleged by the prosecution that P. W. 1 asked his father regarding the occurrence and the deceased disclosed the names of accused Nos. 1 to 5 as his assailants. Thereafter the deceased was taken in a lorry to the Nursing Home of Dr. Ramamurthi at Nellore and P. W. 7 Sarpanch of the village and a very close and intimate friend of the deceased also accompanied the deceased in the lorry upto Nellore. Dr. Ramamurthi had gone to a cinema but on being sent for he arrived at the Nursing Home and attended to the deceased. He directed P. W. 1 to rush to the police station at Sullurpet to report the occurrence. P. W. 1 went to Sullurpet and reported the matter to

the Sub-Inspector who made a station diary entry Ext. D-4. The Sub-Inspector, however, did not choose to register the case on the basis of the diary entry but proceeded to Nellore. We would like to mention here that Ext. D-4 was the real F.I.R. in the case within the meaning of Section 164, Cr. P. C. and the Sub-Inspector committed a dereliction of duty in not registering the case on receiving the First Information Report about the death of the deceased from P. W. 1 the son of Venugopala Reddy. We might also mention that the Sub-Inspector P. W. 15 was also a friend of the deceased being his class fellow. It may be pertinent to note here that although a report was made by P. W. 1 to the Sub-Inspector yet the names of the appellants were not at all mentioned in the station diary entry which was based on the verbal report given by P. W. 1. No reason or explanation seems to have been given by the prosecution for the non-disclosure of the names of the appellants by P. W. 1 if in fact he had been told these names by the deceased himself at the spot. When the Sub-Inspector P. W. 15 reached the Nursing Home he was asked by the Doctor P. W. 17 to get a Magistrate so that the dying declaration of the deceased may be recorded. Acting upon the instructions of P. W. 17 the Sub-Inspector went to the Magistrate P. W. 11 who arrived at the Nursing Home and recorded the dying declaration of the deceased which is Ext. P-2 in the case and which forms the basis of the conviction of the two appellants. Thereafter in view of the critical condition of the deceased Dr. Ramamurthi advised that the deceased should be taken to the Madras General Hospital and accordingly the relations of the deceased took the deceased to the Madras General Hospital where also he is said to have made another dying declaration before the police. This dying declaration, however, was rejected both by the Sessions Judge and the High Court and it is not necessary for us to refer to this part of the evidence. Even the oral dying declaration said to have been made by the deceased to P. Ws. 1 and 2 and others also

has not been accepted either by the Sessions judge or by the High Court.

6. The accused pleaded innocence and averred that they had been falsely implicated due to enmity. Thus it would appear that the conviction of the accused depends entirely on the reliability of the dying declaration Ext. P-2. The dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration. The law on the subject has been clearly and explicitly enunciated by this Court in *Khushal Rao v. State of Bombay*, 1958 SCR 552 = (AIR 1958 SC 22) where the Court observed as follows:

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it can-

not be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination."

The above observations made by this Court were fully endorsed by a Bench of five Judges of this Court in Harbans Singh v. State of Punjab 1962 Supp (1) SCR 104 = (AIR 1962 SC 439). In a recent decision of this Court in Tapinder Singh v. State of Punjab, (1971) 1 SCR 599 = (AIR 1970 SC 1566) relying upon the earlier decision referred to above, this Court observed as follows:

"It is true that a dying declaration is not a deposition in court and it is neither made on oath nor in the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances."

In Lallubhai Devchand Shah v. State of Gujarat, (1971) 3 SCC 767 = (AIR 1972 SC 1776) this Court laid special stress on the fact that one of the important tests of the reliability of a dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind and observed as follows:

"The Court, therefore, blamed Dr. Pant for not questioning Trilok Singh with a view to test whether Trilok Singh was in a "fit state of mind" to make the statement. The "fit state of mind" referred to is in relation to the statement that the dying man was making. In other words, what the case suggests is that the person who records a dying declaration must be satisfied that the dying man was making a conscious and voluntary statement with normal understanding."

7. We would now examine the dying declaration Ext. P-2 in the light of the principles enunciated above. To begin with, we would like to deal with the surrounding circumstances and the attendant factors which culminated in the dying declaration Ext. P-2 made by the deceased at Dr. Ramamurthi Nursing Home. According to the prosecution there were three clear occasions when the deceased was conscious and could have made a statement disclosing the names of his assailants. The first occasion was at the place of occurrence itself, after the deceased is said to have been assaulted by the accused. The persons who were present on this occasion were P. Ws. 1, 2, 5

and 6. According to P. W. 1 (page 5 of the printed Paper Book) the deceased even though he was groaning was in a condition to speak out and on being questioned he narrated the entire occurrence and disclosed the names of the five accused persons to P. W. 1. The fact that the deceased had mentioned the names of all the accused to this witness has been disbelieved by both the Courts and in our opinion rightly, because P. W. 1 did not make any mention of this fact either in the F. I. R. Ext. D-4 or in his statement to the police. Nevertheless from the statement of P. W. 1 who is the son of the deceased it is manifestly clear that the deceased was in a position to make a statement and yet he did not disclose the names of the assailants. Similarly P. W. 2 (page 15 of the Printed Paper Book) categorically states that in his presence P. W. 1 asked the deceased as to how the incident took place and the deceased told him that all the five accused had assaulted him with sticks, stones and knives and then ran away. This also shows that the deceased was conscious when he is said to have made this statement. Lastly, there is the evidence of P. W. 6 (page 29 of the Paper Book) who also says that although the witness could not hear what the deceased said yet he was speaking very slowly with his son. Thus at the first stage, namely, when the deceased was at the spot he was in a position to make the statement and yet, according to the findings of the Courts below, he did not disclose the names of the assailants to anybody.

8. The second occasion when the deceased could have disclosed the names of his assailants was at the time when he was carried in a lorry from the place of occurrence to Dr. Ramamurthi Nursing Home. P. W. 1 (page 8 of the printed Paper Book) categorically states that at the time when his father was put on the lorry he was groaning but he was in a position to talk. The witness further goes on to state that none of the 20 to 30 persons who had gathered at the scene tried to ask the deceased as to how the incident took place. Similarly P. W. 6 (page 29 of the printed Paper Book) clearly stat-

ed that the injured was in a position to talk while he was being put on the lorry and about 50 to 60 persons were present there at that time.

9. The third occasion when the deceased could have disclosed the names of the assailants was when he reached the Nursing Home. In this connection P. W. 1 (page 9 of the printed Paper Book) has stated that on reaching the hospital the Doctor was sent for and at that time his father was conscious and was in a position to talk though he was groaning with pain. He further admitted that he did not tell the Doctor what his father had told him. Similarly P. W. 2 states (at page 16 of the printed Paper Book) that when the Sub-Inspector of Sullurpet came and saw the injured in the room of the Nursing Home the injured was in a position to talk but the Sub-Inspector did not talk to him or question him on anything. P. W. 15 the Sub-Inspector of Sullurpet states (at page 41 of the printed Paper Book) that he found about 20 persons at the Nursing Home gathered outside the Nursing Home and saw Dr. Ram Murthy attending on the injured inside when the injured was in a conscious state.

10. From the evidence discussed above, it is clearly established that although the deceased was conscious at the place of occurrence, at the time when he was put on the lorry and also at the time when he was brought to the Nursing Home and was in a position to speak he did not disclose the names of the assailants to anybody. This conduct of the deceased can be explained only on two hypotheses, namely, either the deceased was not conscious at all and was not in a position to talk to anybody or that even though he was conscious he did not disclose the occurrence to anybody because under the stress and strain of the assault, which took place admittedly at a time when darkness had set in and there was very little moonlight, he was not able to identify the assailants. No third inference can be spelt out from the conduct of the deceased in not disclosing the names of the assailants on these three occasions. Furthermore, the fact that

the deceased was not in a position to identify the assailants receives intrinsic support from the statement of P. W. 1 (at page 6 of the printed Paper Book) where he clearly states that he had seen A-3, A-4 and A-1 at A-5's house about five years before the occurrence. He further states that he did not know if his father knew A-1, A-3 and A-4 well and by their names. He further states that A-3 had visited his house five years ago and he could not say whether his father was present at that time. Lastly the witness states that he had no other acquaintance with A-3 and A-4. He also states that he came to know A-2 only after the occurrence of this case. The learned Sessions Judge has rightly relied on these circumstances to come to the conclusion that the deceased did not know the names of the accused nor was he able to identify them in the darkness and this introduces a serious infirmity in the dying declaration itself. It would be seen that in the dying declaration Ext. P-2 the name of the accused No. 1 Ramachandra Reddy is clearly mentioned and so is the name of accused No. 2. If according to P. W. 1 there was a clear possibility of the deceased not having known the names of A-1, A-2 or A-3 then it is not understandable how these names could be mentioned by the deceased in his dying declaration unless the names were suggested to him by somebody. Against this background the presence of P. W. 2 the cousin of the deceased by his side even at the time when the dying declaration was recorded or a little before that clearly suggests that the possibility of prompting cannot be excluded. Even the High Court has clearly found that the possibility of prompting was there.

11. Dr. Ramamurthi P. W. 17 has stated that while the Magistrate was recording the statement of the injured, the injured was sitting for a while and was thereafter lying in the lap of P. W. 2 who was nursing him then. Another important circumstance that has been considered by the learned Sessions Judge but overlooked by the High Court is that even though according to the evi-

dence led by the prosecution the deceased was fully conscious in the hospital and had met persons from his village, his friends and acquaintances including Dr. Ramamurthi P. W. 17 and the Sub-Inspector P. W. 15 yet he did not make any statement to any of these persons nor did any of these persons try to question the deceased about the occurrence. In fact the categorical evidence of P. W. 17 Dr. Ramamurthi is that from the time the patient was brought in the Nursing Home till the Magistrate arrived, the patient did not talk to anyone including him. The learned Sessions Judge has observed that this is a very extraordinary and unnatural circumstance which throws a good deal of doubt on the circumstances in which the dying declaration was recorded. The Doctor was known to the deceased and yet neither the deceased talked to him nor did the Doctor make any inquiry from him. On the other hand P. W. 15 the Sub-Inspector had stated (at page 42 of the printed Paper Book) that when the deceased had reached the Hospital he was not in a position to talk and was groaning. P. W. 17 Dr. Ramamurthi has also stated that the state of mind of the deceased was restlessness. He further deposed that till the Magistrate arrived, the witness had no opportunity to assess the mental capacity of the injured Venugopala Reddy. It would appear from the evidence of P. W. 20 who made the post-mortem that there were as many as 48 injuries on the person of the deceased out of which there were 28 incised wounds on the various parts of the body including quite a few gaping incised injuries. In view of these serious injuries we find it difficult to believe that the deceased would have been in a fit state of mind to make a dying declaration. The Magistrate P. W. 11 who recorded the dying declaration has admitted that the injured was suffering from pain and he was not in a position to sign and so his thumb impression was taken. The Magistrate further admitted that the injured was taking time to answer the questions. The Magistrate further admitted that the injured was very much suffering with pain. In

spite of these facts the Magistrate appears to have committed a serious irregularity in not putting a direct question to the injured whether he was capable mentally to make any statement. In the case of Lallubhai Devchand Shah, (1971) 3 SCC 767 = (AIR 1972 SC 1776) referred to by us supra the omission of the person who recorded the dying declaration to question the deceased regarding his state of mind to make the statement was considered to be a very serious one and in our opinion in the instant case the omission of the Judicial Magistrate who knew the law well throws a good deal of doubt on the fact whether the deceased was really in a fit state of mind to make a statement. The Sessions Judge has rightly pointed out that even though the deceased might have been conscious in the strict sense of the term, there must be reliable evidence to show, in view of his intense suffering and serious injuries, that he was in a fit state of mind to make a statement regarding the occurrence. Having regard, therefore, to the surrounding circumstances mentioned above, which have not been fully considered by the High Court, we find it extremely unsafe to place any reliance on Ext. P-2 particularly in view of the conduct of the deceased in not making any disclosure regarding the occurrence on the three previous occasions when he had a full and complete opportunity to name his assailants.

12. Lastly it is admitted that there was serious enmity between the parties. P. W. 2 states (at p. 16 of the printed Paper Book) that there were ill-feelings between the deceased and A-1, A-2 to A-5. While counsel for the State has submitted that the deceased was assaulted due to enmity, the possibility cannot be ruled out that the accused may have been named because of the enmity. The learned standing counsel for the State relied upon the statement of Dr. Ramamurthi who had given the certificate that the deceased was in a fit state of mind to make a statement. This certificate by itself would not be sufficient to dispel the doubts created by the circumstances mentioned by us and particularly the omission by the Magistrate in not

putting a direct question to the deceased regarding the mental condition of the injured when he was satisfied that the injured was suffering from severe pain and was not able to speak normally. For these reasons, therefore, this case clearly falls within principles (5) and (6) laid down by this Court in Khushal Rao's case 1958 SCR 552 = (AIR 1958 SC 22) (supra). In these circumstances we feel that it would be wholly unsafe to found the conviction of the appellants on the basis of Ext. P-2.

13. Mr. P. Ram Reddy for the State submitted that Ext. P-2 was corroborated by the presence of at least accused No. 1 near the petrol pump slightly before the occurrence took place. The presence of accused No. 1 in Tada Bazar near his village is not completely inconsistent with his guilt and being a resident of the village close by his presence in the Bazar can be explained on account of various reasons. It was then submitted that the accused had been absconding. The accused, however, surrendered within 14 days and this is not a circumstance which can outweigh the effect of the suspicious circumstances under which the dying declaration was made. It seems to us that as the deceased did not know the names of the appellants nor did he know them from before he was not able to identify his assailants and the names were supplied by P. W. 2 his cousin just before the dying declaration was made. Putting the prosecution case at the highest, there can be no doubt that the view taken by the learned Sessions Judge that the dying declaration did not amount to a truthful disclosure cannot be said to be against the weight of the evidence on the record and even if the High Court was in a position to take a view different from the one taken by the Sessions Judge on the same evidence, this would not be a ground for reversing the order of acquittal. In *Ram Jag v. State of U. P.*, (1974) 3 SCR 9 = (AIR 1974 SC 606) this Court observed as follows:

"Such regard and slowness must find their reflection in the appellate judgment, which can only be if the

appellate court deals with the principal reasons that influenced the order of acquittal and after examining the evidence with care gives its own reasons justifying a contrary view of the evidence. It is implicit in this judicial process that if two views of the evidence are reasonably possible, the finding of acquittal ought not to be disturbed."

Thus in the instant case as two views were reasonably possible and therefore the High Court was in error in disturbing the order of acquittal passed by the Sessions Judge.

14. For the reasons given above, we are satisfied that the High Court was not at all justified in reversing the order of acquittal passed by the Sessions Judge. The appeal is accordingly allowed, the conviction and sentence passed against the appellants are set aside and they are acquitted of the charges framed against them. The appellants are directed to be set at liberty forthwith.

Appeal allowed.

AIR 1976 SUPREME COURT 2002

(From: ILR (1972) Guj 336)

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

State of Gujarat and others, Appellants v. Ambalal Haiderbhai etc., Respondents.

Civil Appeals Nos. 967-969 of 1971, D/- 14-4-1976.

(A) Land Acquisition (Companies) Rules (1963) R. 4 — Acquisition of land for Company — Enquiry under R. 4 requires compliance with rules of natural justice. (Constitution of India, Art. 226 — Natural Justice).

Although the rule is silent regarding the mode and method of the enquiry to be held by the Collector and the report of the Collector is of a recommendatory character, yet regard being had to the legislative history and purpose of the rule, and the mischief sought to be prevented, it must be held that, in conducting the enquiry, the Collector has, in the interest of fair play, to observe the principles of natural justice by afford-

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ing the persons interested in the land a reasonable opportunity of being heard and of adducing material before the Collector to refute the allegations of the Company. AIR 1975 SC 629, Rel. on; ILR (1972) Guj 336, Affirmed. (Para 8)

(B) Constitution of India, Article 226 — Natural Justice — Concept of — Change in recent years — Rules of natural justice may be implied from nature of duty to be performed under statute.

The concept of natural justice has undergone a great deal of change in recent years. The dividing line between an administrative and quasi judicial function is often blurred.

(Para 8)

Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its content should be for a given case must depend to a great extent on the facts and circumstances of that case, the frame work of the law under which the enquiry is held, and the constitution and nature of duties of the Tribunal or the body of persons appointed for that purpose. AIR 1969 SC 198 and AIR 1970 SC 150, Rel. on. (Para 3)

Cases Referred: Chronological Paras
AIR 1975 SC 629 = (1975) 3 SCR 284 9
AIR 1970 SC 150 = (1970) 1 SCR 457 3, 8
AIR 1969 SC 198 = (1969) 1 SCR 317 3

Judgment of the Court was delivered by

JASWANT SINGH, J.:— These three Appeals Nos. 967 to 969 of 1971 by special leave which are directed against the common judgment of the High Court of Gujarat dated April 17/18, 1970 in Special Civil Application Nos. 116 of 1967, 1621 of 1967 and 1622 of 1967 arise thus:

Proceedings under the Land Acquisition Act, 1894, (hereinafter referred to as 'the Act') for acquisition of certain lands in villages Sayajipuri, Bapod and Savad, District Baroda, Taluka Baroda were initiated

by the Government of Gujarat at the instance of Sardarnagar Co-operative Industrial Society Limited, registered under the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as 'the Company') for the purpose of establishing an industrial estate for small scale industries. The acquisition being for the Company, a notification was issued under Section 4 of the Act on July 2, 1964 after following the provisions of Part VII of the Act. An agreement under Section 41 of the Act between the State Government and the Company was entered into on April 2, 1965 and was published on October 15, 1966. The final notification under Section 6 of the Act was issued on October 18, 1966. The owners of the aforesaid lands who are contesting respondents herein challenged the aforesaid notifications issued under Sections 4 and 6 of the Act by filing petitions under Article 226 of the Constitution of India inter alia on the ground that the provisions of Rule 4 of the Land Acquisition (Companies) Rules, 1963 (hereinafter referred to as 'the Rules') made by the Central Government in exercise of the powers conferred under Section 55 of the Act, which by virtue of Rule 1 (2) of the Rules apply to acquisition of land for all companies under Part VII of the Act, have not been complied with particularly as they had not been given a right to be heard in accordance with the principles of natural justice at the enquiry held by Special Land Acquisition Officer, Baroda, appellant No. 2 herein. The plea raised by the owners of land found favour with the High Court which allowed the petitions, set aside the notification under Section 6 of the Act, and issued a mandamus commanding appellant No. 2 to complete the statutory enquiry under Rule 4 of the Rules in accordance with the principles of natural justice.

2. The short but important question which we are called upon to decide in these appeals is whether the enquiry under Rule 4 of the Rules requires compliance with the rules of natural justice.

3. As observed by this Court in Suresh Koshy George v. University

of Kerala, (1969) 1 SCR 317 = (AIR 1969 SC 198) and reiterated in A.K. Kraipak v. Union of India, (1970) 1 SCR 457 = (AIR 1970 SC 150) rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its content should be for a given case must depend to a great extent on the facts and circumstances of that case, the frame work of the law under which the enquiry is held, and the the constitution and nature of duties of the Tribunal or the body of persons appointed for that purpose. Let us, therefore, advert to the provisions of Rule 4 of the Rules which require the appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings. The rule is in these terms:—

"4. Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings.—

(1) Whenever a Company makes an application to the appropriate Government for acquisition of any land, that Government shall direct the Collector to submit a report to it on the following matters, namely:—

(i) that the Company has made its best endeavour to find out lands in the locality suitable for the purpose of the acquisition;

(ii) that the Company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed;

(iii) that the land proposed to be acquired is suitable for the purpose;

(iv) that the area of land proposed to be acquired is not excessive;

(v) that the Company is in a position to utilise the land expeditiously; and

(vi) where the land proposed to be acquired is good agricultural land, that no alternative suitable site can be found so as to avoid acquisition of that land.

"(2) The Collector shall, after giving the company a reasonable op-

portunity to make any representation in this behalf, hold an enquiry into the matters referred to in sub-rule (1) and while holding such enquiry he shall,—

(i) in any case where the land proposed to be acquired is agricultural land, consult the Senior Agricultural Officer of the district whether or not such land is good agricultural land;

(ii) determine, having regard to the provisions of Sections 23 and 24 of the Act, the approximate amount of compensation likely to be payable in respect of the land which, in the opinion of the Collector, should be acquired for the Company; and

(iii) ascertain whether the Company offered a reasonable price (not being less than the compensation so determined), to the persons interested in the land proposed to be acquired.

Explanation.— For the purpose of this rule “good agricultural land” means any land which, considering the level of agricultural production and the crop pattern of the area in which it is situated, is of average or above average productivity and includes a garden or grove land.

(3) As soon as may be after holding the enquiry under sub-rule (2), the Collector shall submit a report to the appropriate Government and a copy of the same shall be forwarded by that Government to the Committee.

(4) No declaration shall be made by the appropriate Government under Section 6 of the Act unless—

(i) the appropriate Government has consulted the Committee and has considered the report submitted under this rule and the report, if any, submitted under Section 5A of the Act; and

(ii) the agreement under Section 41 of the Act has been executed by the Company.”

4. To sum up, sub-rule (1) of the above quoted rule requires the appropriate Government to which an application is made by a Company for acquisition of land to direct the Collector to submit a report on six matters set out therein.

5. Sub-rule (2) of the said rule re-emphasizes what is contained

in sub-rule (1) by making it obligatory for the Collector to hold an enquiry into six matters referred to in sub-rule (1). It also makes it obligatory for the Collector while holding the enquiry (1) to consult the Senior Agricultural Officer of the District in case the land is agricultural land, (2) to determine the approximate amount of compensation likely to be payable in respect of the land in question keeping in view the provisions of Sections 23 and 24 of the Act and (3) to ascertain whether the Company offered a reasonable price (which is not less than the compensation so determined) to the persons interested in the land which is proposed to be acquired.

6. A conjoint reading of sub-rules (1) and (2) leaves no room for doubt that the enquiry by the Collector, which is meant inter alia to find out whether all reasonable efforts have been made by the Company to get the land by negotiation on payment of reasonable price and such efforts have not fructified and to determine the approximate amount of compensation likely to be payable in respect of the land keeping in view the provisions of Secs. 23 and 24 of the Act, is of vital importance to the persons interested in the land.

7. Sub-rule (3) of the rule requires the Collector to submit his report to the concerned Government which in turn is required before making a declaration under Section 6 of the Act to consider that report as well as the report, if any, submitted by it under Section 5A of the Act after ascertaining the view of the Committee constituted under Rule 3 of the Rules in regard to the Collector's report under Rule 4 of the Rules.

8. Although the above mentioned rule is silent regarding the mode and method of the enquiry to be held by the Collector and the report of the Collector is of a recommendatory character, yet regard being had to the legislative history and purpose of the rule, and the mischief sought to be prevented, we have no hesitation in holding that, in conducting the enquiry, the Collector has, in the in-

terest of fair play, to observe the principles of natural justice by affording the persons interested in the land a reasonable opportunity of being heard and of adducing material before the Collector to refute the allegations of the Company. The concept of natural justice as evident from the observations made in A. K. Kraipak's case (AIR 1970 SC 150) (supra) has undergone a great deal of change in recent years. The dividing line between an administrative and quasi-judicial function is often blurred.

9. Our view is reinforced by the following illuminating observations made by the learned Chief Justice in State of Gujarat v. Patel Chaturbhai Narsibhai. (1975) 3 SCR 284 = (AIR 1975 SC 629):

"The contention of the State that the enquiry under Rule 4 is administrative and that the owner of the land is not entitled to be given an opportunity to be heard at the enquiry cannot be accepted for these reasons. The enquiry under Rule 4 shows that the Collector is to submit a report among other matters that the Company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed. The persons interested therein are the owners of the land which is proposed to be acquired. The company at such an enquiry has to show that the company made negotiations with the owners of the land. The owners of the land are, therefore, entitled to be heard at such an enquiry for the purpose of proving or disproving the reasonable efforts of the company to get such land by negotiation. The contention on behalf of the State that the owners of the land will get an opportunity when an enquiry is made under Section 5-A of the Act is equally unsound. Section 17 of the Act provides that the appropriate Government may direct that the provisions of Section 5-A shall not apply, and if it does so direct a declaration may be made under Section 6 at any time after the publication of the notification under Section 4 of the Act. Therefore, the enquiry under Section 5-A may not be held."

10. For the foregoing reasons, the question is answered in the affirmative and the appeals are dismissed. The parties are left to bear and pay their own costs in these appeals.

Appeals dismissed.

AIR 1976 SUPREME COURT 2005

(From: (1) Gujarat (2) Bombay)*

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

Civil Appeal No. 282 of 1971.

(1) Harbanslal Jagmohandas and another, Appellants v. Prabhudas Shivlal, Respondent.

and

Civil Appeal No. 2068 of 1971

(2) Rev. Everett M. Fasanachat and another, Appellants v. West End Works, Respondent.

Civil Appeals Nos. 282 and 2068 of 1971, D/- 12-3-1976.

(A) **Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 12 (3) (a) and (b) and 11 (3) and (4) — Notice of termination of tenancy on ground of arrears of rent — Dispute as to standard rent has to be raised latest before expiry of one month after service of notice. Spl. Civil Appln. No. 859 of 1967, D/- 31-3-1971 (Bom), Reversed.**

In order to avoid the operation of S. 12 (3) (a) of the Act the dispute in regard to standard rent or permitted increases must be raised at the latest before the expiry of one month from the date of service of notice under Section 12 (2) of the Act and it is not enough to raise a dispute for the first time in written statement. AIR 1964 Guj 9 and (1966) 7 Guj LR 945, Approved. AIR 1964 Guj 9 held not overruled by AIR 1964 SC 1341; C. R. A. No. 1353 of 1970, D/- 22-12-1970 (Guj), Affirmed. (Paras 19, 20, 21, 22)

The view that disputing within one month of the service of the no-

*(1) C. R. A. No. 1353 of 1970, D/- 22-12-1971 (Guj) and (2) Spl. Civil Application No. 859 of 1967, D/- 31-3-1971—(Bom)).

tice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at any stage of the suit nullifies the provisions contained in Section 12 and Explanation thereto and confers a right on the tenant where the legislation does not contemplate such a right. Spl. Civil Appln. No. 859 of 1967, D/- 31-3-1971 (Bom), Reversed. (Para 24)

The provisions in Section 11 (3) of the Act deal with orders which may be passed by the Court during the pendency of the application disputing the rent. Provisions in Section 11 (4) of the Act deal with orders which may be passed consequent upon dispute as to rent. It is only when an application disputing rent is made within the time contemplated by Explanation I to Sec. 12 of the Act that the provisions in subsections (3) and (4) of Section 11 are attracted. (Para 25)

Cases Referred: Chronological Paras

AIR 1971 Bom 396 = 73 Bom LR 371 (FB) 11
AIR 1968 SC 1109 = (1968) 3 SCR 346 23
(1966) 7 Guj LR 945 = ILR (1966) Guj 1169 19
AIR 1964 SC 1341 = (1964) 5 SCR 157 20, 21
AIR 1964 Guj 9 = (1962) 3 Guj LR 625 17, 19, 22

Mr. D. V. Patel, Sr. Advocate, (M/s. S. K. Dholakia and R. C. Bhatia, Advocates with him), for Appellants in Civil Appeal No. 282 of 1971.

Mr. V. S. Desai, Sr. Advt., (M/s. Mekohn F. A. Pereiza and H. S. Parihar, Advocates for Mr. I. N. Shroff, Advocate with him), for Appellants in Civil Appeal No. 2068 of 1971.

Mr. V. S. Desai, Sr. Advocate, (Mr. H. S. Parihar, Advocate for Mr. I. N. Shroff, Advocate with him), for Respondent in Civil Appeal No. 282 of 1971.

The Judgment of the Court was delivered by

RAY C. J.:— Civil Appeal No. 282 of 1971 referred to as the Gujarat Appeal is by special leave from the order dated 22 December, 1970 of the High Court of Gujarat rejecting a revision application against the

judgment and decree passed by the Extra Assistant Judge on 17 September, 1970.

2. Civil Appeal No. 2068 of 1971 hereinafter referred to as the Bombay Appeal is by special leave from the judgment and order dated 31 March, 1971 of the High Court of Bombay.

3. Both the appeals raise a common question as to whether the provision contained in Section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 hereinafter referred to as the Act applies. The Gujarat High Court took the view that the provisions of Section 12 (3) (a) of the Act apply to the suit. The Bombay High Court took the view that the provisions contained in Section 12 (3) (a) of the Act do not apply to the suit, but that the suit is governed by the provisions contained in Section 12 (3) (b) of the Act.

4. The principal question is whether on receipt of a notice from the landlord terminating the tenancy on the ground of arrears of rent dispute as to standard rent has to be raised before the expiry of the period of one month after the service of the notice.

5. The Gujarat High Court has taken the view that the dispute as to standard rent is to be raised within one month from the service of the notice on the tenant. The Bombay High Court has taken a contrary view and held that the tenant can raise a dispute as to standard rent in his written statement in answer to the suit and in such a case the provisions of Sec. 12 (3) (b) of the Act will apply.

6. In the Gujarat appeal the respondent filed a suit for recovery of possession of a portion of the ground floor of a building on the ground that the appellant was in arrears of rent from 1 September, 1964 and also on the ground that the respondent bona fide required possession of the premises in suit. The Third Joint Civil Judge in the trial Court gave a decree in favour of the respondent for possession of the premises. The trial Court held that the appellants were in arrears of rent from 1 September, 1964 and that they

were not ready and willing to pay the rent. The trial Court further held that the contractual rent in respect of the premises was not unreasonable and excessive.

7. The appellants in the Gujarat appeal filed an appeal in the Court of District Judge of Surat. The Appellate Court by judgment dated 17th September, 1970 confirmed the judgment and decreed the suit.

8. The appellants thereafter filed a revision application before the Gujarat High Court on the ground that the court should have held that the case fell under Section 12 (3) (b) of the Act. The High Court rejected the revision application at sight.

9. The facts found in the Gujarat appeal are as follows: The appellants paid rent to the respondent up to 31 August, 1964. The respondent landlord by notice dated 14 November 1966 terminated the tenancy of the appellants, inter alia, on the ground that the appellants were in arrears of rent for more than six months. The appellants received the notice on 6th December, 1966. The respondent filed the suit on 2 February, 1967.

10. In the Gujarat appeal the appellants contended that they raised the dispute about the standard rent by their letters dated 17 November, 1966; 19 December, 1966 and 11 February, 1967, and, therefore, there was a dispute as to standard rent and the provisions contained in Section 12 (3) (a) of the Act do not apply. The Appellate Court found that the letters dated 17 November, 1966 and 19 December, 1966 alleged to have been written by the appellants to the respondents were manufactured by the appellants and the certificates of posting were obtained by unscrupulous means. As to the alleged letter of the appellants dated 11 February, 1967 the Appellate Court found that in that letter the appellants referred to the letters dated 17th November, 1966 and 19 December, 1966. The respondent by his reply dated 16 February, 1967 denied that the respondent ever received any letter dated 17 November, 1966 or 19 December, 1966. On this evidence the Appellate Court found that there was no dispute as to rent within one

month of the service of the notice terminating the tenancy.

11. In the Bombay Appeal the notice terminating the tenancy was dated 5 April, 1963 to deliver possession on the expiration of 15 May, 1963. The suit was filed on 11 September, 1963. The appellants landlords alleged that the tenants were in arrears from 15 March 1960 to 15 March, 1963, viz., for over six months. In the Bombay appeal the trial Court gave a decree for possession. The Appellate Court confirmed the judgment of the trial Court. In an application under Article 227 of the Constitution the Bombay High Court held that when the respondent paid all arrears and costs of the suit on 23 December, 1964 it could not be said that the respondent did not comply with the provisions of Section 12 (3) (b) of the Act. The Bombay High Court took the view that the Full Bench of the Bombay High Court in *Dattu Subhana v. Gajanan Vithoba*, AIR 1971 Bom 396 (FB) held that a tenant could raise a dispute as to standard rent by raising an issue as to standard rent in the written statement.

12. The provisions contained in Sections 12 (3) (a) and (b) of the Act are as follows:

"(3) (a) Where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court."

13. Explanation I to Section 12 of the Act is as follows:

"In any case where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court."

14. The following provisions with regard to standard rent are found in Section 11 of the Act. The Court may, upon an application made to it for that purpose, or in any suit or proceedings, fix the standard rent, *inter alia*, where there is any dispute between the landlord and the tenant regarding the amount of standard rent. If any application for fixing the standard rent is made by a tenant who has received a notice from the landlord under sub-section (2) of Section 12, the Court shall forthwith specify the amount of rent or permitted increases which are to be deposited in Court by the tenant and make an order directing the tenant to deposit such amount in Court or at the option of the tenant make an order to pay to the landlord such amount thereof as the Court may specify, pending the final decision of the application. Out of any amount deposited in Court, the Court may make an order for payment of such reasonable sum to the landlord towards payment of rent or increases due to him as it thinks fit. If the tenant fails to deposit such amount or, as the case may be, to pay such amount thereof to the landlord, his application shall be dismissed.

15. Under Section 12 of the Act the landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. Sub-section (2) of Section 12 of the Act states that no suit for reco-

very of possession shall be instituted by a landlord against the tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in the manner provided in Section 106 of the Transfer of Property Act. Clause (a) of sub-section (3) of Section 12 of the Act provides for the passing of a decree for eviction first, where the rent is payable by the month; second, there is no dispute regarding the amount of standard rent or permitted increase; third, the rent or increases are in arrears for a period of six months; and fourth, the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2) of section 12 of the Act. Clause (b) of sub-section (3) of section 12 the Act, states that in any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court.

16. Explanation I to Section 12 of the Act provides that where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (1) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court.

17. Counsel for the appellant in the Gujarat appeal relied on the Bombay view that there is no limitation of time during which a dispute must be raised and none can be implied from the Explanation. The Bombay High Court has not agreed

with the view of the Gujarat High Court in *Ambalal v. Babalda*, AIR 1964 Guj 9. The Bombay view is that the dispute in Section 12 (3) (a) is not limited only to a dispute raised within one month of the notice as contemplated in Section 12 (3) (b) of the Act. The Bombay High Court relied on Section 11 (4) of the Act the provisions whereof are as follows:—

“Where at any stage of a suit for recovery of rent whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the Court shall, and in any other case if it appears to the Court that it is just and proper to make such an order the Court may make an order directing the tenant to deposit in Court forthwith such amount of the rent as the Court considers to be reasonably due to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the Court may specify. The Court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent, or at the option of the tenant an order to pay to the landlord such amount thereof, as the Court may specify, during the pendency of the suit. The Court may also direct if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the Court, which leave may be granted subject to such terms and conditions as the Court may specify.”

18. The Bombay High Court held that to limit raising a dispute within one month from the service of notice would render the provisions of Section 11 (4) nugatory. The Bombay High Court held that the effect of Sections 11 and 12 of the Act is to give the tenant a right to dispute the standard rent in the event of a suit and if the tenant raises a dispute in answer to a suit for recovery of rent it would be a dispute within the meaning of Section 12 (3) (a) of

the Act and would take the suit out of the provisions of that sub-section.

19. The Gujarat High Court in the decision in *Ambalal's case* AIR 1964 Guj 9 (supra) and in *Chunilal Shivilal v. Chimanlal Nagindas*, (1966) 7 Guj LR 945 took the view that in order to avoid the operation of Section 12 (3) (a) of the Act the dispute in regard to standard rent or permitted increases must be raised at the latest before the expiry of one month from the date of service of notice under Section 12 (2) of the Act and it is not enough to raise a dispute for the first time in the written statement. In *Ambalal's case* (supra) the question was as to what should be the stage at which the dispute in regard to standard rent or permitted increases must be raised in order to take the case out of S. 12 (3) (a) of the Act. The Gujarat High Court held that the dispute is one which is in existence at the date of the notice or at any rate before the expiry of one month from the date of its service and not the one raised subsequently in a written statement with a view to avoiding the operation of Section 12 (3) (a) of the Act.

20. Counsel for the appellants in the Gujarat appeal contended that the decision of *Abbasbhai v. Gulamnabi*, (1964) 5 SCR 157 = (AIR 1964 SC 1341) has overruled *Ambalal's case* (supra). In *Abbasbhai's case* the notice terminating the tenancy was dated 1 December, 1956. The tenant by reply dated 7 December, 1956 contended that the contractual rent was excessive. The tenant made an application on 5 January 1957 for fixation of standard rent under Section 11 (1) of the Act. While the application was pending the landlord filed the suit on 27 January, 1957 for ejectment. The tenant in the written statement reiterated the contention that the contractual rent was excessive and that the standard rent should be fixed by the Court. On these facts the question in *Abbasbhai's case* (supra) was whether the case fell within Section 12 (3) (a) or Section 12 (3) (b) of the Act.

21. The only point in controversy in *Abbasbhai's case* (AIR 1964 SC 1341) was whether the second condition in Section 12 (3) (a) of the

Act, viz., that there was no dispute regarding the amount of standard rent was fulfilled. The landlord's contention was that the dispute concerning standard rent is one which must have been raised before service of the notice and since there was admittedly no dispute in regard to standard rent or permitted increases at the date of service of the notice under Section 12 (2) of the Act the second condition in Section 12(3) (a) that there was no dispute was satisfied. The Court did not accept the landlord's contention there and held that the defendant in that case raised the contention by reply dated 7 December, 1956 that the contractual rent was excessive and raised the same contention in the application filed for fixation of standard rent.

22. The Gujarat High Court in Ambalal's case (AIR 1964 Guj 9) (supra) held that in order to attract the applicability of Section 12 (3) (a) of the Act there must be non-existence of the dispute at the date of the notice and such non-existence must continue right up to the expiration of one month from the date of service of the notice so that if the dispute is raised at any time prior to the expiration of the said period of one month, the operation of Section 12 (3) (a) would be excluded. The latest point of time when according to Ambalal's case (supra) the dispute in regard to the standard rent must be raised in order to avoid the operation of Section 12 (3) (a) of the Act is the expiry of one month from the date of service of the notice. Ambalal's case (supra) did not say that the dispute concerning standard rent must be raised before service of the notice in order to repel the applicability of Section 12 (3) (a) of the Act. If the dispute is in existence prior to the expiry of one month after service of the notice though subsequent to the date of the notice that would be sufficient to oust the operation of Section 12 (3) (a) of the Act. The decision of this Court in Abbasbhai's case (AIR 1964 SC 1341) (supra) has not overruled the decision in Ambalal's case (supra). In Ambalal's case (supra) the conclusion is a single one and it is that in order to exclude the operation of Section 12 (3) (a) of the Act the dis-

pute must be in existence latest within one month after service of the notice.

23. The question as to when a dispute is to be raised came up for consideration in Dhansukhlal Chhaganlal v. Dalichand Virchand, (1968) 3 SCR 346 = (AIR 1968 SC 1109). The appellant fell into arrears of rent in that case. The landlord gave a notice to the tenant on 18 April, 1955 demanding the arrears of rent and also terminating the tenancy of the defendant with effect from 31 May, 1955. The notice was received by the defendant on 21 April, 1955. The suit for ejectment was filed on 15 March, 1956 on the ground that the defendant was in arrears of payment of rent and permitted increases and as such not entitled to the protection of the Act. This Court held that Section 12 (1) of the Act must be read with the Explanation and so read it means that the tenant can only be considered to be ready and willing to pay if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified by the Court. This Court found in Chhaganlal's case (AIR 1968 SC 1109) (supra) that the tenant made no payment within the period of one month of the notice of ejectment and further that although in his written statement he raised a dispute about the standard rent he made no application in terms of Section 11 (3) of the Act. The tenant can claim protection from the operation of Section 12 (3) (a) of the Act only if the tenant makes an application within one month of the service of the notice terminating the tenancy by raising a dispute as to standard rent.

24. The view of the Bombay High Court overlooks the limitation of time within which a dispute is to be raised as to standard rent. The view of the Bombay High Court is that disputing within one month of the service of the notice terminating the tenancy is one mode of raising a dispute and there is another mode of raising the dispute at any stage of the suit. The view of the Bombay

High Court nullifies the provisions contained in Section 12 and Explanation thereto and confers a right on the tenant where the legislation does not contemplate such a right.

25. The provisions in Section 11 (3) of the Act deal with orders which may be passed by the Court during the pendency of the application disputing the rent. Provisions in Section 11 (4) of the Act deal with orders which may be passed consequent upon dispute as to rent. It is only when an application disputing rent is made within the time contemplated by Explanation I to Section 12 of the Act that the provisions in sub-sections (3) and (4) of Section 11 are attracted.

26. For the foregoing reasons we uphold the view of the Gujarat High Court and we do not accept the view of the Bombay High Court. We dismiss Civil Appeal No. 282 of 1971 with costs. We accept Civil Appeal No. 2068 of 1971 and the judgment of the Bombay High Court is set aside. The decree passed by the Civil Judge on 31 October, 1964 and affirmed by the Assistant Judge on 27 September, 1966 is restored. The Appellants will be entitled to costs.

C. A. No. 282 of 1971
dismissed

C. A. No. 2068 of 1971
allowed.

AIR 1976 SUPREME COURT 2011

(From: Rajasthan)*

A. N. RAY C. J., M. H. BEG AND
JASWANT SINGH, JJ.

Kishori Lal, Appellant v. Birdhi Lal and others, Respondents.

Civil Appeal No. 1436 of 1975,
D/- 10-3-1976.

(A) Constitution of India, Article 226 — Scope of proceedings — Error of law — High Court can rectify error of law apparent on the face of the record and quash judgment of lower tribunal. (Rajasthan Tenancy Act (3 of 1955), S. 5 (44)).

*(Civil Writ Petn. No. 384 of 1968,
D/- 10-3-1975—(Raj)).

DT/DT/A857/76/WNG

In the instant case, the suit for possession was decreed, holding the defendant to be a trespasser, by the Appellate Revenue Tribunal as well as the Board of Revenue. The essential conditions for his being a trespasser under S. 5(44) of the Rajasthan Tenancy Act (3 of 1955) were manifestly not satisfied. Hence the High Court in writ proceedings was justified in quashing their judgments.

(Para 4)

Mr. Ahmed Bux, Mr. Beni Madhava Sharma, M/s. V. J. Francis and R. A. Gupta, Advocates, for Appellant; Mr. S. M. Jain and Mr. Sushil Kumar Jain, Advocates, for Respondent No. 1.

Judgment of the Court was delivered by

JASWANT SINGH, J.:— This appeal by special leave is directed against the judgment dated March 10, 1975 of the High Court of Rajasthan at Jodhpur passed in Civil Writ Petition No. 384 of 1968.

2. The facts leading to this appeal are: On July 1, 1961, Kishori Lal, the appellant herein, brought a suit in the court of the Assistant Collector, Baran, against Birdhi Lal, respondent No. 1, for possession of land comprised in khasra Nos. 513, 669 and 678 situate in village Bala-khera of Anta Tehsil of Kota District under Sections 180 and 183 of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as the Act). By his judgment dated December 24, 1962, the Assistant Collector dismissed the suit. The appellant thereupon preferred an appeal to the Revenue Appellate Authority who allowed the same by its judgment dated November 9, 1963, and reversing the judgment of the Assistant Collector decreed the suit holding that Birdhi Lal was a trespasser. Aggrieved by the judgment and decree of the Revenue Appellate Authority, Birdhi Lal took the matter in further appeal to the Board of Revenue, Rajasthan, but remained unsuccessful as the members of the Board affirmed the view taken by the Revenue Appellate Authority. Dissatisfied with the decisions of the Revenue Appellate Authority and the Board of Revenue, Rajasthan, Birdhi Lal approached the High Court of Rajasthan by means of a petition under Article 226 of the

Constitution. The High Court by its aforesaid judgment and order dated March 10, 1975, allowed the petition and held that Birdhi Lal being a tenant within the meaning of Section 5 (43) of the Act and not a trespasser as conceived by Section 5 (44) of the Act, was not liable to be ejected from the land. Dissatisfied with this judgment, Kishori Lal has come up to this Court.

3. The learned counsel for the appellant has, while supporting the appeal, vehemently tried to press upon us that as the High Court has exercised appellate jurisdiction and substituted its own opinion for the opinion of the Revenue authorities contrary to the well-established principles of law, the impugned judgment cannot be sustained. Elaborating his submission, the learned counsel has submitted that since both the Revenue Appellate Authority and the Board of Revenue had concurrently held that Birdhi Lal was a trespasser and there was no error apparent on the face of the record, the High Court was not justified in interfering with the aforesaid decisions of the Revenue Appellate Authority and the Board of Revenue. The contention advanced on behalf of the appellant is, in our opinion, wholly untenable. The expression 'trespasser' is defined in Section 5 (44) of the Act as follows:—

"5 (44). Trespasser shall mean a person who takes or retains possession of land without authority or who prevents another person from occupying land duly let out to him."

4. The above definition makes it clear that in order to be able to succeed in his suit, Kishori Lal had to show that Birdhi Lal had taken or retained possession of the land without authority or that he had prevented him from occupying the land duly let out to him. In the instant case, there was no allegation by the appellant in his plaint that he was prevented by Birdhi Lal from occupying the land which had been let out to him. The only point that we are therefore, left to determine is whether Birdhi Lal took possession or retained possession of the land without authority. The material on the record does not at all establish any

of these elements. On the other hand, as rightly pointed out by the High Court, the Parcha lagan, Exhibit A-3 and Pantinama, Exhibit A-4 clearly show that the land in question had been let out by the appellant to Birdhi Lal on payment of rent. As the essential conditions for holding Birdhi Lal to be a trespasser were manifestly not satisfied in the present case, the High Court was perfectly right in rectifying the error of law apparent on the face of the record and quashing the judgments of the Appellate Revenue Authority and the Board of Revenue.

5. It was next urged that even if the respondent Birdhi Lal is held to be a tenant by reason of the Pantinama (Ex. A-4), he was liable to be ejected as the appellant Kishori Lal had framed his suit alternatively under Section 180 of the Act. Reference to Section 180 of the Act shows that it applies only to suits for "ejectment or Khudkasht or Ghair-Khatedar tenants or sub-tenants." Khudkasht is defined in Section 5, sub-section (23) as land "cultivated personally by an estate holder." It also includes "land recorded as Khudkasht, sir, havala, niji-jot, ghar-khed in settlement records" at the commencement of the Act as well as "land allotted after such commencement as Khudkasht under any law." Similarly, the components of rights to sub-tenancy and gair khatedari tenancies are also determined by the provisions of the Act. The High Court had recorded the finding, on this part of the case: "It may be mentioned at the outset that although the suit was raised by respondent Kishori Lal under Sections 180 and 183 of the Act as aforesaid, his claim was not upheld under Section 180 so that the suit was decreed as one under Section 183." In other words, the findings of the Revenue Courts as well as the High Court repel the alternative case sought to be made out before us. It required necessary averments and proof of facts which were absent in the case. It was therefore, a completely hopeless plea which we cannot entertain at this stage.

6. For the foregoing reasons, we do not find any merit in this ap-

peal which is hereby dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2013

(From: Orissa)*

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Banka Naiko and others, Appellants v. State of Orissa, Respondent.
Criminal Appeal No. 235 of 1971, D/- 25-2-1976.

(A) Penal Code (1860), Ss. 302 and 34 — Conviction under — Legality — Dying declaration not proved by reliable evidence — Accused, held entitled to benefit of doubt. Criminal Appeal No. 82 of 1970, D/- 10-2-1971 (Orissa), Reversed. (Evidence Act (1872), Section 32).

Where the High Court after coming to the conclusion that the statements of eye-witnesses by themselves, were inadequate proof of the commission of the offences under Section 302/34 by the appellants upheld the conviction of the appellants on the basis that the evidence of eye-witnesses had been corroborated by the dying declaration as stated by other prosecution witnesses.

Held, that as the dying declaration had not been proved by reliable evidence, the same could not corroborate the statements of those who had been examined as eye-witnesses. The appellants, in the circumstances, were entitled to benefit of doubt. Criminal Appeal No. 82 of 1970, D/- 10-2-1971 (Orissa), Reversed.

(Para 8)

Although the witnesses to the alleged dying declaration had stated that the deceased told them that two appellants "pierced" him and the third appellant had assaulted on the head with a "kati", the Doctor who performed the post mortem examination nowhere stated that he found any such injury as could corroborate the version that piercing injury had been inflicted on the deceased.

(Para 8)

*(Criminal Appeal No. 82 of 1970, D/- 10-2-1971—(Orissa)).

GT/GT/A691/76/CWM

The witnesses to the alleged dying declaration had stated that they found deceased lying unconscious and he came to his senses temporarily when some water was put into his mouth. The Doctor had, however, stated that there was congestion of the brain of the deceased due to the head injuries and that having "lost consciousness the victim might not have regained consciousness." It could not thus be said with any amount of certainty that the deceased made dying declaration as stated by the witnesses to the alleged declaration.

(Para 8)

M/s. K. R. Chaudhari, K. Rajendra Choudhary and N. Venu Gopal Nayagar, Advocates, for Appellants; Mr. Govind Das, Sr. Advocate, and Mr. G. S. Chatterjee, Advocate with him, for Respondent.

Judgment of the Court was delivered by

SHINGHAL, J.:— This appeal of Banka Nayako, Radhakrishna Choudhury and Dandapani Choudhury, by special leave, is directed against the appellate judgment of the Orissa High Court dated February 10, 1971, upholding their conviction for an offence under Section 302/34, I. P. C. and sentence of rigorous imprisonment for life.

2. It is not in dispute, and is in fact admitted, that there was a long standing dispute between Ramchandra Choudhury (P. W. 1) on the one side, and appellants Radhakrishna Choudhury and Dandapani Choudhury on the other. Appellant Banka Nayako is the servant of Radhakrishna Choudhury. The dispute related to partition of joint family properties, and gave rise to several civil and criminal cases. Saita Naik was the servant of Ramchandra Choudhury (P. W. 1) and was his supporter in the litigation. He had also started some criminal cases against the appellants and was a witness for Ramchandra Choudhury (P. W. 1) in some cases against the accused. He was involved in some cases started by appellant Dandapani Choudhury. A dacoity case started by Ramchandra Choudhury (P. W. 1) was pending against the accused on the date of the incident. It is alleged that Ramchandra Choudhury (P. W. 1) started from his village Punando

on March 5, 1969, at about 4 p.m., along with Saita Naik and reached Hinjilikatu at about 6 p.m. He then left for Aska by bus. Saita Naik, Nabadwipa Padhi (P. W. 2) and Bishnu Gouda (P. W. 5) left for Punando. While they were passing through the dry bed of Ghodahada river, it is alleged that Saita Naik stayed back to answer the call of nature, while his two companions proceeded towards the northern bank of the river. When they reached the northern bank, it is alleged that Nabadwipa Padhi and Bishnu Gouda found that all the fourteen accused who were challaned in this case were present near a ditch armed with 'Khanatis', lathis and 'Katis'. They began to attack Nabadwipa Padhi (P. W. 2) and Bishnu Gouda (P. W. 5) but they ran away. It is alleged that the accused then attacked Saita Naik. Appellants Dandapani Choudhury and Radhakrishna Choudhury are said to have pierced him with 'khanatis', and Banka Nayako hit him with a 'kati' on the head. Nabadwipa Padhi (P. W. 2) went to Hinjilikatu and then to Aska, and narrated the incident to Ramchandra Choudhury (P. W. 1). Both of them went to Pattapur Police Station and lodged a report at 2 a.m. It is alleged that, in the meantime, Golla Nahaka (P. W. 10), who was a nephew of Saita Naik, heard about the incident from Bishnu Gouda (P. W. 5) at mauza Puddo, and went to Ghodahada river along with some villagers including Saita Naik's son Musa Nayak (P. W. 3). They found that Saita Naik was lying unconscious in the bed of the river. Musa Nayak is said to have given him some water, and he regained consciousness. It is further alleged that, on inquiry, Saita Naik informed those present that Dandapani Choudhury and Radha Krishna Choudhury had pierced him with 'khanatis' and Banka Nayako had struck him with a 'kati' on his head and that he expressed a desire to be taken to Hinjilikatu where he said he would give further details of the incident. He was accordingly taken there, but he died by the time he reached Hinjilikatu. A report of the incident was lodged by Golla Nahaka (P. W. 10) at Hinjilikatu police station. A post-

mortem examination was performed on the body of Saita Naik by Dr. K. K. Misra (P. W. 13). He found several injuries on his body, and his report is on the record as Ex. 5. All the injuries were found to be ante-mortem and Saita Naik's death was found to be due to the combined effect of syncope and coma. Fourteen accused were challaned and the Sessions Judge of Ganjam-Boudh, Behrampur, convicted them all of the offence of rioting armed with deadly weapons under Section 148 and of murder under Section 302 read with Section 34, I. P. C. He sentenced them to undergo rigorous imprisonment for two years for the offence under Section 148, and to imprisonment for life for the offence under Section 302 read with Section 34, I. P. C. On appeal, the High Court upheld the conviction and sentences of the present appellants, but acquitted the remaining eleven accused.

3. The prosecution examined Nabadwipa Padhi (P. W. 2), Bishnu Gouda (P. W. 5), Ganapati Choudhury (P. W. 4) and Khalli Padhi (P. W. 8) as eye-witnesses of the incident. At the trial, Bishnu Gouda (P. W. 5) did not support the case of the prosecution. Of the remaining three witnesses, Nabadwipa Padhi (P. W. 2) has been held by the High Court to be an interested witness, and rightly so, for he has admitted that he looked after the cultivation of Ramchandra Choudhury (P. W. 1) for a period of five years. It will be recalled that Ramchandra Choudhury (P. W. 1) was the person who had employed Saita Naik and was involved in criminal and civil cases against the appellants. Nabadwipa Padhi (P. W. 2) has also admitted that appellant Dandapani Choudhury had started two cases against him before the date of occurrence, and that he was a witness for Ramachandra Choudhury (P. W. 1) in four cases against the accused. Moreover Nabadwipa Padhi did not state in his report to the police that the accused were armed with 'khanatis' or 'katis', or that he had seen them surrounding Saita Naik. The High Court has not therefore found it possible to convict the appellants on his testimony.

4. Ganapati Choudhury (P. W. 4) has admitted that he accompanied

Ramachandra Choudhury (P. W. 1) for canvassing for him in the election of Sarpanch in 1967, and that he had sworn two affidavits in his favour in two cases against Dandapani Choudhury under Section 145, Cr. P. C. He was also a witness in a criminal case started by Ramachandra Choudhury (P. W. 1) against Dandapani Choudhury. The High Court has therefore rightly taken the view that his evidence could not be accepted without sufficient corroboration.

5. Khalli Padhi (P. W. 8) has stated that when he was going from Hinjilikatu to the village he heard the shouts of Nabadwipa Padhi near the bank of Ghodahada river and saw that the accused were armed with 'khanatis' and 'katis' and they were assaulting or shouting to assault Saita Naik. He has stated further that when he protested he was asked by the accused not to disclose the incident to anybody. He went to his village, and talked about the incident to Dandapani Khandual (P. W. 7), Murli Biswal (P. W. 9) and Suma in the morning. The statement of this witness has, however, not been held to be reliable because of the fact that there was no satisfactory explanation why he was not examined for a period of 18 days, and the further fact that he was taken to the police station by no less a person than Ramachandra Choudhury (P. W. 1). Moreover, Dandapani Khandual (P. W. 7) and Murli Biswal (P. W. 9) have not corroborated his statement. The High Court was therefore again right in taking the view that his statement could not be accepted without further corroboration.

6. It would thus appear that the High Court has not found it possible to uphold the conviction of the appellants on the basis of the statements of Nabadwipa Padhi (P. W. 2), Ganapati Choudhury (P. W. 4), Bishnu Gouda (P. W. 5) and Khalli Padhi (P. W. 8) without the aid of corroborative evidence. It was also not impressed by the statements of Dandapani Khandual (P. W. 7) and Murli Biswal (P. W. 9) that they had seen all the accused at the place of the occurrence. The High Court has

however taken the view that the evidence of those who claimed to be eye-witnesses of the incident had been corroborated by the dying declaration of Saita Naik as stated by Musa Nayak (P. W. 3) and Golla Nahaka (P. W. 10), and it is on account of that corroboration that it has upheld the conviction of the appellants. The question is whether the dying declaration could be said to have been proved by reliable evidence?

7. Musa Nayak (P. W. 3) has stated that when he learnt about the incident, he went to the place of occurrence and found that his father was lying senseless in the bed of the river. He put some water in his mouth, and then he came to his senses. The witness has stated further that on inquiry Saita Naik told him that Dandapani Choudhury and Radhakrishna Choudhury pierced him with 'khanati' and Banka Nayako assaulted him on his head with 'Kati'. He has stated further that his father told him that he should be taken to Hinjilikatu where he would "tell the rest of the occurrence", but he died on the way. Golla Nahaka (P. W. 10) is the other witness who has deposed about the dying declaration. He has corroborated the statement of Musa Nayak (P. W. 3).

8. As has been pointed out, Musa Nayak (P. W. 3) is the son of the deceased, while Golla Nahaka (P. W. 10) is his nephew. Their statements are to the effect that the deceased told them that Dandapani Choudhury and Radhakrishna Choudhury 'pierced' him while Banka Nayako assaulted on the head with a 'kati'. We however find that Dr. K. K. Misra (P. W. 13) has categorically stated that while there was one "incised looking" lacerated wound on the forehead and side of the scalp and one similar lacerated wound on the eye-brow and the left temple, they were lacerated wounds which could have been caused by a blunt weapon. There is nothing in the statement of the witness to show that he found any such injury as could corroborate the version that piercing injuries had been inflicted on the deceased. It appears that this important part of the statement of

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Dr. K. K. Misra (P. W. 13) was not brought to the notice of the High Court and it could not therefore take note of the fact that instead of corroborating the statements of Musa Nayak (P. W. 3) and Golla Nahaka (P. W. 10) regarding the alleged dying declaration, it went to discredit them altogether. It will be recalled that Musa Nayak (P. W. 3) and Golla Nahaka (P. W. 10) had stated that they found Saita Naik lying unconscious in the bed of the river and that he came to his senses temporarily when some water was put into his mouth, but he became unconscious once again. Dr. K. K. Misra (P. W. 13) has however stated that he found, on a post-mortem examination, that there was congestion of the brain of the deceased due to the head injuries and that having "lost consciousness the victim might not have regained consciousness." This part of the statement was also not noticed by the High Court and was also not taken into consideration even though it had a great bearing on the question whether the deceased could regain consciousness and make a dying declaration. As it is, it cannot be said with any amount of certainty that the deceased made the dying declaration as stated by his son Musa Naik (P. W. 3) and his nephew Golla Nahaka (P. W. 10), and it could not therefore be held that it could corroborate the statements of those who had been examined as witnesses of the incident. So when the statements of the eye-witnesses have, by themselves, been held by the High Court to be inadequate proof of the commission of the offences by the appellants, they are entitled to benefit of the doubt.

9. The appeal is allowed and appellants Banko Nayako, Radhakrishna Choudhury and Dandapani Choudhury are acquitted. They are in jail and shall be released forthwith. In view of this, there could be no question of their condition for an offence under Section 148, I. P. C. and they are acquitted of that offence also.

Appeal allowed.

AIR 1976 SUPREME COURT 2016

(From: Allahabad)*

P. N. BHAGWATI AND P. K. GOSWAMI, JJ.

The State of Uttar Pradesh, Appellant v. Ram Kishun and others, Respondents.

Criminal Appeal No. 253 of 1971, D/- 13-2-1976.

(A) Constitution of India, Article 136 — Appeal by special leave — Appeal against acquittal — Interference by Supreme Court — Test. Criminal Appeal No. 1285 of 1970, D/- 11-2-1971 (All), Reversed.

In an appeal against acquittal the Supreme Court is slow to interfere with the decision of the High Court, even though it has interfered with the conviction by the trial Court, where the same is reached after a proper appreciation of the entire evidence. The possibility that it may just be reasonably feasible for the Supreme Court to take a different view of the evidence from that of the High Court is not the test in an appeal against acquittal. But where the High Court has read the evidence in an unusual way which is obvious from the perusal of the judgment; and when the injuries on the victim are *res ipsa loquitur* and tell tale and when a completely erroneous view of the prosecution evidence is taken resulting in failure of justice, the Supreme Court interfered in appeal: Acquittal of accused set aside by Supreme Court; Criminal Appeal No. 1285 of 1970, D/- 11-2-1971, (All) Reversed. (Paras 10, 13, 14)

Mr. O. P. Rana, Advocate, for Appellant; Mr. Shiv Punjan Singh, Advocate, for Respondents.

The Judgment of the Court was delivered by

GOSWAMI, J.:— This appeal by special leave at the instance of the State of Uttar Pradesh is against the judgment of acquittal of the High Court of Allahabad.

2. Balram, Ram Khelawan and Khuddi are three sons of one Ram Charan. The injured Vishwanath (P. W. 1), Shankar, Kankar and

*(Criminal Appeal No. 1285 of 1970, D/- 11-2-1971—(All)).

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deceased Channu are sons of Balram. Accused Sheo Murat, Ram Kishun, Shobha and Motilal are sons of Ram Khelawan. Accused Shyam Lal is the son of accused Ram Kishun, Shiv Nath (PW 2) and Jagan Nath are sons of Khuddi. Thus all of them have branched off from Ram Charan and all the members have got share in their ancestral house at village Bhiwanipur. In this ancestral house Vishwanath, Kankar, Chhannu, Jagan Nath and accused Ram Kishun along with his mother and married younger sister Bhagwantia resided. All others along with the rest of the four accused lived in a nearby separate house.

3. On March 18, 1969, certain quarrel ensued between Bhagwantia and Kankar's wife of Patia. Vishwanath tried to pacify both the quarrelling women. Since Bhagwantia did not heed Vishwanath's words, the latter gave her one or two slaps. Ram Kishun and his brothers were not in the village on that day but learning about this incident on the following day accused Sheo Murat, Ram Kishun, Shobha, Moti Lal and Shyam Lal went to Vishwanath's place at about 7.00 or 8.00 P.M. What followed may be described in the words of the injured Vishwanath:

"On the next day at 7 or 8 P.M. I was sitting at the door of my osara. My younger brothers, Kankar and Channu, were sitting at a short distance from me at the well. Sheonath, my cousin, was also sitting near Kankar and Channu. A burning lantern was hanging from a bamboo pole outside the osara; and there was sufficient light from it. Ram Kishun, Shobha, Sheo Murat, Shyam Lal, and Moti, accused present in the court, came there. Ram Kishun asked from me as to why I had slapped Bhagwantia and that I should come out and settle up. I stood up and said, "Brother, what will you settle up." At this Ram Kishun instigated his companions saying, "Beat the salas". At once Shobha caught hold of my hand and Sheo Murat dealt knife blows to me. Channu, my younger brother, came to save me, whereupon Shyam Lal and Moti caught hold of him and Sheo Murat started giving knife-blows to

him. On hearing their instigation, Sohan, Phool Chand, Dukhi and others came over there and began to forbid them. Chhannu and I fell down on sustaining injuries. Then all the five accused persons ran away with the knife."

4. What has been stated above by Vishwanath has been repeated by Shiv Nath (PW 2), Hausla Prasad (PW 9), Phool Chand (PW 10) and Sohan (PW 13). The story given by these witnesses remains absolutely unshaken in the scanty cross-examination by the defence. Indeed there was little or no cross-examination with regard to the incident itself.

5. Deceased Chhannu had the following external injuries on his person as stated by Dr. U. P. Singh who held the autopsy:

(1) Incised stab wound $\frac{3}{4}$ " x $\frac{1}{3}$ " on right side chest, 1" medial to right nipple, going into the chest cavity.

(2) Incised stab wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x 1" to the right of left nipple and 1" below it, going into the chest cavity.

(3) Incised stab wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x abdominal cavity deep, on lower part of right side abdomen.

(4) Incised stab wound $\frac{1}{2}$ " x $\frac{1}{4}$ " on lower part of abdomen, 3" above the joint of hip-bones.

(5) Incised stab wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x $1\frac{1}{2}$ " deep, on left hip.

(6) Incised stab wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x chest cavity deep, on left side back, 6" below scapula.

(7) Abrasion $\frac{1}{2}$ " x $\frac{1}{2}$ " on lateral aspect of right elbow.

(8) Abrasion $\frac{1}{2}$ " x $\frac{1}{2}$ " on lateral aspect of right hand.

Internal examination revealed that the cartilage of fifth rib had been cut under injury No. (2). There were punctured wounds in the chest cavity in relation to injury Nos. (1), (2) and (6). Right ventricle of heart had a punctured wound $\frac{1}{4}$ " x $\frac{1}{4}$ " and the pericardial cavity contained blood. The upper lobe of left lung had a punctured wound $\frac{1}{2}$ " x $\frac{1}{4}$ " in relation to injury No. (2). In the opinion of the Doctor death was due to shock and haemorrhage resulting from injuries to heart and lungs.

6. Another Doctor Siddiqui (PW 5) found the following injuries on the person of Vishwanath:—

(1) Incised wound $\frac{3}{4}$ " x $\frac{1}{8}$ " x $\frac{1}{2}$ " deep, on front side of lower part of neck, directed downwards, backwards and leftwards. The wound was in the middle of the neck and 1" above the bone. On coughing air passed through the wound.

(2) Incised wound $\frac{3}{4}$ " x $\frac{1}{8}$ " x 3" or more than this, abdominal cavity deep, $1\frac{1}{2}$ " above and to the left of umbilicus. Direction of wound was backwards, slightly upwards and towards centre of abdomen.

The injuries were fresh and described by the Doctor as dangerous.

7. All the five accused were charged under Section 302/149, I.P.C. for causing the death of Chhannu and also under Sec. 307/149, I. P. C. for attempting to murder Vishwanath. While Sheo Murat was charged under Section 148, I. P. C. the other four accused were charged also under Section 147, I. P. C. The Sessions Judge convicted accused Sheo Murat under Sections 148, 307 and 302, I. P. C. He was sentenced to death under Section 302, I. P. C. to seven years rigorous imprisonment under Section 307, I. P. C., and to two years rigorous imprisonment under Section 148, I. P. C. Accused Ram Kishun, Shobha Moti Lal and Shyam Lal (the present respondents) were convicted under Section 302/149 I. P. C., Section 307 read with Section 149 and Section 147, I. P. C. These four accused were sentenced to one year's rigorous imprisonment under Section 147, I. P. C., to seven years' rigorous imprisonment under Section 307/149, I. P. C. and to imprisonment for life under Section 302/149, I. P. C. The sentences of all the accused were to run concurrently. The accused appealed to the High Court. There was also a reference under Section 374, Criminal Procedure Code, to the High Court for confirmation of the death sentence on Sheo Murat. Both the matters were heard together by the High Court and a common judgment was delivered on February 11, 1971. The High Court maintained conviction and sentence of the accused Sheo Murat under Section 307, I.P.C.

and also maintained his conviction under Section 302, I. P. C. but reduced the sentence to imprisonment for life. The conviction and sentence of Sheo Murat under Section 148, I.P.C. were, however, set aside. The conviction and sentence of the four other accused (the present respondents) were set aside.

8. The State prayed for special leave against the rejection of the reference by reducing the death sentence to imprisonment for life but this Court rejected the same. The State's special leave application with regard to the respondent's acquittal was, however, admitted on October 13, 1971 and non bailable warrants were issued against them. We are, therefore, not concerned in this appeal with the conviction of accused Sheo Murat who was the assailant of the deceased as well as of Vishwanath.

9. We have to consider whether the High Court has committed a grave and palpable error in acquitting the respondents resulting in miscarriage of justice.

10. It is well settled that in an appeal against acquittal this Court is slow to interfere with the decision of the High Court, even though it has interfered with the conviction by the trial Court, where the same is reached after a proper appreciation of the entire evidence. The possibility that it may just be reasonably feasible for this Court to take a different view of the evidence from that of the High Court is not the test in an appeal against acquittal. Even so, we are unable in this case to sustain the order of the High Court for the reasons which will presently follow.

11. We have already quoted the evidence of Vishwanath which is unerringly corroborated by all the other eye-witnesses. Both the trial court as well as the High Court believed the evidence. Indeed the High Court has observed and, in our opinion rightly that "there is no infirmity in the prosecution case." We then find that the High Court has read the evidence in a rather unusual way which is at once obvious when we peruse the judgment. We are not told wherefrom the High Court could describe the evidence as follows:—

"After reaching the house of Vishwanath they (the accused persons) entered into a conversation which became heated and ultimately ended in exchange of abuses."

The High Court also observed that—

"it is not at all clear from the prosecution evidence whether Shobha kept on holding Vishwanath till the very end i.e. till both the knife injuries had been caused to him, or whether he let go his hold as soon as Sheo Murat started the attack."

The High Court further observed that—

"there is nothing in the prosecution evidence to indicate in what order those injuries were caused to Chhannu, and whether or not the injuries on the back were caused first." The High Court further gave unusual importance to the statement of PW 13 when he deposed in cross-examination to the following effect:—

"I cannot remember whether the two persons who had caught hold of Chhannu had held him from the front or from the back or from the side. Further, I do not remember whether they were holding him each with both his arms or whether each of them held him only with one arm. I do not recollect whether Sheo Murat had caused injuries to Chhannu from the front side or from the back side."

12. We are unable to appreciate how the evidence of PW 13, who could not remember certain details, could help the court in coming to any conclusion for the purpose of displacing the clear and unambiguous prosecution evidence.

13. The injuries on the two victims are *res ipsa loquitur* and tell-tale. Accused Shobha caught hold of Vishwanath's hands and Sheo Murat gave him two stab blows, one on the neck and the other on the abdomen. When deceased Chhannu advanced in order to save Vishwanath he was caught by accused Shyamlal and Moti Lal and Sheo Murat gave as many as six stab injuries in quick succession. None of these stab wounds are on any part of the hands or arms which would have necessarily been caused if the victims were not caught hold of by a person or persons while

they were attacked with a knife. It would be unnatural to expect that the victims would not have exercised their natural instinct of self preservation by trying to stave off the stab injuries by raising their hands. And in that process if they were not caught hold of by some person or persons there would have been one or two injuries on the hands or arms. This would clearly go to show that the story that Vishwanath was caught by Shobha and Chhannu was caught by Moti Lal and Shyam Lal, as deposed to by the PWs, stands corroborated by the medical evidence. The High Court completely ignored this most relevant and important aspect in the prosecution case but felt satisfied to acquit the accused on the sole ground that there was no evidence to show whether Shobha caught Vishwanath all the time when the two blows were given and also whether Moti Lal and Shyam Lal were catching hold of deceased Chhannu during the entire period of the assault. The High Court particularly felt in that direction because PW 13 being an independent witness could not recollect certain things to which we have already referred to above. The injuries would clearly show that the victims were caught hold of by a person or persons when these were inflicted upon them.

14. We are clearly of opinion that this is a completely erroneous view of the prosecution evidence adduced in this case resulting in failure of justice. We are further satisfied that if the High Court had not read the evidence by introducing an extraneous gloss for the purpose of its conclusion it could not have acquitted the accused.

15. It is also evident that the accused came in a body to challenge Vishwanath for the previous day's incident. Although the four respondents were unarmed, Sheo Murat had a knife with him. There is nothing to show from the evidence that Vishwanath gave any provocation to the accused persons. He only replied to the challenge by saying "brother, what will you settle up"? At this Ram Kishun instigated the other accused persons saying "beat the salas." At once accused Shobha

caught hold of Vishwanath's hands and Sheo Murat stabbed him twice with his knife. Assuming the respondents had no earlier knowledge about Sheo Murat's carrying a knife, from this moment they came to know that Sheo Murat had a knife with which he had already stabbed Vishwanath. What did they then do when deceased Chhannu came to the aid of Vishwanath to save him from further assault? Now Motilal and Shyam Lal caught hold of Chhannu and Sheo Murat inflicted several stab blows in quick succession. It is, therefore, clear that Moti Lal and Shyam Lal shared the common intention with Sheo Murat in inflicting stab injuries to Chhannu by participating in the assault.

16. Sheo Murat has been convicted under Section 302, I. P. C. We may only give these two accused Moti Lal and Shyam Lal benefit of doubt with regard to participation with Sheo Murat in the common intention to cause death of Chhannu. It is, however, absolutely impossible to relieve them of any liability whatsoever in connection with the stab injuries which were facilitated by their catching hold of Chhannu when Sheo Murat was inflicting the stab wounds. There is no escape from the conclusion on this evidence that Moti Lal and Shyam Lal shared at least the common intention with Sheo Murat to cause grievous hurt under Section 326, I. P. C. A clear case has been established against both the accused persons under Section 326/34, I. P. C. They are, therefore, convicted under Section 326/34, I. P. C. and sentenced to four years' rigorous imprisonment.

17. With regard to accused Ram Kishun he merely instigated by saying "beat the salas." He is the person who started the affair by challenging Vishwanath and also instigating the other accused persons to beat. From this alone it is not possible to attribute to him any common intention to cause more than simple assault. He is, therefore, found guilty only under Section 323/109, I. P. C. He is, therefore, convicted under Section 323/109, I. P. C. and sentenced to rigorous imprisonment for one year.

18. Accused Shobha, who caught hold of Vishwanath to facilitate the two stab injuries on him by Sheo Murat, is also guilty under section 326/34 I. P. C. We are prepared to give him the benefit of doubt only with regard to section 307 I. P. C. but the evidence clearly establishes the case under Section 326/34, I. P. C. He is accordingly convicted under Section 326/34, I. P. C. and sentenced to four years' rigorous imprisonment.

19. We should observe that no prejudice is caused to the accused by alteration of the conviction to S. 326/34 although they had been originally charged under S. 302/149 and S. 307/149, I. P. C. on the particular facts of the prosecution case which clearly pointed to participation by the respective accused in the two attacks and which they had to meet in the trial.

20. Since the respondents are detained in jail in pursuance of the non-bailable warrants issued by this Court on October 13, 1971, at the time of granting special leave, they will be entitled to the benefit of S. 428, Criminal Procedure Code and that period shall be set off against the sentences which we have passed in this appeal.

21. In the result the judgment of the High Court is set aside, the appeal is allowed and the four accused stand convicted and sentenced as aforesaid subject to the observations mentioned above.

Appeal allowed.

AIR 1976 SUPREME COURT 2020

(From: Punjab and Haryana)*

A. C. GUPTA AND JASWANT
SINGH, JJ.

M/s. Mohan Meakin Breweries Ltd., Appellant v. Excise and Taxation Commr., Chandigarh and others. Respondents.

Civil Appeals Nos. 582 of 1971, and 1418 of 1970, D/- 4-5-1976.

*(Civil Writ Nos. 2376 of 1970 and 342 of 1969, D/- 29-7-1970 and 4-12-1969, Respectively — (Punj. and Har.)).

GT/GT/C140/76/GGM

(A) Punjab Excise Act (1914), Ss. 59 and 22 — Punjab Bonded Warehouse Rules (1957), Rr. 8 and 9 — Vires — Rules are not ultra vires the Rule making power of Financial Commissioner.

Rules 8 and 9 of the Punjab Bonded Warehouse Rules, are not ultra vires the Rule making power of the Financial Commissioner. Although it is the State Government alone which is empowered to impose excise duty or countervailing duty on any excisable article and to prescribe rates thereof as also to make rules for carrying out inter alia the purposes of Section 31 of the Act, the impugned rules do not impose any one of the aforesaid duties or prescribe the rates thereof or create any liability in respect thereof. They are in essence and substance of a regulatory character meant to guard against perpetration of fraud or deception on the Revenue. They provide for and regulate the storage of liquor in the Bonded Warehouse without payment at the initial stage of the duty payable under the Act and subsequently the removal of the liquor from the Warehouse on payment or otherwise of the duty which is chargeable under the Fiscal Rules of 1937 issued by the State Government. The powers exercised by the Financial Commissioner are clearly available to him under Sections 59 and 22 of the Act and he does not overstep the same. (Para 6)

(B) Punjab Excise Act (1914), Ss. 16, 23 and 31 — Punjab Bonded Warehouse Rules (1957), Rr. 8 and 9 — Validity — Rules are within the scope of Sections 16, 23 and 31 of the Act and Entry 51 of List II of Seventh Schedule to Constitution — (Constitution of India, Schedule 7, List II, Entry 51.).

Section 31 of the Act read with Entry 51 of List II of the Seventh Schedule to the Constitution permits imposition of (i) excise duty by the State Government on any excisable article imported into or exported from or transported in accordance with the provisions of Section 16 of the Act which means after payment of any duty to which it may be liable under the Act or after execution of a bond for such payment and (ii)

countervailing duty inter alia on alcoholic liquors for human consumption manufactured or produced elsewhere in India. (Para 10)

Appellant transported for the purpose of bottling, various quantities of Indian made foreign liquors from its distilleries in Uttar Pradesh and Himachal Pradesh to its Bonded Warehouse at Chandigarh on the strength of the permits issued by the Excise and Taxation Officer, Chandigarh. Pursuant to Rule 7 of the Rules, the Officer-in-charge of the Warehouse verified the quantities of the consignments with those shown in the permits and discovered that they suffered from shortage which exceeded the wastage allowance of 1 per cent permissible under Rule 8 of the said Rules. As a sequel to the detection of the shortage the Excise and Taxation Commissioner exercising the powers of Financial Commissioner, Chandigarh Administration, after notices to the appellant to show cause why duty at the prescribed rate be not levied against it on the wastage in excess of the prescribed limit and after considering the appellant's plea that the liquor evaporated during transit, and that the wastage occurred by leakage of drums in transit; made the notices absolute holding that there was no material on the record to show that the appellant was entitled to any remission in the duty leviable on the wastage. The appellant challenged the validity of the Rules inter alia on the ground that they were outside the scope of Entry 51 of Seventh Schedule.

Held that the liquor for which permits were obtained by the appellant was admittedly in existence and was meant for human consumption and did leave the appellant's distilleries in Uttar Pradesh for being transported to its Warehouse in Chandigarh at its own risk and responsibility. Since a portion of the liquor which exceeded the permissible limit of wastage did not reach the appellant's Warehouse and was not found therein and the shortage remained unaccounted for, it was evident that duty was not sought to be charged on an excisable article which was not in existence, but was sought to be charged on liquor

which was actually manufactured and left Uttar Pradesh but was found short beyond the permissible limit.

(Para 11)

Cases Referred: Chronological Paras

AIR 1971 SC 517 = (1971) 1 SCR 844 12

AIR 1966 SC 1686 = (1966) 1 SCR 865 9

Mr. Tirath Singh Munjral, Advocate, Mr. G. K. Arora, Advocate, M/s. B. C. Das Gupta and Co., Advocates, for Appellant; Mr. N. S. Das Behl, Advocate and Mr. O. P. Sharma, Advocate, for Respondents.

The Judgment of the Court was delivered by

JASWANT SINGH, J.:— These two Civil Appeals Nos. 1418 of 1970 and 582 of 1971, the first by certificate of fitness granted under Article 133 (1) (a) of the Constitution by the Punjab and Haryana High Court and the second by special leave granted by this Court which are directed against the judgments and orders of the said High Court dated December 4, 1969, and July 29, 1970, rendered in Civil Writ Petitions No. 342 of 1969 and No. 2376 of 1970 respectively shall be disposed of by this judgment as they arise out of identical proceedings and raise common questions of law.

2. The appellant, a public limited company incorporated under the Indian Companies Act, which carried on the business inter alia of manufacture, storage and sale of various kinds of Indian made foreign liquors and had its plants for manufacture and production of beer and distillation and production of the said liquors at Solan (in Himachal Pradesh), at Mohan Nagar (in Uttar Pradesh), at Lucknow (in Uttar Pradesh) and at Kasauli (in Himachal Pradesh) held in the years 1967, 1968 and 1969 a licence in form P. W. H 2 under Section 22 of the Punjab Excise Act (1 of 1914) (hereinafter referred to as 'the Act') read with Rule 2 of the Punjab Bonded Warehouse Rules, 1957 (hereinafter referred to as 'the 1957 Rules') which were framed by the Financial Commissioner under Section 59 read with Section 22 of the Act, permitting it to run on conditions specified therein a Bonded Warehouse at

Chandigarh for storage of bottled and bulk liquor and issue thereof under bond or on payment of duty to the licensees of Punjab, Haryana, Himachal Pradesh etc. One of these conditions required the appellant to observe the provisions of the Act as also the Rules framed and instructions issued thereunder from time to time.

3. Rules 7 to 10 of the 1957 Rules governing the appellant's licence run thus:

"7. No liquor shall be received in the bonded warehouse unless accompanied by a pass from the Officer-in-charge of the distillery or bonded warehouse from which it has been imported or transported.

Immediately on arrival of a consignment at the bonded warehouse the officer-in-charge shall be informed and the consignment shall not be opened until the same has been examined and verified with the pass by the Officer-in-charge who shall also note the results in the register maintained for the purpose and also on the pass covering the consignment. One copy of the pass with entries of receipt shall be immediately returned to the Officer, who issued the pass and the other copy with entries thereon, shall be kept in the Warehouse.

8. A wastage allowance not exceeding 1 per cent shall be made for the actual loss in transit by leakage or breakage of vessels or bottles containing liquor. The allowance shall be determined by deducting from the quantity despatched the quantity received at the destination, both quantities being stated in terms of proof litres of spirit contents or in case of beer in bulk litres.

9. If the report of the Officer-in-charge shows that the wastage exceeds the prescribed limit, the licensee shall be liable to pay duty at the prescribed rate as if the wastage in excess of the prescribed limit had actually been removed from the Warehouse.

Provided that each case of excessive wastage shall be reported to the Financial Commissioner for orders, who may in his discretion, on good cause being shown, remit it whole or a part of the duty leviable on such wastage.

10. Liquor shall be imported/transported under bond in accordance with the Punjab Liquor Permit and Pass Rules at the sole risk and responsibility of the licensee. The bond in form L. 37 shall be discharged, after liquor has been duly checked and proved by the Officer-in-charge and deposited in the Warehouse."

4. Between June, 1967 and April, 1969, the appellant transported, for the purpose of bottling, various quantities of Indian made foreign liquors from its aforesaid distilleries in Uttar Pradesh and Himachal Pradesh to its Bonded Warehouse at Chandigarh. This was done on the strength of the permits issued by the Excise and Taxation Officer, Chandigarh. Pursuant to Rule 7 of the 1957 Rules, the Officer-in-charge of the Warehouse examined the consignments on their arrival at their destination with a view to checking and verifying the quantities thereof with those shown in the permits and discovered that they suffered from shortage which exceeded the wastage allowance of 1 per cent permissible under Rule 8 of the said Rules.

5. As a sequel to the detection of the aforesaid shortages, the Excise and Taxation Commissioner exercising the powers of Financial Commissioner, Chandigarh Administration, who is the first respondent herein, issued notices calling upon the appellant to show cause why duty at the prescribed rate of Rupees 20/- per proof litre be not levied against it on the wastage in excess of the prescribed limit "as if the same had been removed from its Bonded Warehouse at Chandigarh." In the written representations submitted on behalf of the appellant in reply to the notices, it was pleaded that the liquor evaporated during transit; that the Bonded Warehouse was in its initial stage and the method of measurement of spirit was crude; that at the time of measurement, the temperature of spirit was not taken and that apart from evaporation, wastage occurred by leakage of drums in transit. By his detailed orders dated January 15, 1969, and February 10, 1970, the said respondent repelled all the pleas raised on behalf of the

appellant and made the notices absolute holding that there was no material on the record to show that anything peculiar had taken place in respect of the consignment in question which entitled the appellant to any remission in the duty leviable on the wastage. The appellant thereupon preferred to the High Court writ petitions Nos. 342 of 1969 and 2376 of 1970 under Articles 226 and 227 of the Constitution challenging the aforesaid orders on various grounds. While the first writ petition was dismissed by the High Court by an elaborate judgment and order dated December 4, 1969, the second one was dismissed in limine vide order dated July 29, 1970. While the High Court granted, as already indicated, a certificate of fitness for appeal to this Court against its judgment and order dated December 4, 1969, it refused to do so in respect of its order dated July 29, 1970.

6. Though several contentions were raised by the appellant in the aforesaid two writ petitions filed by it in the High Court, counsel appearing on its behalf has assailed before us the correctness of the impugned orders passed by the first respondent on two grounds. He has in the first instance contended that Rules 8 and 9 of the 1957 Rules under which the duty is sought to be imposed are ultra vires the rule making power of the Financial Commissioner. Elaborating his submission, counsel has urged that since the State alone has, by virtue of Sec. 31 of the Act, the power to impose duties mentioned therein, as also the exclusive power under Section 58 (1) of the Act to make rules for the purpose of carrying out the provisions of the Act including those of Sec. 31 or any other law for the time being in force relating to excise revenue and Section 13 (a) of the Act prohibits the State Government to delegate the powers conferred on it by Sections 14, 21, 31, 56 and 58 of the Act, Rules 8 and 9 of the 1957 Rules are manifestly beyond the competence of the Financial Commissioner. This contention cannot, in our opinion, be accepted as it proceeds on a misconception of the correct legal position. It is, no doubt, true that it is the State Government

alone which is empowered to impose excise duty or countervailing duty on any excisable article and to prescribe rates thereof as also to make rules for carrying out inter alia the purposes of Section 31 of the Act, but it seems to be overlooked that the impugned rules do not impose any one of the aforesaid duties or prescribe the rates thereof or create any liability in respect thereof. They are in essence and substance of a regulatory character meant to guard against perpetration of fraud or deception on the Revenue. They provide for and regulate the storage of liquor in the Bonded Warehouse without payment at the initial stage of the duty payable under the Act and subsequently the removal of the liquor from the Warehouse on payment or otherwise of the duty which, as correctly pointed out by the High Court, is chargeable under the Fiscal Rules of 1937 issued by the State Government. The powers exercised by the Financial Commissioner were clearly available to him under Sections 59 and 22 of the Act and he has not, in our opinion, overstepped the same. The first contention raised on behalf of appellant is, therefore, overruled.

7. It is next contended by counsel for the appellant that Rules 8 and 9 of the 1957 Rules are also invalid as they go beyond the scope of Sections 16, 23 and 31 and Entry 51 of List II of the Seventh Schedule to the Constitution. Dwelling on this contention, counsel has submitted that as the taxing power of even the State Legislature is restricted to the imposition of excise duty or countervailing duty on an excisable article which, according to Section 3 (6) of the Act, means inter alia an alcoholic liquor for human consumption implying thereby an alcoholic liquor in existence, the incorporation in Rule 9 of the 1957 Rules of the fiction making the licensee liable to pay duty at the prescribed rate on wastage in excess of permissible limit as if the said wastage had actually been removed from the Warehouse has the effect of imposing duty on an article which neither existed in the State nor was removed from the Bonded Warehouse thus violating the scope and extent of the taxing power.

8. For a proper appreciation of the true legal position, it is necessary to advert to Sections 3 (6-b), 31, 32, 16 and 23 of the Act and Entry 51 of List II of the Seventh Schedule to the Constitution and the connotation of the term 'countervailing duty.'

"Section 3 (6-b) 'excise duty' and 'countervailing duty' mean any such excise duty or countervailing duty as the case may be, as is mentioned in Entry 51 of List II in the Seventh Schedule to the Constitution.

Section 31. Duty on excisable articles.— An excise duty, or a countervailing duty, as the case may be at such rate or rates as the State Government shall direct, may be imposed, either generally or for any special local area, on any excisable article—

(a) imported, exported or transported in accordance with the provisions of Section 16, or

(b) manufactured or cultivated under any licence granted under Section 20, or

(c) manufactured in any distillery established or any distillery or brewery licensed under Section 21;

Provided as follows:—

(i) Duty shall not be so imposed on any article which has been imported into India and was liable on importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878.

(ii) xx xx xx

Explanation.— Duty may be imposed under this section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article."

"Section 32. Manner in which duty may be levied.— Subject to such rules regulating the time, place and manner as the Financial Commissioner may prescribe, such duty shall be levied rateably, on the quantity of excisable article imported, exported, transported, collected or manufactured in, or issued from, a distillery, brewery or warehouse:

Provided that duty may be levied—

(a) on intoxicating drugs by an acreage rate levied on the cultivation

of the hemp plant, or by a rate charged on the quantity collected;

(b) on spirit or beer manufactured in any distillery established, or any distillery or brewery licensed, under this Act in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe;

(c) on tari, by a tax on each tree from which the tari is drawn:

Provided further that, where payment is made upon issue of an excisable article for sale from a warehouse established or licensed under Section 22 (a), it shall be made—

(a) if the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article, or

(b) in the absence of such direction by the State Government, at the rate of duty which is in force on that article on the date when it is issued from the warehouse."

"Section 16. Import, export and transport of intoxicants. No intoxicant shall be imported, exported or transported except—

(a) after payment of any duty to which it may be liable under this Act, or execution of a bond for such payment, and

(b) in compliance with such conditions as the State Government may impose."

"Section 23. Removal of intoxicant from distillery. No intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage established or licensed under this Act, unless the duty, if any, payable under Chapter V has been paid or a bond has been executed for the payment thereof."

"Entry 51 of List II of the Seventh Schedule to the Constitution— Duties on excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this Entry."

9. The expression 'countervailing duty' is not defined in the Act but its meaning has been made clear in the judgment of this Court in *Kalyani Stores v. State of Orissa*, (1966) 1 SCR 865 = (AIR 1966 SC 1686) where it was observed:—

"This brings us to the consideration of the meaning of the expression 'countervailing duties' used in Ent. 51, List II of the Seventh Schedule to the Constitution. The expression 'countervailing duties' has not been defined in the Constitution or the Bihar and Orissa Act 2 of 1915. We have, therefore, to depend upon its etymological sense and the context in which it has been used in Entry 51. In its etymological sense, it means to counterbalance; to avail against with equal force or virtue; to compensate for something or serve as an equivalent of or substitute for: see *Black's Law Dictionary*, 4th Edn. 421. This would suggest that a countervailing duty is imposed for the purpose of counterbalancing or to avail against something with equal force or to compensate for something as an equivalent. Entry 51 in List II of the Seventh Schedule to the Constitution gives power to the State Legislature to impose duties of excise on alcoholic liquors for human consumption where the goods are manufactured or produced in the State. It also gives power to levy countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The fact that countervailing duties may be imposed at the same or lower rates suggests that they are meant to counterbalance the duties of excise imposed on goods manufactured in the State. They may be imposed at the same rate as excise duties or at a lower rate, presumably to equalise the burden after taking into account the cost of transport from the place of manufacture to the taxing State. It seems, therefore, that countervailing duties are meant to equalise the burden on alcoholic liquors manufactured or produced in the State. If no alcoholic liquors similar to those imported into the State are

produced or manufactured, the right to impose counterbalancing duties of excise levied on the goods manufactured in the State will not arise. It may, therefore, be accepted that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied."

10. It will be seen that Section 31 of the Act read with Entry 51 of List II of the Seventh Schedule to the Constitution permits imposition of (i) excise duty by the State Government on any excisable article imported into or exported from or transported in accordance with the provisions of S. 16 of the Act which means after payment of any duty to which it may be liable under the Act or after execution of a bond for such payment and (ii) countervailing duty inter alia on alcoholic liquors for human consumption manufactured or produced elsewhere in India.

11. The contention advanced on behalf of appellant which seems to proceed on the assumption that the Chandigarh Administration can impose duty only if liquor is consumed in its territory is erroneous as, according to Section 31 of the Act read with the aforesaid Entry 51 of List II of the Seventh Schedule to the Constitution, countervailing duty can be imposed on liquor meant for consumption which is manufactured or produced elsewhere in India. It is immaterial whether the liquor for which permits were obtained was consumed within the Union Territory of Chandigarh or was in existence in that territory or not. What is material is whether permits were obtained for import from Uttar Pradesh of alcoholic liquor meant for human consumption and the quantity shown in the permits left Uttar Pradesh. In the present case, the liquor for which permits were obtained by the appellant was admittedly in existence and was meant for human consumption and did leave the appellants' distilleries in Uttar Pradesh for being transported to its Warehouse in Chandigarh at its own risk and responsibility. It is also not denied on behalf of the appellant that a portion of the liquor which

exceeded the permissible limit of wastage did not reach the appellant's Warehouse and was not found therein and the shortage remained unaccounted for. It is thus evident that duty is not sought to be charged on an excisable article which was not in existence, as contended on behalf of the appellant but is sought to be charged on liquor which was actually manufactured and left Uttar Pradesh but was found short beyond the permissible limit and no reasonable explanation was tendered by the appellant in respect thereof. There is accordingly no merit or substance in the second contention advanced on behalf of the appellant as well.

12. The decision of this Court in *Bimal Chandra Banerjee v. State of Madhya Pradesh*, (1971) 1 SCR 844 = (1970) 2 SCC 467 = (AIR 1971 SC 517) which is strongly relied upon on behalf of the appellant is not applicable to the present case. In that case, the condition introduced by the State Government in the purported exercise of its power under clauses (d) and (h) of Section 62 (2) of the Madhya Pradesh Excise Act, 1915, in the appellants' licences prescribing the minimum quantity of liquor to be purchased by them from the Government and enjoining them to make compulsory payment of excise duty on the quantity of liquor which they failed to take delivery of was held to be invalid as it went beyond the provisions of Ss. 25, 26, 27, 62 (1) and clauses (d) and (h) of Section 62 (2) of the aforesaid Act. In the present case, however, the liquor was lifted by the appellant from its distilleries in Uttar Pradesh and a portion thereof remained unaccounted for, as already stated, on arrival of the consignments at their destination.

13. For the foregoing reasons, the respondents were right in demanding the duty on the shortages.

14. In the result, the appeals fail and are dismissed with costs, limited to one set.

Appeals dismissed.

AIR 1976 SUPREME COURT 2027

(From: Madras)*

R. S. SARKARIA AND N. L. UNTWALIA, JJ.

Ramaswami Ayyangar and others,
Appellants v. State of Tamil Nadu,
Respondent.

Criminal Appeals Nos. 251 of
1972 and 243 of 1973, D/- 24-3-1976.

(A) Penal Code (1860), S. 34 — Application of — Essential for — Simultaneous consensus of minds of persons participating in criminal action to bring about a particular result.

Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the "criminal act." The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal

* (Criminal Appeals Nos. 369 of 1972 and 976 of 1971, D/- 22-9-1972 —Mad.).

nal action to bring such a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (Para 12)

Held on facts and circumstances of the case that A-2 obviously was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented P. W. 1 from going to the relief of the deceased and Section 34 was therefore fully attracted and A-2 was equally responsible for the murder of the deceased, though he did not physically participate in the fatal beating administered by A-3 and A-4 to the deceased. (Para 12)

(B) Evidence Act (1872), S. 3 — Evidence of person injured in the same occurrence — His ocular version of incident is of great value. (Para 7)

(C) Criminal P. C. (1898), S. 423 — Appeal against acquittal — Interference by High Court.

Where the view taken by the trial Court was reasonably possible to be taken and the reasons given by it for acquittal were not such as to justify an interference, it was held that the High Court was not justified in convicting the accused. (Para 9)

(D) Penal Code (1860), Ss. 147, 148 and 149 — Conviction under — Six accused persons — Acquittal of three — Remaining three cannot be convicted for forming an unlawful assembly for any criminal common object — None can be convicted under Section 147 or Section 148 — Section 149 cannot be pressed into service against any. (Para 13)

(E) Criminal P. C. (1898), S. 423 — Powers of Appellate Court — Accused 1, 5 and 6 acquitted by trial Court of all offences including rioting — Accused 2, 3 and 4 were convicted of other offences but acquitted of rioting — Appeal by State against acquittal of accused 1, 5 and 6 — No appeal against acquittal of accused 2, 3 and 4 for rioting — High Court, held, was not justified in convicting them for rioting. (Para 5)

Mr. Debabrate Mookerjee, Sr. Advocate, Mr. M. S. K. Sastri and Mr. M. S. Narasimhan, Advocates with him, for Appellants; Mr. A. V. Rangam and Miss A. Subhashini, Advocates: for Respondents.

Judgment of the Court was delivered by

UNTWALIA, J.:— Criminal Appeal No. 251 of 1972 has been filed under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and Criminal Appeal No. 243 of 1973 is by special leave. In all there are six appellants. It would be convenient to refer to them with reference to their accused number given in the judgment of the Sessions Court. They are as follows:

- Accused No. 1 (A-1)—Ramaswami Ayyangar.
- Accused No. 2 (A-2)—Vattappan.
- Accused No. 3 (A-3)—Kaipilai alias Karuppayan.
- Accused No. 4 (A-4)—Raman.
- Accused No. 5 (A-5)—Kathayyan.
- Accused No. 6 (A-6)—Kulandaian.

2. The occurrence giving rise to these two appeals took place on Monday the 21st April, 1971 at about 4.00 p.m. at Sivan Koil tank in village Thaduthalkondapuram. In the said occurrence was seriously injured one Kaliaperumal who later died in the Hospital at about 9.00 p.m. the same evening. Another person injured in the occurrence was also named Kaliaperumal, P. W. 1. The prosecution case is that deceased Kaliaperumal was living with his maternal uncle Pichai Konar, P. W. 7 since infancy. A-1 is the Karnam of the village and A-6 is the Government vetti. A-2 and A-3 are brothers. A-4, A-5, and A-6 are also inter se brothers. A-2 to A-6 worked under A-1. There was enmity between P. W. 7 and the deceased on the one hand and A-1 on the other on account of several causes. The facts showing the enmity between them are stated in the judgments of the courts below and are not necessary to be detailed here. Two days prior to the occurrence Marimuthu, P.W. 10 was driving

some cattle, 4 or 5 of them went astray and entered into the Gingilli Kollai (field) belonging to A-1. A-1's men scolded P. W. 10 and the deceased who was informed about the incident by the former at a tea shop. P. W. 1 was also present there. Deceased Kaliaperumal passed on the information to P. W. 7.

3. Ramalingam, P. W. 4 brother of the deceased was taking his bath in the Sivan Koil tank. Kaliaperumal (deceased) also came there saying something against the Karnam. He also started bathing at the north-western corner of the tank. According to the prosecution case, A-1 came there followed by A-2 to A-6. A-2 had a cross-stop (an instrument used in Survey and measurement, perhaps the correct name of the instrument is cross-staff). A-3 and A-4 were each armed with an Aruwal. A-5 had a stick and A-6 was carrying a stick with a spear attached to it. According to the evidence in Court, A-1 told the other accused "not content to with grazing (his) cattle in my gingilly field, he is also abusing me. Cut him, whatever be the expenses, I will look after that." Thereupon A-4 asked the deceased Kaliaperumal "Why are you abusing the 'Iyar'?" Saying something Kaliaperumal ascended the bank. A-3 and A-4 assaulted him on his head with Aruvals. P. W. ran to separate them when A-2 assaulted him on his head with the cross-staff. P. W. 1 attempted to run. Thereupon it is said A-6 obstructed him from running with the help of the stick with spear head. A-4 again cut on the head of Kaliaperumal (deceased) with his Aruwal. A-2 beat on P. W.'s head with the cross-staff four or five times. P. W. 1 fell down unconscious. P. W. 7 and others took the injured to the Government Dispensary Kodavasal. Dr. Radha Singh, Civil Assistant Surgeon, P. W. 15 examined Kaliaperumal deceased at 4.55 p.m. and issued a Wound Certificate. Since his condition was serious he was sent to the Government Hospital, Kumbakonam. P. W. 15 examined the injuries of P. W. 1 at 5.20 p.m. and found as many as nine injuries on his person. As already stated

Kaliaperumal died at about 9.00 p.m. Dr. N. Jayaraj, P. W. 18 performed the autopsy over the dead body. As many as 14 injuries were found. The injuries given on the head with Aruval according to the opinions of the Doctors were sufficient in the ordinary course of nature to cause his death.

4. Various charges were framed against the six accused including that of rioting under Section 147, I.P.C. against A-1 and A-5 and Section 148 against A-2, A-3, A-4 and A-5. A-1 was further charged under Sections 302/149 and Sections 302/109. A-2 to A-6 were charged under Section 302. An extra charge under Section 324 was levelled against A-2 for causing simple hurt to P. W. 1 with the cross-staff, an instrument which had sharp edges. A-6 was also charged under Section 341 of the Penal Code for preventing P. W. 1 from escaping. The accused denied their complicity in the occurrence and pleaded not guilty. A-1 took a plea of alibi also and asserted that he had gone to Madras in connection with some marriage negotiations. Two days after the date of occurrence he was arrested at Kumbakonam Railway Station when he alighted from the train on his return from Madras. The trial Judge acquitted A-1, A-5 and A-6 of all the charges. He convicted A-3 and A-4 under Section 302 of the Penal Code and awarded a sentence of life imprisonment to each of them. They were acquitted of the charge under Section 148. A-2 was convicted only under Section 324 with sentence of 4 months' rigorous imprisonment and acquitted of all other charges.

5. A-2, A-3 and A-4 preferred an appeal in the Madras High Court against their conviction and the sentences imposed upon them by the trial Court. State preferred an appeal against the acquittals of A-1, A-5 and A-6 as also against the acquittal of A-2 of the charge under Section 302. It, however, did not prefer any appeal against the acquittal of A-2, A-3 and A-4 of the charge under Section 148 of the Penal Code. Yet it is surprising to find that the High Court has convicted all the six accused for the offences of rioting, A-1 and A-5 under

Section 147 with two years' rigorous imprisonment and A-2, A-3, A-4 and A-6 u/s 148 with 3 years' rigorous imprisonment. Conviction of A-3 & A-4 for the offence of murder under Section 302 has been maintained with the aid of Section 34. High Court has also convicted A-2, A-5 and A-6 under Sections 302/34 and awarded each of them life imprisonment. A-1 has been convicted by the High Court under Sections 302/149 and 302/109 with sentence of life imprisonment under each. Conviction of A-2 under Section 324 has been maintained. Hence these two appeals.

6. That there was enmity and bad blood between A-1 and P. W. 7 is not open to any doubt. An occurrence did take place on the date, time and place as given by the prosecution. The manner of occurrence in so far as it relates to the attack on the deceased is concerned by A-2 and A-3 has also been proved to the hilt. The factum of assault by A-2 on P. W. 1 also does not admit of any doubt. But the High Court does not seem to be justified in reversing the order of acquittal recorded by the trial Court in favour of A-1, A-5 and A-6.

7. It was claimed by the prosecution that apart from P. W. 1 there were four more eye-witnesses to the occurrence namely Govindaswami, P. W. 3, Ramalingam, P. W. 4, Rajagopal, P. W. 5 and Kaliaperumal, P. W. 6. P. Ws. 3 and 4 are brothers of the deceased. P. W. 5 is the brother-in-law of P. W. 3. Ext. P-1 is the statement of P. W. 1 before the police on the basis of which the First Information Report was drawn up. On reading this statement as also the evidence of P. W. 1 in Court, the trial Judge rightly came to the conclusion that P. Ws. 3, 4, 5 and 6 arrived at the scene of occurrence after it had taken place. None of them had witnessed it. It considered the evidence of each witness, viz. P. Ws. 3 to 6, individually and did not rely upon it. In our judgment, the High Court was not right as against the explicit statement and evidence of P. W. 1 in treating P. Ws. 3 to 6 as eye-witnesses to the occurrence. It is significant to note that although P. Ws. 3

and 4 were the brothers of the deceased Kaliaperumal but none of them made any attempt to save him from the attack of the assailants. Had they been present at the occurrence surely they would have tried to save their brother, as was done by P.W. 1. We are, therefore, left with the evidence of P. W. 1 alone. Since he was injured in the same occurrence, undoubtedly, his ocular version of the incident is of great value to the prosecution.

8. The plea of alibi set up by A-1 has not been substantiated at all. The trial Judge was not right in doubting the prosecution case merely because A-1 had applied for leave on the 18th April — 3 days before the occurrence. There was no evidence to show that he was at Madras on the date of occurrence. According to the Investigating Agency, A-1 was arrested not on the Railway platform but near the Railway crossing of Kumbakonam Railway Station. But the trial Court was right in saying that the only part attributed to A-1 was the order giving for assault. In the statement Ext. P-1 the only words of order attributed to A-1 are "to cut". In Court there was great embellishment and improvement in the evidence of P. W. 1 when he put several sentences in the mouth of A-1 at the time of the alleged order giving. As already stated, A-1 was the Karnam of the village and even if he was at the back of the assault on the deceased it does not stand to reason that he himself would go to the place of occurrence merely for giving the order for assault. The order, if any, must have been given to the assailants in secret by A-1. He must not have come to the place of occurrence merely for this purpose. We are, therefore, of the view that although the High Court in its judgment purported to keep in front the well-settled principles of law to justify an interference by it with the order of acquittal, it did commit a mistake in the applications of those principles. Conviction of A-1 by the High Court under any count is not justified.

9. So do we find in the case of A-5 and A-6 that they had not taken any part in the occurrence at

all. The alleged obstruction given by A-6 to P. W. 1 when he wanted to run was not believable and has not been believed by the trial Court. The reasons given by the trial Court for their acquittal were not such as to justify an interference by the High Court. The view taken by the trial Court was reasonably possible to be taken.

10. Coming to the case of A-2 we find that he did assault P. W. 1 with the cross-staff marked Ext. MO-1. This cross-staff, as alleged has been recovered from the house of A-1. The trial Court, rightly, did not believe the story of its recovery from his house. But surely A-2 had used the cross-staff for assaulting P. W. 1. A serious question for consideration is whether his conviction under Section 302 with the aid of Section 34 is justified or not. In this connection we find the statement of P. W. 1 in Ext. P-1 to the following effect:

"Raman too with the aruval in his hand dealt a cut at the front portion of his head. I ran there to prevent it. At that time Vattappan with the string fixed wood he was having in his hand beat on my head."

In the Sessions Court also he deposed:

"Thereupon, Accused No. 3 immediately cut on the head of Kaliyaperumal in the front portion with the aruval he was having in his hand. I ran to separate them. Immediately Accused No. 2 beat on my head with M. O. 1..... Then accused number 2 beat on my head with M. O. 1, 4 or 5 times. I fell down unconscious. After some time, President Kaliyaperumal, Rajagopal, Mani alias Rajagopal, Ramalingam, Govindaswami — these persons came there."

From the evidence of P. W. 1 corroborated as it is from his statement in Ext. P-1 it is clear that P. W. 1 wanted to save Kaliyaperumal — the deceased, from the murderous attack by A-3 and A-4. A-2 was standing as a guard and did not allow P. W. 1 to protect the deceased. A-2 went to the length of assaulting P. W. 1 and making him fall down unconscious.

11. It is contended that A-2 cannot be held vicariously liable with the aid of S. 34 for the act of A-3 and A-4, for two reasons: Firstly, he did not physically participate in the fatal beating administered by A-3 and A-4 to the deceased and thus the "criminal act" of murder was not done by all these three accused within the contemplation of Sec. 34, the act committed by A-2 in regard to the beating of P. W. 1 being a different and separate act of A-2. Secondly, it has not been shown that the act of A-2 in beating P. W. 1 was committed in furtherance of the common intention of all the three, pursuant to a pre-arranged plan.

12. The contention is fallacious and cannot be accepted. Section 34 is to be read along with the preceding Section 33 which makes it clear that the "act" spoken of in Section 34 includes a series of acts as a single act. It follows that the words "when a criminal act is done by several persons" in Section 34, may be construed to mean "when criminal acts are done by several persons." The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Sec. 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.' The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular

result. Such consensus can be developed at the spot and thereby intended by all of them. In the case before us, A-2 obviously, was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented P. W. 1 from going to the relief of the deceased. Section 34 was therefore fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased. Under these circumstances we think the High Court was justified in convicting A-2 for the offence of murder of Kaliyaperumal with the aid of Sec. 34 of the Penal Code. There was absolutely no difficulty in maintaining the convictions of A-3 and A-4 for the murder of Kaliyaperumal with the aid of Section 34 because both had mercilessly assaulted him with Aruvals on the vital parts of the body. In the case of A-2 also it is quite legitimate to hold that he had shared the common intention of A-3 and A-4 in the commission of the murder of Kaliyaperumal.

13. The conviction of none of the accused for the offence of rioting can be maintained either in law or on facts. In the view which we have expressed above that the High Court was not justified in reversing the acquittals of A-1, A-5 and A-6, there were only 3 left in the party of the assailants. Moreover the State did not file any appeal, as stated already, against the acquittal of A-2, A-3 and A-4 under Section 148 of the Penal Code. That being so, they could not be convicted for having formed an unlawful assembly for any criminal common object. None could be convicted, therefore, under Section 147 or 148. Section 149 could not be pressed into service against any.

14. In the result we allow both the appeals in part, restore the order of acquittal recorded in favour of A-6 viz. Ramaswami Ayyangar, A-5 Kathayyan and A-6 Kulandaiyan acquitting them of all the charges, set aside the conviction of the remaining accused under Sections 147 and 148 of the Penal Code and maintain the convictions of A-2 Vattappan, A-3 Kaipillai alias Karuppayyan, A-4 Raman under Sections 302

34 with the sentence of life imprisonment to each. We also maintain the conviction of A-2 under Section 324 Indian Penal Code with the concurrent sentence of 4 months' rigorous imprisonment under the said count.

Appeals allowed in part.

AIR 1976 SUPREME COURT 2032

(From: Punjab and Haryana)*

R. S. SARKARIA AND N. L. UNTWALIA, JJ.

Bahal Singh, Appellant v. State of Haryana, Respondent.

Criminal Appeal No. 257 of 1973, D/- 12-3-1976.

(A) Criminal P. C. (1974), S. 386 — Appeal against acquittal — High Court's power to interfere — Guidelines — View taken by trial Court not perverse but reasonably possible — High Court held not justified in interfering with it — Criminal Appeal No. 256 of 1971, D/- 24-9-1973 (Punj. & Har.), Reversed.

The High Court has powers as full and wide in appeals against acquittal as in appeals against conviction. Whether the High Court is dealing with one class of appeals or the other, it must equally have regard to the fundamental principles of criminal jurisprudence that unless the statute provides to the contrary, there is a presumption of innocence in favour of the accused and secondly, that the accused is entitled to the benefit of reasonable doubt. Due regard to the views of the trial Court as to the credibility of witness in matters resting on pure appreciation of evidence and the studied slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing and hearing the witnesses, where such seeing and hearing can be useful aids to the assessment of evidence, are well known principles which generally inform the administration of justice and govern the exercise of all ap-

*(Criminal Appeal No. 256 of 1971, D/- 24-9-1973—(Punj. and Har.)).

GT/GT/B11/76/VBB

pellate jurisdiction. Such regard and slowness must find their reflection in the appellate judgment, which can only be if the appellate court deals with the principal reasons that influenced the order of acquittal and after examining the evidence with care gives its own reasons justifying a contrary view of the evidence. It is implicit in this judicial process that if two views of the evidence are reasonably possible, the finding of acquittal ought not to be disturbed. AIR 1974 SC 606 and AIR 1971 SC 66, Foll. (Paras 2, 3)

Held, in the instant case, the High Court, having entertained a grave suspicion against the accused as being responsible for the murder in question, allowed itself to transgress the limits of its power and felt persuaded to brush aside or side track some of the salient features of the prosecution case which led the trial Judge to doubt it and acquit the respondent. After having examined the two judgments and the relevant pieces of evidence, the Supreme Court in appeal came to the conclusion that the trial Judge was right in recording an order of acquittal in favour of the respondent and there was no sufficient justification for the High Court to interfere with it. In any event, the view taken by the trial Court was reasonably possible to be taken and the High Court could not reverse it merely because it was inclined to take a different view of the facts. Criminal Appeal No. 256 of 1971, D/- 24-9-1973 (Punj. and Har.), Reversed. (Paras 4, 14)

(B) Evidence Act (1872), S. 3 — Evidence, appreciation of — Criminal trial — Motive.

Even if the genesis or the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only on that account, if otherwise it was reliable.

(Para 8)

(C) Evidence Act (1872), S. 3 — Chance witness — Evidence, appreciation of.

If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness.

And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused, then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny. (Para 10)

Cases Referred: Chronological Paras

AIR 1974 SC 606 = 1974 Cri LJ 479
2, 3

AIR 1971 SC 66 = (1970) 2 SCC 450
= 1971 Cri LJ 20 2

Mr. R. L. Kohli and Mr. Prem Malhotra, Advocates, for Appellant; Mr. H. S. Marwah, Advocate and Mr. R. N. Sachthay, Advocate, for Respondent.

Judgment of the Court was delivered by

UNTWALIA, J.:— Bahal Singh, the sole respondent in this appeal, was tried by the Sessions Judge of Hisar for an offence under Section 302 of the Indian Penal Code for the murder of one Ram Sarup, brother of Manphool, P. W. 2. The Trial Judge held that the prosecution was not able to establish the occurrence in the manner alleged by any reliable evidence; at any rate, the case against the respondent was not free from doubt. Accordingly, he acquitted the respondent. On appeal by the State of Haryana the High Court of Punjab and Haryana set aside the respondent's acquittal, convicted him under Section 302 of the Penal Code and imposed a sentence of life imprisonment. This appeal has been preferred under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

2. The principles governing the scope of an appeal against acquittal and the High Court's power to interfere in it are well settled by several decisions of this Court, to wit Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 = (AIR 1971 SC 66) and Ram Jag v. State of Uttar Pradesh, AIR 1974 SC 606. In Khedu Mohton's case (supra) it has been pointed out by Hegde, J. in paragraph 3 at page 452 = (para 3 at pp. 67-68 of AIR SC):

"It is true that the powers of the High Court in considering the evidence on record in appeals under

Section 417, Cri. P. C., are as extensive as its powers in appeals against convictions but that Court at the same time should bear in mind the presumption of innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the appellate judge has found them not guilty. Unless the conclusions reached by him are palpably wrong or based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusion. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal."

3. Chandrachud, J. speaking for the Court in Ram Jag's case (AIR 1974 SC 606) (supra) has summarized the law on the point in the following terms:

"The principles governing appeals against acquittal are thus firmly established and the issue cannot now be re-opened. The Code of Criminal Procedure by Section 423, has accorded parity to appeals against conviction and appeals against acquittal, the Code makes no distinction between the powers of the appellate court in regard to the two categories of appeals and therefore the High Court has powers as full and wide in appeals against acquittal as in appeals against conviction. Whether the High Court is dealing with one class of appeals or the other, it must equally have regard to the fundamental principles of criminal jurisprudence that unless the statute provides to the contrary, there is a presumption of innocence in favour of the accused and secondly that the accused is entitled to the benefit of reasonable doubt. Due regard to the views of the trial Court as to the credibility of witness in matters resting on pure appreciation of evidence and the studied slowness of the appellate court in disturbing a finding of fact arrived at by a Judge who had the

advantage of seeing and hearing the witnesses, where such seeing and hearing can be useful aids to the assessment of evidence, are well known principles which generally inform the administration of justice and govern the exercise of all appellate jurisdiction. They are self-imposed limitations on a power otherwise plenary and like all voluntary restraints, they constitute valuable guidelines. Such regard and slowness must find their reflection in the appellate judgment, which can only be if the appellate court deals with the principal reasons that influenced the order of acquittal and after examining the evidence with care gives its own reasons justifying a contrary view of the evidence. It is implicit in this judicial process that if two views of the evidence are reasonably possible, the finding of acquittal ought not to be disturbed."

4. In the instant case it appears to us that the High Court, having entertained a grave suspicion against the respondent as being responsible for the murder in question, allowed itself to transgress the limits of its power and felt persuaded to brush aside or side track some of the salient features of the prosecution case which led the trial Judge to doubt it and acquit the respondent. After having examined the two judgments and the relevant pieces of evidence with the assistance of the learned counsel for the parties we have come to the conclusion that the trial Judge was right in recording an order of acquittal in favour of the respondent and there was no sufficient justification for the High Court to interfere with it. In any event, the view taken by the trial Court was reasonably possible to be taken and the High Court could not reverse it merely because it was inclined to take a different view of the facts.

5. The learned Sessions Judge in his judgment has levelled several criticisms against the prosecution case and the evidence. Some of them were too insignificant and flimsy to shake the prosecution version of the occurrence. The High Court, no doubt, has taken pains to discuss and refer to almost all the criticisms

mentioned in the judgment of the trial Court and has rightly not attached any importance to some of the minor criticisms. But in dealing with some of the salient features of the case it seems to have unjustifiably tilted the balance in favour of the prosecution as against the views of the trial Court.

6. There is a village Kajla within the jurisdiction of Sadar Police Station, Hissar, District Hissar situated at a distance of about nine miles. On the 15th of March, 1970 Ram Sarup — the deceased, respondent Bahal Singh and Jagdish, P. W. 8, according to the prosecution case went to the Cattle fair at Hissar. Ram Sarup and Bahal Singh indulged in gambling. The latter lost Rs. 1,100/-. There was altercation between them because Bahal Singh wanted the return of the money lost by him. Ram Sarup and Jagdish returned to the village on the 16th March. Bahal Singh also returned a day later. On the 17 March, 1970 at about sunset time i.e. at about 6.30 p.m. Ram Sarup and his brother Manphool, P. W. 2, the prosecution case further runs, were going through a lane in the village to the house of one Ram Chander — their Siri-incultivation who was not attending to their work for 3 or 4 days. When they reached near the shop of one Gobind Sunar (not examined) Bahal Singh was standing there armed with his single barrel-gun. On seeing the two brothers, he challenged Ram Sarup and fired a shot at him hitting him on his left thigh. Ram Sarup fell down. Manphool pounced upon Bahal Singh to catch him and his gun but the latter fled away with it. The phatti (fore-end) (wrongly described as stock in the judgment of the High Court) got separated from the barrel of the gun and came in the hands of Manphool. Two other persons Sheo Narain, P. W. 4 and Surja, P. W. 5 are said to have witnessed the occurrence. Injured Ram Sarup was taken to Civil Hospital, Hissar in a bullock cart where the party reached at about 10.00 p.m. The Doctor on duty found Ram Sarup dead and sent a Ruka to Police Station at 10.15 p.m. Sub-Inspector Sis Ram, P. W. 11 received the Ruka at 12.30 A.M. on the 18th

March, 1970 and reached the Hospital at 2.00 A.M. He recorded the statement of Manphool at 2.30 A.M. About an hour later, the formal First Information Report was recorded and a copy of it reached the Illaka Magistrate in the town of Hissar at about 7.30 in the morning. The respondent is said to have been apprehended with his gun which was a licenced one at Agraha turning bus stand on the 22nd March, 1970 when Sis Ram — the Sub-Inspector was returning to Hissar from Adampur where he had gone for an investigation of another case. The phatti is Ext. P1 and the gun is Ext. P2. After charge-sheet and commitment the respondent was tried in the Court of Session under Section 302 of the Penal Code.

7. Ignoring the minor and the flimsy criticisms of the prosecution evidence in the case out of those mentioned in the judgment of the trial Court, we shall advert to the principal and important reasons given therein. They are the following:

(1) Jagdish P. W. 8 admitted in cross-examination that Bahal Singh and Ram Sarup did not gamble in his presence. His evidence, therefore, was not sufficient to establish the genesis or the motive of the occurrence.

(2) The story of Manphool that both the brothers were going to the house of Ram Chander, their Siri, was not natural and probable.

(3) P. Ws. 4 and 5 are collaterals of Manphool. Both were chance witnesses and their reasons for their presence at the place and time of occurrence were not credible.

(4) Manphool's testimony of having snatched the phatti of the gun from the hands of the respondent, its deposit with the Sub-Inspector, P. W. 11 did not appear to be true.

(5) The alleged eye-witnesses who were three in number including Manphool did not make any attempt to follow and apprehend the respondent even after his gun became useless on the alleged separation of the phatti.

(6) No independent witness from around the place of occurrence was

examined in support of the prosecution version of the occurrence.

(7) The story of apprehending the respondent on the 22nd March at Agroha turning and the seizure of the gun without the phatti, was not reliable.

(8) A pair of shoes was found at the place of occurrence and no attempt was made to find out as to whose shoes they were.

(9) The clothes of the deceased were found to be torn by the Doctor who held the autopsy on the dead body. The explanation given by Manphool in that regard was not believable. Rather, the torn clothes showed that there was a scuffle between the deceased and the assailant. The gun also seems to have been fired on him from a very close range.

8. Now we come to the High Court judgment and refer to the discussion of the points in the order mentioned above. The High Court is of the opinion that although, Jagdish P. W. 8 admitted that Bahal and Ram Sarup did not gamble in his presence, it appeared that they had altercation and exchanged slaps and fist blows in his presence as he was positive in asserting that he had separated the respondent and the deceased. The tenor of the evidence of P. W. 8 did not warrant this conclusion. According to the said evidence, gambling, altercation and exchange of slaps and fist blows all happened in succession at the same time. The statement in examination-in-chief was suggestive of the fact of the presence of the witness at the said happenings. When in cross-examination Jagdish admitted that the gambling did not take place in his presence it shook his entire evidence. It may, however, be said that even if the genesis or the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only on that account, if otherwise it was reliable.

9. The trial Court was not unreasonable in doubting the story of Manphool going with his brother Ram Sarup to the house of Ram Chander merely to find out the reason of his not coming to work. The view taken by the High Court that in villages

both the brothers could go for the purpose is also possible to be taken. But unless the one taken by the trial Court was perverse or reasonably not possible, a different view was not warranted.

10. As to the presence of P. Ws. 4 and 5 at the time and place of occurrence the trial Court entertained grave doubts. If by coincidence or chance a person happens to be at the place of occurrence at the time it is taking place, he is called a chance witness. And if such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautious and close scrutiny. In the instant case, P. Ws. 4 & 5 were agnatic relations of the deceased—one of them a close one. The reason given by them for being at the place of occurrence did not appear to be true to the trial Court. There was not any compelling or sufficient reason for the High Court to differ from the evaluation of the evidence of the two chance witnesses. It may well be as remarked by the High Court that the respondent was also their collateral but they appeared to be partisan witnesses on the side of the prosecution and hence their testimony was viewed with suspicion by the trial Judge.

11. The reasons 4, 5, 6 and 7 mentioned above from the trial Court judgment may be taken up together. Either there was delay in giving information to the police or unexplained delay in the various steps taken by Sub-Inspector Sis Ram. The Police Station was at a distance of about 3 kilometers from the Hospital. It does not stand to reason that the Ruka sent by the Doctor took more than two hours to reach the Sub-Inspector at the Police Station and that the latter took an hour and a half in reaching the Hospital after receipt of the Ruka. The copy of the First Information Report was received by the Illaka Magistrate at 7.30 A.M. in the morning. Although there was no evidence in support of the suggestions thrown on the side of the respondent, the possibility of

the suggestions being true could not be ruled out. Viewed in the background of the very suspicious story of the apprehension of the respondent on the 22nd March, 1970 at Agroha turning the story of snatching the fore-end of the gun by Manphool becomes very doubtful. From the evidence it is not clear how far this Agroha turning is from village Kajla. But Jagdish P. W. 10, it is interesting to find, happened to be at Agroha turning just by chance although he is a resident of a village 20 miles away from there. He is also related to the deceased. He was a witness to the seizure of the gun from the person of the respondent at Agroha turning. His evidence was too crude on its face to inspire any confidence as to the arrest of the respondent at Agroha turning with the phattiless gun. The High Court, in our opinion, has wrongly accepted this evidence as against its rejection by the trial Court. It is strange that Sis Ram could find the respondent present at the Agroha turning just by chance and P. W. 10 also a ready witness by chance. In this background the suggestion on behalf of the respondent that his licenced gun was taken away from his house soon after the occurrence in the same night, although not proved by any evidence, does cast doubt on the prosecution story as to the manner of Manphool's catching hold of the phatti. P. Ws. 4 and 5 are also licenced gun holders. If the story of separation of the phatti on Manphool's pouncing upon the respondent was correct the three persons present at the scene of occurrence, if at all they were present, could have succeeded in catching the respondent with his gun. It was a single barrel gun and after one shot was fired it could not be reloaded on detachment of its fore-end. There would have been, therefore, no fear or risk in the witnesses pursuing and apprehending the respondent with his gun at or near the place of occurrence. There are houses of persons around the scene of occurrence. The occurrence is said to have taken place at about sun-set time. There must have been present independent persons in the village to watch the occurrence if it did take place in the manner alleg-

ed. But there was no such witness coming forward. The High Court remarked that some persons came immediately after the occurrence. But none of them was examined to say whether any of the three eye-witnesses was present at the scene of occurrence or any of them told the persons who arrived there the name of the respondent as being the assailant of the deceased.

12. The High Court was not justified on mere speculation in observing that the pair of shoes found at the place of occurrence by Sub-Inspector Sis Ram might have been of the deceased. There was no evidence in that regard. Had the pair of shoes been of the deceased or of the respondent the prosecution could have no excuse for its failure to say so. It suggests that the pair of shoes, if it was not transplanted later by somebody, was of an unknown assailant. Or, in any event it was also a hook in the chain of doubt as to the prosecution case.

13. Coming to the 9th and the last reason mentioned above it would be noticed that the shirt of the deceased was found to be torn at two places. His dhoti was also torn and kachha was found torn at some places. It was not Manphool's evidence that Ram Sarup while going with him was wearing torn and tattered clothes. He was, therefore, obliged to give an explanation for their being found torn. The explanation was that while putting Ram Sarup on the bullock cart the clothes got torn. The trial Judge found it difficult to swallow this explanation. In our opinion the High Court was wrong in accepting it. In the circumstances of the case the probability of the clothes being torn and especially of the kachha in the manner suggested by the prosecution, was not there at all. On the other hand, it was quite legitimate to think that Ram Sarup had a scuffle with his assailant and the clothes got torn in that scuffle. Neither Manphool nor P. Ws. 4 and 5, perhaps, saw the occurrence. It is also clear that the gun was fired by the assailant at Ram Sarup's thigh from a very close range. The muzzle of the gun at the time of fire must not be more than a foot away from the thigh. The Doctor

who did post-mortem examination found a piece of card-board torn in four parts and a metallic pellet in the left thigh of Ram Sarup. There was burning of the margins of the wound of entry. The Doctor was not quite right in saying that it was due to heat of the bullet or the pellet. And this showed that the gun was fired from a close range. The High Court was also of the same view. The ocular version of the occurrence given by the prosecution witnesses 2, 4 and 5 does not indicate that the gun was fired by the respondent after he had come very close to the deceased. Rather, according to the evidence of Manphool it was fired from a distance of about 1½ pondas i.e. about 7½ ft.

14. In our judgment, therefore, the order of acquittal recorded by the trial Court was correct as the prosecution case could not be said to have been proved beyond doubt against the respondent. In any view of the matter the order was not such as could be justifiably and legally interfered with by the High Court. The High Court has gone wrong in setting the acquittal aside and convicting the respondent. We allow his appeal and set aside his conviction and sentence.

Appeal allowed.

AIR 1976 SUPREME COURT 2037

(From: Allahabad)*

A. N. RAY C. J., M. H. BEG AND JASWANT SINGH, JJ.

R. C. Sharma, Appellant v. Union of India and others, Respondents.

Civil Appeal No. 1155 of 1971, D/- 6-5-1976.

(A) Constitution of India, Article 311 — Departmental inquiry — Reasonable opportunity of being heard and to lead evidence — Denial of — Effect.

The question whether a civil servant in a departmental enquiry against him was given a reasonable opportunity to lead evidence and to be heard or not is largely a question

*(First Appeal No. 178 of 1961, D/- 17-11-1969—(All.)).

of fact. It is only when opportunity denied is of such a nature that the denial contravenes a mandatory provision of law or a rule of natural justice that it could vitiate the whole departmental trial. Prejudice to the government servant resulting from an alleged violation of a rule must be proved. (Para 6)

(B) Constitution of India, Article 311 — Departmental inquiry on same allegations as in previous inquiry — If operates as bar.

If an inquiry is held, at a particular stage, possibly to determine whether regular proceedings should be drawn up or started, it does not debar a departmental trial after framing a charge. AIR 1975 SC 2277 and AIR 1937 PC 27, Rel. on.

(Para 7)

(C) Civil P. C. (1908), S. 9 — Suit challenging validity of departmental proceedings — Jurisdiction of Civil Court when can be exercised.

A suit challenging the validity of departmental proceedings cannot be treated as an appeal from the findings in the departmental proceedings or the punishment inflicted upon the Govt. servant even if these are erroneous. A question which could affect the result in a civil suit has to be of such a nature that it goes to the root of the jurisdiction and the conduct of the departmental trial and vitiates the result. It is only if the departmental proceedings is null and void that a plaintiff in such a suit could obtain the reliefs he had asked for. AIR 1962 SC 1621, Rel. on.

(Para 10)

(D) Civil P. C. (1908), O. 20, R. 1 — "Or on some future day" — Unreasonable delay in delivering judgment after hearing arguments unless explained properly is undesirable.

(Para 12)

(E) Constitution of India Article 136 — Revocation of special leave — Special leave petition not stating that all points sought to be raised were not argued before Divisional Bench — Not enough to merit cancellation of special leave — Fact that after hearing arguments Supreme Court does not see the point on which special leave was granted does not by itself merit its revocation. (Para 14)

Cases Referred: Chronological Paras
AIR 1975 SC 2277 = 1975 Lab IC 1681 7

AIR 1962 SC 1621 = (1963) 1 SCR 778 11

AIR 1937 PC 27 = 64 Ind App 40 7

Mr. S. C. Manchanda, Sr. Advocate, (M/s. Sadhu Singh, R. N. Kapoor, Mrs. Nirmala Gupta, Mr. Uzzal Singh and Mr. J. M. Khanna, Advocates with him), for Appellant; Mr. Gobind Das, Sr. Advocate, (M/s. P. P. Rao, Girish Chandra and S. P. Nayar, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

BEG, J.:— This is an appeal by special leave against the judgment and order of a Division Bench of the Allahabad High Court given by it on 17 November, 1969, dismissing a plaintiff's first appeal arising out of an original suit for a declaration that the order passed by the Commissioner of Income-tax, Lucknow, on 2nd April, 1956, reducing the appellant in rank from the post of an Income-tax Officer to that of an Income-tax Inspector, was void and inoperative. It appears that the appellant was in service upto 30th April, 1958, when he was prematurely retired. The appellant also claimed Rs. 20,904/- as arrears of salary, but he reduced this claim to Rupees 16,561.29.

2. The appellant was originally appointed on 22nd November, 1922, as Lower Division Clerk, and, thereafter, promoted as Income-tax Inspector in 1942. He was promoted to the post of Income-tax Officer in 1945. His case was that he had worked to the entire satisfaction of his immediate superior officers and higher authorities and had earned a number of certificates highly appreciative of his work. He was confirmed early in 1952 as an Income-tax Officer. He was, however, placed under suspension on 30th September, 1953, by the Commissioner of Income-tax, U. P., Lucknow, on the basis of a preliminary enquiry on allegations involving corruption and violation of service rules. Charges were framed on 30th December, 1953, by Shri A. K. Bose, Deputy Director

f Investigations, who was appointed by the Commissioner of Income-tax as the Inquiring Officer. The preliminary enquiry had been conducted by Shri G. S. Srivastava, Inspecting Assistant Commissioner of Income-tax, Meerut.

3. The first charge was that the appellant had entered into partnership with others, under the name of Gautam Cycle Mart, Meerut, in 1939, in contravention of the Government Servants' Conduct Rules. The second charge was that he had made various investments in the names of various members of his family far in excess of and disproportionate to the known sources of his income. His high standard of living and expenditure were also mentioned there. The third and the last charge gave particulars of thirteen assessment cases in which the appellant was alleged to be either "grossly negligent, careless, inefficient, and/or corrupt in the performance of his duties as Income-tax Officer."

4. The appellant's defences included alleged confused nature of charges characterized by him as "vague, over-lapping, intermingled" and wrongly joined together. He also pleaded that there had been an enquiry in 1949, by Shri A. R. Suchlewa, Asstt. Inspecting Commissioner, into some of the matters mentioned in the charges, and, about others in 1952 by Shri R. N. Srivastava, another Inspecting Commissioner, and that the appellant had been exonerated of the allegations and imputations made against him on each occasion. One of his defences was that a fresh enquiry into the same charges was not permissible under the Departmental rules and was also barred by rules of natural justice. He also complained of failure to give him opportunity to produce nine witnesses in his defence with some documents.

5. It is evident that the questions raised by the appellant depended on findings of fact. All relevant facts had been examined by the officer who held the enquiry and by the punishing authority. No mala fides against either the Inquiring Officer, Shri A. K. Bose, Deputy Director of Investigation, or against the

punishing authority was alleged. There are, however, suggestions that Shri G. S. Srivastava and Shri R. N. Srivastava, Inspecting Assistant Commissioners, were pursuing the appellant for some unknown reason which we do not find stated anywhere. We fail to see how these two officers, who neither conducted the actual departmental trial nor could have any influence over the punishing authority, could cause any miscarriage of justice or do anything to vitiate the departmental trial merely because they held preliminary inquiries before framing charges. The defence of the appellant seemed something similar to the much too common a defence of the accused in criminal trials attributing all their misfortunes to the hostility of the police.

6. The question whether the appellant was given a reasonable opportunity to lead evidence and to be heard or not is largely a question of fact. It is only when an opportunity denied is of such a nature that the denial contravenes a mandatory provision of law or a rule of natural justice that it could vitiate the whole departmental trial. Prejudice to the government servant resulting from an alleged violation of a rule must be proved.

7. The plea that the appellant has been subjected to trial on allegations which had been the subject matter of previous enquiries overlooks that no charge was framed as a result of any previous enquiry. Therefore, the two authorities cited: *State of Assam v. J. N. Roy Biswas*, AIR 1975 SC 2277 and *R. T. Rangachari v. Secy. of State*, AIR 1937 PC 27 do not help the appellant. If an inquiry is held, at a particular stage, possibly to determine whether regular proceedings should be drawn up or started, it does not debar a departmental trial. That was the nature of the previous enquiries. It appears that it is only after the appellant's activities had become more notorious that further enquiry was undertaken and regular charges framed. It is possible that the appellant may have been emboldened by the failure of officers to report earlier that charges should be framed and tried. In any case, this could not

stand in the way of the first regular enquiry in the course of which charges were actually framed and fully enquired into by Officers whose integrity and sense of justice is not challenged.

8. As for the denial of the opportunity to produce nine witnesses in defence, all that is suggested is that these witnesses could only state what opinions they had formed about the work, efficiency, and integrity of the appellant. They could not say anything about the particular instances which formed the subject matter of the charges against the appellant. It is not uncommon for astute Govt. servants, facing such enquiries, to give long lists of witnesses and documents so as to either prolong an enquiry or to prepare grounds for future litigation. Unless the exclusion of evidence is of a kind which amounts to a denial of natural justice or would have affected the final decision it could not be material. In the case before us, it has not even been shown how the witnesses whose production was said to have been disallowed could help the appellant's case on specific charges. Indeed, we do not know whether any evidence which the appellant tried to produce was really wrongly excluded and at what stage and for what reasons. All these are questions of fact which should be initially raised in the departmental trial. After that, if there was any patent error a writ petition lay. Finally, the trial Court and the High Court had considered at some length all relevant questions raised.

9. Learned counsel for the appellant has handed over a very carefully and laboriously prepared statement of facts of the case to show us that the evidence did not support the charges levelled against the appellant. It was also submitted that, apart from the charges relating to partnership in the Gautam Cycle Mart, no other charge was found substantiated. Furthermore, it was submitted that, after the inquiring officer had found that the Gautam Cycle Mart was started in 1942 and not in 1939, the appellant should have been given a further opportunity to meet a new case. No rule was cited in support of such a tech-

nical objection to the nature of the charge which would cover the starting of the Gautam Cycle Mart at any time subsequent to 1939 also. In any case, it was for the appellant to satisfy the Departmental authorities, which had looked into the case upto its final stages, that he had suffered some injustice which had to be set right. He had been given a second opportunity by the punishing authority before it inflicted the punishment of demotion. Nothing further was required by law. And, it was probably because the appellant was absolved of charges involving corruption in the discharge of his duties that he was given the lesser punishment of demotion and neither dismissed nor removed from service.

10. A suit challenging the validity of departmental proceedings cannot be treated as an appeal from the findings in the departmental proceedings or the punishment inflicted upon the Govt. servant even if these are erroneous. A question which could affect the result in a civil suit has to be of such a nature that it goes to the root of the jurisdiction and the conduct of the departmental trial and vitiates the result. It is only if the departmental proceeding is null and void that a plaintiff in such a suit could obtain the reliefs he had asked for. We are unable to see what point had been raised by the appellant which could have had that effect upon the departmental proceedings.

11. In *Smt. Ujjam Bai v. State of U. P.*, (1963) 1 SCR 778 at pages 835, 836 = (AIR 1962 SC 1621) at pages 1629, 1630 this Court said (at page 835) (of SCR) = (at page 1629 of AIR):

"A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e.) has jurisdiction to determine."

After citing a passage from Halsbury's Laws of England, 3rd Edn. Vol. 11, page 59, this Court held (at page 836) (of SCR) = (at page 1630 of AIR):

"The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal."

12. Learned counsel for the appellant said all that could possibly be said on behalf of his client. He pointed out that the High Court had given its judgment eight months after it had heard arguments. He urged that the result was that the High Court did not deal with a number of submissions made because they had, apparently, been forgotten. The Civil Procedure Code does not provide a time limit for the period between the hearing of arguments and the delivery of a judgment. Nevertheless, we think that an unreasonable delay between hearing of arguments and delivery of a judgment, unless explained by exceptional or extraordinary circumstances is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments. Justice, as we have often observed, must not only be done but must manifestly appear to be done.

13. On 4th March, 1971, however, the High Court refusing the certificate of fitness of the case for appeal to this Court observed that questions had been attempted to be raised before it in asking for certifi-

cation which had not been argued at the time when the first appeal was heard by the High Court. We find that one of the learned Judges who dismissed the application for a certificate of fitness of the case had also heard the arguments in the first appeal. There is no affidavit before us that any particular points argued before the Division Bench had not been referred to or dealt with by the Bench. Moreover, the Division Bench had probably not dealt with all arguments on questions of fact because it did not consider it necessary to do so. After all, it was not hearing an appeal against the findings of the departmental authorities. It pointed this out. Furthermore, after hearing the arguments of the learned Counsel for the appellant, we are ourselves unable to see any point which could be raised on behalf of the appellant capable of vitiating the departmental proceedings. Unless such a point could be raised, there could be no declaration that the departmental proceedings were null and void.

14. There is also an application before us for revocation of grant of special leave to appeal by this Court on the ground that some material facts were suppressed or misrepresented for the purpose of obtaining special leave. Although the special leave petition does not state that all the points sought to be raised by it were not argued before the Division Bench, this is not enough to merit cancellation of the special leave to appeal which was granted by this Court. At the time of grant of special leave, the order refusing grant of certificate of fitness of the case for appeal to this Court must have been before this Court. We are unable now to see the point on which special leave was granted. But, that too would not, by itself, merit a revocation of special leave at this stage after hearing arguments.

15. We, therefore, dismiss both the appeal and the application for revocation of special leave. Parties will bear their own costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2042

(From: Punjab and Haryana)*

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Kasturi Lal, Appellant v. The State of Haryana, Respondent.

Criminal Appeal No. 276 of 1971, D/- 5-5-1976.

(A) Penal Code (1860), S. 302 — Appreciation of evidence — Appellant alleged to have killed deceased along with other accused — Two of the accused along with appellant alleged to be armed with axe inflicted injuries — Medical report indicating only two incised injuries — Two of the accused acquitted — Discrepancy in the version of witnesses and medical report — Deceased having relations in Police department — Brother of deceased alleged to have been chased by appellant — F.I.R. recorded by the brother omitting to mention this fact — Held that the case of the appellant was not distinguishable from that of the two accused already acquitted. Criminal Appeal No. 251 of 1970, D/- 7-4-1971 (Punj. and Har.), Reversed.

(Paras 6, 7 and 11)

Mr. Frank Anthony, Sr. Advocate. (M/s. R. L. Kohli and S. K. Sabharwal, Advocates with him), for Appellant; Mr. N. N. Goswamy, Advocate and Mr. R. N. Sachthey, Advocate, for Respondent.

Judgment of the Court was delivered by

SHINGHAL, J.:— This appeal by Kasturi Lal accused arises from the judgment of the High Court of Punjab and Haryana dated April 7, 1971, upholding his conviction for various offences, including the offence of committing the murder of Sardari Lal for which he has been sentenced to imprisonment for life and a fine of Rs. 500/- under Section 302 read with Section 149, I.P.C. There were six other accused in the case including Khazan Singh and Gurdial Singh, but both of them were acquitted by the Sessions Judge of Karnal by his judgment dated December 19, 1970, whereas the appellant and the

*(Criminal Appeal No. 251 of 1970, D/- 7-4-1971—(Punj. and Har.))

GT/GT/B774/76/GGM

other accused were convicted for various offences and sentenced to various terms of imprisonment. Four appeals were filed in the High Court, including an appeal by the present appellant Kasturi Lal and on appeal by the State of Haryana against the acquittal of Khazan Singh and Gurdial Singh. The High Court dismissed all the four appeals and the present appeal of Kasturi Lal has come up for consideration by special leave.

2. A report of the incident in this case was lodged by Girdhari Lal (P. W. 4), brother of Sardari Lal deceased, at police station Ladwa, on December 25, 1967, at 5.15 p.m. It was stated in the report that Girdhari Lal's brothers Sardari Lal (deceased) and Madan Lal (P. W. 5), who were residents of Ghallaur, left for Ladwa in the morning of December 25, 1967, as the Tehsildar had summoned them in connection with Idgah-wali land. Girdhari Lal followed them at a distance of 2/3 'Killas' along with Sardari Lal's wife Smt. Ram Piari (P. W. 7), Charan Singh and Subhash. When Sardari Lal and Madan Lal reached a sugarcane field on the way, in the area of village Mehra, at about 10 or 11 a.m., they shouted "Mar Diya, Mar diya." Girdhari Lal and others who were accompanying him ran and reached there and saw that appellant Kasturi Lal, Khazan Singh and Gurdial Singh were "belabouring" Sardari Lal with 'Kulhar' Ajit Singh, Pooran Singh and Gurmukh Singh were "belabouring Madan Lal with 'lathis' and Mangal Singh with a spear. It was further alleged that when Girdhari Lal reached there along with Smt. Ram Piari, Subhash and Charan Singh, accused Ajit Singh, Mangal Singh, Pooran Singh and Gurmukh Singh left Madan Lal and started beating him. Mangal Singh gave a spear blow on his right leg, Ajit Singh a lathi blow on his head and Pooran Singh and Gurmukh Singh inflicted injuries with 'lathis' on his arms and chest. Sardari Lal and Madan Lal fell down on account of their injuries, and Girdhari Lal ran towards village Mehra. He narrated the incident there to Sarpanch Ram Kishan (P. W. 10) and asked him to save him. After some time, Smt.

Ram Piari (P. W. 7), Charan Singh and Subhash brought Sardari Lal and Madan Lal to village Mehra in a bullock cart. Girdhari Lal joined them on their way to civil hospital Ladra. Sardari Lal succumbed to his injuries on the way near dera Dhansura. The Medical Officer declared that Sardari Lal had died, and he examined the injuries of Madan Lal. On this report of Girdhari Lal, the police registered the case and started investigation resulting in the conviction of Kasturi Lal, Ajit Singh, Gurmukh Singh, Pooran Singh and Mangal Singh, and the acquittal of Khazan Singh and Gurdial Singh, as stated above.

3. The High Court examined the appeal, which had been filed by the State against the acquittal of Khazan Singh and Gurdial Singh, but dismissed it as aforesaid. In doing so, it took note of the fact that there were only two incised injuries on the person of Sardari Lal, and one on the person of Girdhari Lal, while the allegation was that Khazan Singh, Gurdial Singh and appellant Kasturi Lal were armed with axes and Mangal Singh with a spear and all of them beat Sardari Lal and Girdhari Lal with axes and spear. The High Court however distinguished the case of Khazan Singh and Gurdial Singh from the case of appellant Kasturi Lal as follows:

"There is no allegation against these two respondents that they followed Girdhari Lal P. W. to village Mehra. The evidence of all the three eye-witnesses is that it were Gurmukh Singh, Kasturi Lal and Mangal Singh appellants who followed Girdhari Lal P. W. to village Mehra. No, doubt, the allegation against Kasturi Lal appellant is that he gave a kulhari blow on the head of Sardari Lal deceased, but his case is distinguishable from the case of these two respondents firstly, on the ground that it is proved from the evidence recorded in this court that "Kasturi Lal's brothers and other relatives were employed in the police department at the relevant time, and from the other attending circumstances of the case, it is clear that the investigation was tainted in this case and was tried to be moulded in favour of

Kasturi Lal appellant. Secondly, according to the evidence of the eye-witnesses, Kasturi Lal appellant followed Girdhari Lal P. W. to village Mehra along with Gurmukh Singh and Mangal Singh appellant. Therefore, as against Kasturi Lal appellant, there is other corroborative evidence which proves the case against him beyond all reasonable doubt."

4. It would thus appear that the following two reasons were given by the High Court for distinguishing the case of Khazan Singh and Gurdial Singh from the case of Kasturi Lal's and for upholding Kasturi Lal's conviction,

(i) It was proved from the evidence that "Kasturi Lal's brothers and other relatives were employed in the police department at the relevant time, and from the other attending circumstances of the case it is clear that the investigation was tainted in this case and was tried to be moulded in favour of Kasturi Lal," and.

(ii) According to the evidence of the eye witnesses Kasturi Lal "followed Girdhari Lal P. W. to village Mehra along with Gurmukh Singh and Mangal Singh." These two circumstances were held by the High Court to be the "corroborative evidence" which proved the case against Kasturi Lal beyond all reasonable doubt.

5. It has been argued by Mr. Anthony that although the High Court distinguished the case of appellant Kasturi Lal with that of the acquitted two accused Khazan Singh and Gurdial Singh for the aforesaid two reasons, it lost sight of the fact that these reasons were of no consequence and could not lend support to the parol evidence on the record

6. In order to appreciate the argument of Mr. Anthony it will be necessary to mention that the Medical Officer Dr. K. L. Passi (P. W. 1), found that there were only two incised wounds on the person of Sardari Lal. One of them was a cut of the frontal and left parietal bones, and the other was a cut of the left parietal bone. The parol evidence on the record however was to the effect that accused Khazan Singh, Gurdial Singh and Kasturi Lal were all armed with axes and inflicted in-

injuries on the head of the deceased with them. The presence of only two incised injuries was therefore a fact which did not corroborate the evidence of the witnesses, and that was why the High Court took the view that a finding could not be recorded beyond all reasonable doubt that Khazan Singh and Gurdial Singh participated in the crime. The High Court realised that that would normally have been a reasonable conclusion in the case of appellant Kasturi Lal also, but it tried to distinguish his case from the case of Khazan Singh and Gurdial Singh by taking into consideration the above two circumstances for the purpose of corroborating the parol evidence of the prosecution.

7. Now the first circumstance which weighed with the High Court was that it found it proved from the evidence recorded by it that appellant Kasturi Lal's brothers and other relations were employed in the police department at the relevant time and that the investigation of the case had been tainted and an effort had been made to mould it in his favour. The High Court did not however give its reasons for holding that the investigation was 'tainted' or 'moulded' in favour of appellant Kasturi Lal and, did not state in what respect the evidence was tainted or moulded. As it is, we find it difficult to ignore the argument of Mr. Anthony that even if it were assumed, for the sake of argument, that the appellant had some junior police officers as his relations, that could not be said to corroborate the evidence of those who claimed to have witnessed the incident, or to lend support to their version in that regard, when there was, as mentioned above, a discrepancy in the evidence of the medical officer and their version in regard to the infliction of injuries by axes on the head of the deceased.

8. The other reason which prevailed with the High Court was that there was evidence to show that appellant Kasturi Lal followed Girdhari Lal (P. W. 4) to village Mehra along with Gurmukh Singh and Mangal Singh. What Girdhari Lal stated in this connection was that he ran towards village Mehra after he had been beaten by the ac-

cused and that on reaching there he narrated the incident to Sarpanch Ram Kishan (P. W. 10). According to the witness, in the meantime, appellant Kasturi Lal, and Gurmukh Singh and Mangal Singh followed him there, to beat him. So as the witness did not state that he was followed to village Mehra by Khazan Singh and Gurdial Singh accused, the High Court took the view that Kasturi Lal's case was distinguishable from their case and he did not deserve an acquittal. But we find that here again the High Court fell into an error. As has been pointed out by Mr. Anthony it did not take notice of the fact that there was no mention in the first information report, which had been recorded by Girdhari Lal himself, that appellant Kasturi Lal followed him to village Mehra alone or in the company of Gurmukh Singh and Mangal Singh accused. The report makes a mention of Girdhari Lal's running to village Mehra and narrating the incident to Sarpanch Ram Kishan, but it does not mention that there was any pursuit by appellant Kasturi Lal or any other accused. The High Court also lost sight of the fact that Madan Lal (P. W. 5) and Smt. Ram Piari (P. W. 7), who were examined as the other eye-witnesses of the incident, stated clearly that all the seven accused ran after Girdhari Lal, to village Mehra, after beating the deceased. So even if the statement of Ram Kishan (PW 10), which runs counter to the version given by the prosecution, is left out of consideration, it appears that the High Court did not read the evidence correctly even though it had a material bearing on the second circumstance mentioned by it for distinguishing the appellant's case from that of Khazan Singh and Gurdial Singh accused.

9. Our attention has been invited by Mr. Goswami to the question of motive, and it has been argued that while appellant Kasturi Lal had motive for committing the offence, there was no such motive in the case of the acquitted accused Khazan Singh and Gurdial Singh, so that it was another reason for distinguishing his case. Mr. Anthony has argued, on the other hand, that the High Court did not come to

grips with the evidence on the question of motive also, and that was why it failed to appreciate that the case of Kasturi Lal was not distinguishable from the case of the acquitted accused on that account also.

10. It has been stated by Girdhari Lal (P. W. 4) that accused Khazan Singh and Gurdial Singh were first cousins, and appellant Kasturi Lal was the brother-in-law of Gurdial Singh. The witness has stated further that accused Ajit Singh was the nephew of Khazan Singh and that Gurmukh Singh, Mangal Singh and Pooran Singh, the other accused, were on visiting terms with the remaining accused. Girdhari Lal has stated that there was a fight between his brothers and accused Ajit Singh and Khazan Singh in 1961, and that accused Gurmukh Singh and Pooran Singh used to cultivate some land of his brother Madan Lal and there was a dispute between them regarding the paddy crop of 1967. Then he has stated that Mohan Singh, brother of Ajit Singh, removed the barley crop of Sardari Lal in 1967 and there were cross security proceedings against them. The witness has further stated that there were four 'Killas' of land belonging to the Wakf Board which adjoined the field of Sardari Lal and Madan Lal and they used to cultivate it, and that a dispute was raised in that respect by Kasturi Lal, Gurdial Singh, Pooran Singh, Gurmukh Singh, Ajit Singh, Khazan Singh and Mangal Singh. It would thus appear that the evidence regarding motive was common to all the accused and was not confined to appellant Kasturi Lal who could not be said to have a motive different from the acquitted accused Khazan Singh and Gurdial Singh. Then there is the further fact that all three of them were not found to have received any injuries in the alleged incident so that their cases were not different in that respect also.

11. Thus the reasons given by the High Court for distinguishing the case of Kasturi Lal from that of Khazan Singh and Gurdial Singh were not correct, and there is justification for the argument of Mr. Anthony that such a distinction would not have been made if the

High Court had read the evidence correctly in all material particulars. So when the case of Kasturi Lal was not distinguishable from that of Khazan Singh and Gurdial Singh, the High Court erred in taking the view that he was not entitled to acquittal.

12. Kasturi Lal's appeal is allowed and he is acquitted of the offences of which he has been convicted. He is in jail and shall be released forthwith.

Appeal allowed.

AIR 1976 SUPREME COURT 2045

(From: Punjab and Haryana)*

A. N. RAY C. J., R. S. SARKARIA,
P. N. SHINGHAL AND
JASWANT SINGH, JJ.

Civil Appeals Nos. 2504-2508 of 1969.

Sham Lal and others, Appellants
v. State of Punjab and others Respondents.

Civil Appeal No. 130 of 1971

M/s. Rala Ram Surinder Singh,
Bhagwan Dass and Co., Appellants v.
State of Punjab and others, Respondents.

Civil Appeal No. 1641 of 1971

Tarlok Singh Lahna Singh and
Co., Appellant v. State of Punjab,
Respondent.

Civil Appeals Nos. 2504-2508 of 1969, 130 and 1641 of 1971, D/- 30-4-1976.

(A) Punjab Excise Rules, Rule 25 (2) — Condition for licence for vend of Country Spirit, Conditions Nos. 15 (ii), 16 and 18 — Contractual obligations cannot be avoided by licensee — Recourse to writ petition not proper.

Conditions 15 (ii), 16 and 18 for grant of licences for vend of country spirit show that the licensee is bound to pay the whole of the license fee for which he had bidden at the auction in 24 equal, fortnightly instalments.

*(Civil Writ Nos. 1976, 2504, 2535, 2539 and 2541 of 1968; C. W. No. 1199 of 1969 and C. W. No. 1194 of 1970, D/- 24-1-1969; 18-11-1968; 1-5-1970 and 13-10-1970, respectively—(Punjab and Har.)).

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alments, on the fixed dates, even if he supplies of liquor to him fell short of the quota fixed for the vends. Where the licensee defaults in making payment and a demand for license fees is made, the proper course for the licensee to follow is the one indicated in condition No. 18. There being a completed contract between the licensee and the Government on the acceptance of his bid, the licensee cannot, by resorting to Art. 226 of the Constitution, avoid the contractual obligations voluntarily incurred. AIR 1975 SC 1121, Rel. on. (Paras 17 and 20)

Cases Referred: Chronological Paras
AIR 1975 SC 1121 = (1975) 3 SCR 254 = 1975 Tax LR 1569 14, 19

Mr. S. K. Mehta, Advocate of M/s. K. L. Mehta and Co. Advocates, or Appellants; Mr. O. P. Sharma Advocate, for Respondents.

Judgment of the Court was delivered by

SARKARIA, J.:— This judgment will govern the disposal of these eight appeals filed on the strength of certificates of fitness granted by the High Court of Punjab and Haryana.

2. The appellants have been carrying on business as liquor contractors. At the annual excise auctions held for the year 1968-69, they were the highest bidders for the country liquor vends at various places in the State of Punjab, and the auctions were knocked down in their favour.

3. Since the questions involved and basic facts — with immaterial variations — are common, it will be sufficient to refer to the facts of the case giving rise to Civil Appeal 1641 of 1971, in which only arguments have been specifically addressed to us by Shri T. S. Munjal, counsel for the appellant. The appellant-firm in this case gave the highest bids of Rs. 2,64,000/- and Rupees 1,03,000/-, respectively, and got licences in Form L-14 for retail country liquor vends at Jandiala and Bundala in Jullundur District. The material conditions of the licences announced at the auction and accepted by the appellants, were that annual quotas of liquor (in proof litres) for the vends at Jandiala and Bundala were 11,000 and 4600 proofs, respec-

tively. Of the annual licence fees representing the highest bids, 1/24th was to be deposited within seven days of the auction or by the last day of the month in which the auction took place. The appellants had duly deposited these amounts before the 1st April, 1968.

4. Condition 15 (ii) of the contract was that "the licensee for retail vend of country spirit had to pay the whole amount of licence fee in 24 equal instalments, each instalment being payable by the 10th and 25th day of each month, beginning from the month of April, 1968."

5. Condition No. 18 reads as follows:

"(i) A licensee shall not be entitled to any compensation or claim for damages if the supplies of country liquor to him falls short of the quota fixed in respect of his vend or vends. He will, however, be entitled to the refund of the proportionate license fee in such a contingency provided he established to the satisfaction of the Excise Commissioner that such a short-fall of supplies did not occur because of any fault on the part of the licensee himself. Such claims for refund shall be preferred and considered only after the close of the financial year 1968-69.

(ii) Subject to availability and genuine demand of the area concerned, the Excise Commissioner or an Officer authorised by him in this behalf may, in his discretion allow additional quota of country liquor, i.e. over and above the quota fixed for his vend or vends on payment of proportionate additional licence-fee."

6. According to condition No. 26, subject to the directions issued by the Excise Commissioner from time to time regulating the supplies from different distilleries in Punjab for various districts/areas, the licensed vendors were free to obtain their supplies of country spirit, wholly or partly from any of the licensed distilleries or the licensed ware-houses in Punjab.

7. Under condition No. 27, the retail vendors were to obtain their requirement of country spirit from the whole-sale vendors.

8. Rule 25 (2) of the Excise Rules provided:

"Subject to availability and genuine demands of the area concerned the Excise Commissioner or an Officer authorised by him in this behalf may, in his discretion, allow additional quota fixed for his vend on payment of proportionate additional licence fee."

9. The appellants admittedly defaulted in the payment of certain instalments of the licence-fee. Thereupon the Financial Commissioner cancelled the licence for Jandiala vend on October 2, 1969. The cancellation was revoked on March 13, 1969. Excepting this interlude of some days there is no dispute between the parties that the vends at both these places, despite defaults on the part of the licensee, were operated by the appellants for the whole year ending March 31, 1969. It was alleged in the writ petition that instead of cancelling the licence of the petitioners owing to defaults committed by them in payment of instalments, the supplies of liquor were restricted against payment of proportionate licence fee, by the Financial Commissioner. In consequence, the quantity of liquor which the petitioners were allowed to lift and sell at the two vends was about 40% to 50% only of the quotas fixed for these vends. It was alleged that there was a breakdown of supplies in January 1969; as a result, the Inspectorate Staff and other officers were instructed not to grant permits to the licensees unless proportionate licence fee for the quantity of the liquor mentioned in the application for permit was first deposited in the Government Treasury. Because of these and other factors, the appellants were not able to reach the expected turnover of business and yield of income therefrom.

10. The Department issued demand notices for the recovery of the deficiency or loss in licence fee as arrears of land revenue.

11. On the preceding facts, the appellants instituted the writ petitions for quashing these notices of demand and prayed for a mandamus directing the respondents not to make recovery of any sum due except with reference to the quantity of liquor actually lifted and sold by the appellants.

12. They further prayed that the respondents be enjoined from blacklisting the appellants.

13. These demand notices were challenged on various grounds. It was contended: that the provisions of Punjab Excise Act and the Rules framed thereunder relating to the levy of licence fee are beyond the legislative competence of the State Legislature; that Section 30A, Section 34, S. 39, Ss. 59 and 60 of the Act authorising, inter alia the Financial Commissioner to fix fee for the grant of licence by auction, are unconstitutional and void as they do not lay down any guidelines for fixing the licence fee and as such are violative of Article 14 of the Constitution; that the unconscionable terms and conditions of the licence offend against the provisions of Article 19 (1) (f) and (g) and Article 31 of the Constitution inasmuch as they impose unreasonable restrictions on the appellants' right to carry on business etc.

14. The questions relating to constitutional validity of the provisions of the Punjab Excise Act and the Rules framed thereunder are no longer *res integra*. Those questions stand concluded by the judgment of this Court in *Har Shankar v. The Dy. Excise and Taxation Commr.*, (1975) 3 SCR 254 = (AIR 1975 SC 1121). Mr. T. S. Munjral has consequently not reagitated those questions.

15. Counsel has now canvassed only two points before us. First, that as soon as a default was committed by the appellant in the payment of any instalment of the licence money, the Financial Commissioner should have cancelled the licence and re-auctioned the vend. It is pointed out that indeed, the Financial Commissioner had cancelled the licence for Jandiala vend on February 10, 1969 because of delay in the payment of certain monthly or fortnightly instalments of the licence fee but he had, without any request from the appellant, revoked the cancellation by an order, dated March 14, 1969. It is also maintained that during the interregnum between this cancellation and revocation of the cancellation, the vend had remained

closed. Secondly, the making of the supplies of liquor conditional on payment of the proportionate amounts of the licence fee, amounted to a breach of the conditions of the contract; consequently, the Revenue was not entitled to anything more than proportionate licence fee relatable to the quantity of liquor actually supplied to and lifted by the appellants.

16. In our opinion, neither of these contentions is sustainable.

17. Mr. Munjral has been unable to point out any condition of the licence which limits the liability of the licensee to the amount of liquor actually lifted by him or actually supplied to him against payment of the proportionate amount of the licence fee. On the contrary, conditions 15 (ii) and 18, extracted above, show that thereunder the licensees were bound to pay the whole of the license fee for which they had bidden at the auction in 24 equal, fortnightly instalments, on the fixed dates, even if the supplies of liquor to him fell short of the quota fixed for the vend. In the instant cases, the appellants had admittedly defaulted in payment of certain instalments on due dates in accordance with these conditions. According to the appellants, the liquor supplied was only 40% to 55% of the total quota; while according to the statement of case filed by the Department, it was 75% of that quota and the short-fall occurred not due to any refusal to supply on the part of the Department, but due to the failure of the licensee to ask for full supply against payment of the proportionate amount of the licence fee. In any case, the proper course to be followed by the licensee was the one indicated in condition No 18. But he has not adopted that course. He does not want to abide by the terms of the contract; at the same time he wants to keep the benefit, he might have made by operating the vend for the whole year. In the counter-affidavit, the revenue had denied that the vend had remained closed for any period of time during the licence year.

18. The impugned demands have been raised in this case in respect of the balance of the licence fee which remains unpaid after ad-

justment of the amounts due against the security deposits.

19. In Har Shankar's case (AIR 1975 SC 1121) (supra) this Court disapproved the conduct of such liquor licensees who offer bids with full knowledge of the terms and conditions attaching to the auctions and thereafter try to wriggle out of the contractual obligations arising out of the acceptance of their bids by resorting to Article 226 of the Constitution. Speaking for the Court, Chandrachud J. observed:

"The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of the trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract."

20. What has been extracted above applies aptly and with greater

force to the cases before us: for, were the vendors were operated by the licensees for the full period of the license year ending March 31, 1969. Having exploited the licences for the entire period without discharging the full burden of the fees payable for the same period, the appellants are seeking to avoid contractual obligations voluntarily incurred and to work the licences on terms as they find convenient.

21. In these circumstances, the High Court rightly refused to exercise its extraordinary jurisdiction under Article 226 of the Constitution in their favour.

22. The appeals fail and are dismissed with costs, excepting C A. 2504 to CA 2508 of 1969 in which the parties will pay and bear their own costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2049

(From: Andhra Pradesh)*

A. N. RAY C. J., M. H. BEG
AND JASWANT SINGH JJ

I. N. Subba Reddy, Appellant v.
Andhra University and others, Respondents.

Civil Appeal No. 1632 of 1974,
D/- 5-4-1976.

(A) Andhra University Act (2 of 1926), Sections 19, 39 (f), 34 and 42 — Administration Manual Ch. V, Section 24 — Validity — Section 24 of Ch. V of Administration Manual is intra vires the powers conferred on the syndicate — University Teachers — Terms and conditions of service — Syndicate has untrammelled powers to define — Section 24 is a condition of service.

Analysis of Sections 19 (d), 19 (c) (iii), 39 (f), 34 and 42 of the Andhra University Act, make it clear that the syndicate is invested with untrammelled power to define the terms and conditions of service of the teachers of the University. Section 24 Chapter V of the Administration Manual being undoubtedly a condition

(Writ Petn. No. 579 of 1974, D/- 10-4-1974—(Andh. Pra.)).

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tion of service of the University teachers, it is not ultra vires the powers of the syndicate. (Para 14)

(B) Andhra University Act (2 of 1926), Sec. 19 (c) (iii) — University Teachers — 'Terms and conditions of service' — Meaning — Power of syndicate under cl. (c) (iii) — Nature of — Power is distinct from the power of dismissal for misconduct — Condition for early termination of teacher — Power is contemplated by cl. (c) (iii). ((1) Words and Phrases — "Conditions of service" — (2) Constitution of India, Arts. 309 and 311).

Clause (c) (iii) of Section 19 of the Andhra University Act empowers the syndicate to fix the emoluments of the teachers of the University and to define their duties and conditions of service subject to such statutes as may be prescribed in that behalf. The expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it. In matters like pension etc. Section 39 (f) of the Act providing for classification and mode of appointment of teachers does not put any fetter on power of syndicate to define terms and conditions of service of the teachers including the condition relating to termination of their services otherwise than by way of dismissal or removal. It follows, therefore, that the power conferred by clause (c) (iii) of Section 19 of the Act is a power quite distinct and apart from the power to suspend or dismiss a teacher for misconduct and includes within its ambit power to lay down a condition relating to early termination of service of a teacher without casting any aspersion on him by giving him a notice for a specified period or on payment to him of salary and allowance in lieu of the notice although he may be eligible to continue in service upto a specified age. (1970) 3 SCR 302, Rel. on.

(Para 13)

(C) Andhra University Code, Chapter XXIX, Sections 7 to 12 — University Administration Manual, Chapter V, Section 24 — Termination of service of University Teacher — Section 24 and agreement

providing for termination of service of University teacher by payment of six months' salary are not inconsistent with Sections 7 to 12 of Chapter XXIX of University Code.

Sections 7 to 12 of Ch. XXIX of the Andhra University Code have nothing to do with termination simpliciter of the services of a teacher without casting any aspersion on him, which is a distinct and separate matter and is provided for Section 24 of Ch. V of the Administration Manual and clause 10 (b) of the aforesaid contract of service. As such, neither Section 24 of Chapter V of the Administration Manual nor clause 10 (b) of the agreement can be held to be void on the ground of repugnancy to Secs. 7 to 12 of Chapter XXIX of the University Code. (Para 16)

(D) Andhra University Act (2 of 1926), Section 19 (c) (iii) — Termination of service of University Teacher — Andhra University Code, Ch. XXIX, Sections 7 to 10 — University Administration Manual Ch. V, Section 24 and Cl. 10 of agreement providing for termination of service of teacher by payment of six months' salary or notice — Termination is termination simpliciter and is valid.

Termination of service of a University teacher ordered in pursuance of Cl. 10 of a contract of service providing for termination after confirmation by payment of six months' salary or notice is a termination simpliciter without attaching any stigma which is governed by the conditions of service specified in the aforesaid contract of employment which the Syndicate is empowered to lay down under Section 19 (c) (iii) of the Act. It is neither a case of abolition nor suspension of a post as contemplated by Section 7, nor of suspension as contemplated by Section 8, nor of dismissal or removal for misconduct as contemplated by Section 9, nor of termination of services on the ground of ill-health. It cannot therefore, be said that the services cannot be terminated except on the grounds mentioned in Sections 7 to 10 of the University Code. AIR 1973 SC 855 and AIR 1971 SC 836, Rel. on; (1957) 1 WLR 594, Dist. (Para 17)

Cases Referred: Chronological Paras
 AIR 1973 SC 855 = (1973) 3 SCR 348 17
 AIR 1971 SC 836 = (1970) 3 SCR 757 18
 (1970) 3 SCR 302 = (1970) 1 SCJ 442 13
 (1957) 1 WLR 594 = (1957) 2 All ER 129 19

Mr. R. K. Garg, Mr. S. C. Agarwal and V. J. Frances, Advocates of M/s. Ramamurthi and Co., Advocates for Appellant; Mr. B. Sen, Sr. Advocate, (M/s. S. Venkata Reddy and G. N. Rao, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

JASWANT SINGH, J.:— This is an appeal by special leave from the judgment and order dated April 10, 1974, of the High Court of Andhra Pradesh at Hyderabad passed in Writ Petition No. 579 of 1974 upholding the resolution dated October 28, 1973, of the Syndicate of the Andhra University (conveniently referred to hereinafter as the 'Syndicate') terminating the services of the appellant by payment to him of salary and allowances for six months in lieu of notice for six calendar months under Section 24 of Chapter V of the Administration Manual of the University and clause 10 (b) of the written contract dated October 28, 1967.

2. Briefly stated, the facts leading to this appeal are: The appellant joined the Anthropology Department of the Andhra University as a Senior Lecturer in 1960. In course of time, he was promoted as Professor of Anthropology with effect from October 1, 1967, pursuant to a resolution of the Syndicate dated September 26, 1967. The conditions of service annexed to the communication of the Registrar of the University informing the appellant that the Syndicate by its aforesaid resolution dated September 26, 1967, had ordered that the appellant be appointed Professor in the department of Anthropology with effect from October 1, 1967, inter alia stated:

"Every teacher, other than those appointed temporarily for one year or less, shall enter into a written contract with the University and get

it executed within one month of the date of his joining duty and no salary can be drawn unless the contract is executed.....

When a teacher is promoted from one grade to another he shall be treated as a new entrant in that grade and the appointee in the new grade shall be placed on probation for a period not exceeding 1 year and shall be required to execute a fresh contract:

"Teachers of the University shall ordinarily be appointed in the first instance on probation for a term not exceeding two years and shall be eligible for confirmation at the end of that period, provided their work is satisfactory. In the case of those who have been teachers before or have shown exceptional merit, the Syndicate may fix a shorter period. Teachers so confirmed shall be eligible to hold their appointments until they are 60 years of age subject to the provisions of Sections 7, 8, 9 and 10 of Chapter XXIX of Vol. I of the University Code.

The appointments are subject to the statutes, ordinances and regulations, etc. of the University authorities that are current now or may be passed from time to time in respect of the University teachers."

3. On October 28, 1967, the appellant entered into an agreement with the University as required by the aforementioned conditions of service and Section 24 of Chapter V of the Administration Manual of the University. Clause 10 of the agreement which contained a reciprocal covenant ran thus:—

"10. That the party of the first part will continue in the service of the University under the terms and conditions herein contained.

(a) Provided always that the party of the first part may determine this agreement on any day after CONFIRMATION by giving to the University a notice in writing of his intention to that effect at least six calendar months before such day and if such notice shall be given this agreement shall terminate on that day accordingly.

(b) Provided further that this agreement may be determined on any day after confirmation by the

Syndicate by giving the party of the first part a notice without assigning reasons in writing of its intention to that effect at least six calendar months before such a day or paying six months' salary in lieu of such notice; and if, such notice is given or payment made, this agreement shall terminate that day accordingly and the party of the first part shall not have the right of appeal to any other officer or authority against such termination.

(c) Provided further that this agreement may be determined on any day by the Syndicate if the Senate shall resolve to abolish the post held by the party of the first part."

4. The appellant was confirmed as Professor of Anthropology with effect from October 1, 1968.

5. On October 28, 1973, the Syndicate passed a resolution determining the aforesaid agreement which the appellant had entered into with the University on his promotion and appointment as Professor of Anthropology. Intimation of the determination of the agreement was communicated to the appellant by registered post which was received by him on November 3, 1973. The said communication was in these terms:—

"Under Section 24 of Chapter V of the Administration Manual of the Andhra University and Cl. 10 of the Agreement entered into on 28-10-1967 between Dr. M. Subba Reddy on one part and the Andhra University on the other part, the said agreement is hereby determined. A cheque bearing No. 460292 dated 28-10-1973 for Rs. 9,316/15 P. on the State Bank of India, Waltair, being the salary and dearness allowance for six months is hereby enclosed as provided for in the aforesaid Sec. 24 and Cl. 10 (b)."

6. The appellant thereupon filed a suit, being Suit No. 910 of 1973, in the Court of District Munsiff, Visakhapatnam questioning the validity of the aforesaid resolution dated October 28, 1973 of the Syndicate. In the said suit, an ex parte temporary injunction was granted on November 5, 1973, restraining the respondents herein from implementing the resolution passed by the

Syndicate. Aggrieved by this injunction, the respondents filed an appeal (CMA No. 41 of 1973) which was dismissed by the Additional District Judge, Visakhapatnam by order dated November 28, 1973. The respondents thereupon filed a revision petition to the High Court which by its order dated January 25, 1974, allowed the same and vacated the injunction holding inter alia that only a suit for damages and not for declaration and continuance in service lay.

7. After the acceptance of the revision petition by the High Court the appellant withdrew the aforesaid suit and filed a writ petition in the High Court under Article 226 of the Constitution on January 29, 1973, challenging the validity of the aforesaid resolution of the Syndicate and the vires of Sec. 24 of Chapter V of the Administration Manual. In that petition, it was inter alia averred by the appellant that the action of the Syndicate terminating his services was mala fide, and that it was with the ulterior object of circumventing the procedure prescribed by Sections 9 and 11 of Chapter XXIX of the University Code and to camouflage the punishment of dismissal visited on him for the legal action that he had taken earlier against the University that the Syndicate purported to act under Section 24 of the Administration Manual and clause 10 (b) of the agreement. It was further asserted by the appellant that Section 24 of Chapter V of the Administration Manual was ultra vires the powers of the Syndicate and clause 10 (b) of the agreement which provided for termination of his services without assigning any reason was void being repugnant to Sections 8 to 12 of Chapter XXIX of the University Code.

8. The petition was vigorously contested by the respondents. While emphatically denying that the impugned action was mala fide or that it had been taken as a measure of punishment, they averred that the relationship between the appellant and the University which was one of master and servant and was regulated by the contract of service entered into between the appellant and the University had been validly de-

termined in accordance with the provisions of Section 24 of Chapter V of the Administration Manual and clause 10 (b) of the aforesaid contract of service which were perfectly legal and valid.

9. In view of the importance of the questions involved in the writ petition viz. whether the University could take recourse to the aforesaid contract entered into between it and the appellant for terminating the services of the latter without regard to the provisions of Sections 8 to 12 of Chapter XXIX of the University Code and whether Section 24 of Chapter V of the Administration Manual was intra vires the powers of the Syndicate, a learned Single Judge of the High Court before whom the petition was placed for hearing referred the same for decision to a Division Bench. Following some decisions of this Court, the Division Bench of the High Court dismissed the writ petition holding that the impugned action had neither been taken as a measure of punishment for any misconduct on the part of the appellant nor did it involve a breach of any mandatory statutory obligation or any principle of natural justice; that in view of the fact that the impugned resolution communicated to the appellant was cumulatively based upon Sec 24 of Chapter V of the Administration Manual which was intra vires and clause 10 of the agreement which was valid and binding, the appellant could not have any legal grievance which could be redressed by a court of law and that no writ lay to quash the order terminating the contract of service.

10. Mr. Garg, counsel for the appellant, has assailed the aforesaid resolution of the Syndicate terminating the services of the appellant on three grounds, viz. (1) that Section 24 of Chapter V of the Administration Manual is ultra vires the powers conferred on the Syndicate; (2) that the said Section 24 and clause 10 (b) of the aforesaid agreement between the appellant and the University being inconsistent with Sections 7 to 12 of Chapter XXIX of the University Code were void and ineffectual and (3) that the services of the appellant

could not be terminated except on the grounds mentioned in Sections 7 to 10 of the University Code.

11. We shall deal with these contentions seriatim. For a proper consideration of the first contention, it is necessary to notice Sec. 24 of Chapter V of the Administration Manual, clauses (c) (iii) and (d) of Section 19, Section 39 (f), Section 34 and Section 42 of the Andhra University Act (hereinafter referred to as 'the Act').

12. Section 24 of Chapter V of the Administration Manual runs as follows:—

"24. The Syndicate may determine the services of a teacher after confirmation on any day by giving him a notice WITHOUT assigning reasons in writing of its intention to that effect at least six calendar months before such a day or paying him 6 months' salary in lieu of such notice. It shall be sufficient service of a notice by the Syndicate, if the notice be signed by the Registrar or such other person as may be authorised in this behalf by the Syndicate and be delivered at or sent by registered post to the address of the teacher with acknowledgment due."

13. Clause (d) of Section 19 of the Act confers power on the Syndicate to suspend or dismiss a teacher of the University (subject to such ordinances as may be made in this behalf) which obviously implies a power to take action for misconduct. Clause (c) (iii) of Section 19 of the Act empowers the Syndicate to fix the emoluments of the teachers of the University and to define their duties and conditions of service subject to such statutes as may be prescribed in this behalf under Section 39 (f). As explained by this Court in *State of Madhya Pradesh v. Sharadul Singh*, (1970) 3 SCR 302, the expression 'conditions of service' means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension etc. Section 39 (f) of the Act lays down that subject to the provisions of the Act, the statutes (which can be framed by the Senate which is the supreme governing body of the

University) may provide for the classification and the mode of appointment of the teachers of the University. It does not say that statutes can be made laying down the terms and conditions of service of the teachers nor does it put any fetter on the power of the Syndicate to define the terms and conditions of service of the teachers including the condition relating to termination of their services otherwise than by way of dismissal or removal. It follows, therefore, that the power conferred by clause (c) (iii) of Section 19 of the Act is a power quite distinct and apart from the power to suspend or dismiss a teacher for misconduct and includes within its ambit power to lay down a condition relating to early termination of service of a teacher without casting any aspersion on him by giving him a notice for a specified period or on payment to him of salary and allowances in lieu of the notice although he may be eligible to continue in service upto a specified age. Section 34 of the Act lays down that every salaried officer and teacher of the University shall be appointed under a written contract. Section 42 of the Act inter alia empowers the Syndicate to make ordinances in consultation with the Academic Council with regard to all matters which by the Act or by the statutes may be provided for by the ordinances.

14. The analysis of the aforesaid provisions of the Act makes it clear that the Syndicate is invested with untrammelled power to define the terms and conditions of service of the teachers of the University. Now Section 24 of Chapter V of the Administration Manual being undoubtedly a condition of service of the University teachers, we are unable to understand how it is ultra vires the powers of the Syndicate. The first contention raised on behalf of the appellant is, therefore, repelled.

15. Let us now see if the above quoted Section 24 of Chapter V of the Administration Manual and clause 10 of the agreement are void being repugnant to and inconsistent with Sections 7 to 12 of Chapter XXIX of the University Code, Sec. 7 of Chapter XXIX of the Code provides for suspension or abolition of

any Professorship, Readership, Lecturership or other teaching post. Section 8 of Chapter XXIX of the Code empowers the Syndicate to suspend any teacher of the University for a maximum period of one year or to require him to retire on sufficient cause shown and after due investigation. Section 9 of Chapter XXIX of the Code confers power on the Syndicate to remove a teacher for misconduct on his part or for breach by him of one or more of the terms of the contract which he has entered into with the University, which, in the opinion of the Syndicate, makes him unfit to hold the post. Section 10 of Chapter XXIX of the Code invests the Syndicate with power to terminate the services of a teacher on the ground of ill health. Section 11 of Chapter XXIX of the Code prescribes the procedure for removal of a teacher. It also confers the right of appeal on the teacher who is removed from service or is suspended. Section 12 of Chapter XXIX of the Code bars a claim for damages or compensation by a teacher against whom disciplinary action is taken i.e. who is suspended or removed from service under Sections 8 and 9 of Chapter XXIX of the Code.

16. The aforesaid sections of the Code have nothing to do with termination simpliciter of the services of a teacher without casting any aspersion on him, which is a distinct and separate matter and is provided for in Section 24 of Chapter V of the Administration Manual and clause 10 (b) of the aforesaid contract of service. As such, neither Section 24 of Chapter V of the Administration Manual nor clause 10 (b) of the agreement can be held to be void on the ground of repugnancy to Sections 7 to 12 of Chapter XXIX of the University Code.

17. This takes us to the third and last contention raised on behalf of the appellant which is also devoid of substance. The instant case, it will be seen, is neither a case of abolition nor suspension of a post as contemplated by Section 7, nor of suspension as contemplated by Section 8, nor of dismissal or removal for misconduct as contemplated by Section 9, nor of termination of

services on the ground of ill-health. It is, in our opinion, a case of termination of service simpliciter without attaching any stigma which is governed by the conditions of service specified in the aforesaid contract of employment which the Syndicate was empowered to lay down under Section 19 (c) (iii) of the Act and is clearly covered by the decision of this Court in *Sirsi Municipality v. Cecelia Kom Francis Telis*, (1973) 3 SCR 348 = (AIR 1973 SC 855) where one of us, namely the learned Chief Justice, after an exhaustive review of the case law bearing on the matter, observed:

"Relationship of master and servant is governed purely by contract of employment. Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. A declaration of unlawful termination and restoration to service in such a case of contract of employment would be indirectly an instance of specific performance of contract for personal services. Such a declaration is not permissible under the law of Specific Relief Act. Termination or dismissal of what is described as a pure contract of master and servant is not declared to be a nullity however wrongful or illegal it may be. The reason is that dismissal in breach of contract is remedied by damages."

18. That the impugned action is not invalid would also be clear from a perusal of another decision of this Court in *Delhi Transport Undertaking v. Balbir Saran Goel*, (1970) 3 SCR 757 = (AIR 1971 SC 836). There the respondent, who was an employee of the appellant undertaking, established under the Delhi Transport Authority Act, challenged his demotion by filing a petition under Article 226 of the Constitution. After the dismissal of the petition the appellant-undertaking passed an order terminating the services of the respondent stating that they were no longer required and that one month's salary in lieu of notice would be paid. The respondent

thereupon filed a suit seeking a declaration that the order of his dismissal was illegal. On the questions (1) whether the respondent's services could be terminated under Regulation 9 (b) by giving one month's notice or pay in lieu thereof without complying with the procedure of enquiry prescribed by Regulation 15 (2) (c) and (2) whether although the order was made in perfectly harmless and innocuous terms and purported to be within Regulation 9 (b) it was a mere camouflage or cloak for inflicting punishment for breach of Standing Order 17 in as much as the respondent had approached the High Court under Article 226 of the Constitution without exhausting the departmental remedies, it was held:

"(i) Even if it be assumed that the law is the same as would be applicable to a case governed by Article 311, it was difficult to say that the services of the respondent were not merely terminated in accordance with Regulation 9 (b) which governed the conditions of his employment. It may be that the motive for termination of his services was the breach of Standing Order 17 i. e. of filing a writ petition in the High Court against the demotion without exhausting departmental remedies but the question of motive is immaterial. No charge-sheet was preferred under Regulation 15 nor was any enquiry held in accordance therewith before the order under Regulation 9 (b) was made.

(ii) As regards the punishment having been inflicted for misconduct the order being a mere camouflage, no such question could arise in the present case. Regulation 9 (b) clearly empowered the authorities to terminate the services after giving one month's notice for pay in lieu of notice. The order was unequivocally made in terms of that Regulation. Even if the employers of the respondent thought that he was a cantankerous person and it was not desirable to retain him in service, it was open to them to terminate his services in terms of Regulation 9 (b) and it was not necessary to dismiss him by way of punishment for misconduct. If the employer chooses to terminate the services in accordance with clause (b) of Regulation 9 after

giving one month's notice or pay in lieu thereof it cannot amount to termination of service for misconduct within the meaning of clause (a). It is only when some punishment is inflicted of the nature specified in Regulation 15 for misconduct that the procedure laid down therein for an enquiry etc. becomes applicable."

19. The decision of the House of Lords in *McClelland's case* (1957) 1 WLR 594 on which strong reliance is placed by Mr. Garg is not at all helpful to the appellant. In that case, the dismissal of the plaintiff was on the ground of redundancy of the staff which was not one of the grounds specified in the terms and conditions of service. In the present case, no such difficulty could arise as the terms and conditions of service specified in the contract of employment entered into between the appellant and the University under Section 34 of the Act contained an express provision for termination of his services by six months' notice on either side.

20. Thus all the contentions raised on behalf of the appellant having failed, the appeal cannot succeed and is hereby dismissed. In the circumstances of the case, the parties are left to bear and pay their own costs of the appeal.

Appeal dismissed.

AIR 1976 SUPREME COURT 2055

(From: Allahabad)*

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

Har Dayal, Appellant v. State of U. P., Respondent.

Criminal Appeal No. 403 of 1974, D/- 23-3-1976.

(A) Penal Code (1860), S. 302 — Murder — Conviction on circumstantial evidence — If justified.

The circumstances proved against the accused at the trial were (1) motive for the crime as disclosed by his threats to the father and grand

*(Criminal Appeal No. 2293 of 1973, and Reference No. 68 of 1973, D/- 14-2-1974—(All.)).

parents of the murdered boy so as to obtain restoration of his wife; (2) the accused had induced the deceased boy and took him away from his house; (3) extra-judicial confession of accused about his taking away the boy from his house; (4) discovery of floating dead body of boy from a well and its identification; (5) post-mortem report showing that boy had first been throttled and then immersed in water.

Held that all the tell-tale circumstances established by the prosecution, had made the chain so complete that there was no escape from the conclusion that within all human probability, the deceased was kidnapped, murdered and his dead body thrown into well by none other but the accused appellant.

(Para 30)

(B) Evidence Act (1872), S. 9 — Identification of dead body in a state of decomposition — Post-mortem report — Value.

The best person to throw light on this aspect of the matter was the medical officer, who conducted the autopsy. But no question was put to him on this point. The very fact that the medical officer found marks of injuries from which he could definitely opine about the cause of death shows that the decomposition was not so advanced as to defy identification.

(Para 29)

(C) Criminal P. C. (1974), S. 354 (3) — Life imprisonment for murder is the rule and capital sentence an exception — Accused sentenced to death on 30-6-1973 — Death sentence hanging over for 21 months — Supreme Court reduced it to life imprisonment by taking into account other circumstances. (Para 31)

Mrs. Urmila Sirur, Advocate, Amicus Curiae, for Appellant; Mr. D. P. Uniyal Sr. Advocate and Mr. O. P. Rana with him, for Respondent.

The Judgment of the Court was delivered by

SARKARIA, J.:— The appellant, Har Dayal, aged 26 years, was tried and convicted for the murder of Rajendra, a boy of 10 or 11 years, by the Sessions Judge, Orai and sentenced to death. He was also convicted on the allied counts under

Sections 364 and 201, Penal Code, and sentenced to 4 years' and 2 years' rigorous imprisonment, respectively. Hardayal's appeal has been dismissed by the High Court of Allahabad, and the sentence of death awarded to him, has been confirmed. He has now come in appeal before us by special leave under Article 136 of the Constitution.

2. The facts of the prosecution case, as they emerge from the record, are as follows:

Lok Chandra (P. W. 13), is a resident of Karyana, Kuli Bazar, Kanpur. His mother, Muniya Devi (P. W. 4) and father, Budhi Lal, (since deceased) have been residing separately from him in Kakori Mohalla, Kanpur. Smt. Shanti (P. W. 12), the sister of Lok Chand was married to the appellant sometime in June 1970. The appellant was given to wine and gambling. He frequently beat and maltreated Smt. Shanti. Consequently, she started living with her parents at Kanpur. The appellant made several attempts to take her back to Konch where he was residing. Each time the parents refused to send the unwilling wife back to the matrimonial home. The appellant then tried trickery. He sent a letter from Konch that his mother was seriously ill and that his wife should come to Konch immediately. When this letter did not bring any result, he sent a second letter around 24th February 1971 saying that his mother had died on the 18th February 1971 and that his wife should be sent to Konch. These letters were addressed to Kunj Behari, another brother of Smt. Shanti. On this occasion, his in-laws sent Smt. Shanti along with Kunj Behari to Konch. On reaching there they learnt that the appellant's mother was very much alive and the letter was only a ruse. Kunj Behari and his sister stayed for the night at Konch in the house of another relation and returned to Kanpur on the following day and apprised their parents about the falsity of the information sent by the appellant.

3. On March 5, 1971, the appellant came to the house of his parents-in-law at Kakori Mohalla,

Kanpur in the evening, and tried to persuade them to send Smt. Shanti with him. Shanti's parents refused saying that she was unwilling to go back to him. Incensed, the appellant went away, uttering a threat that for this refusal they would repent for the whole of their lives.

4. The appellant thereafter, the same evening, went to the house of his brother-in-law, Lok Chand in Kuli Bazar and pressed the latter to persuade his parents to send Shanti with him. Lok Chand expressed his inability to do anything, adding that he had no say whatever in the matter. In anger, the appellant went away, holding out a threat to Lok Chand.

5. On the following morning at 7.30 a.m., the appellant returned to the residence of Lok Chand. The latter had already gone away to the Gun Factory where he was employed. Lok Chand's wife Rajjo Devi (P. W. 5) was also not present there. She was away to the public latrine for easing herself. Their minor son, Rajendra, aged about 10 or 11 years, was all alone in the house. Rajendra was about to go to the school where he was studying. After ascertaining from Rajendra that his parents were not at home, the appellant offered some inducement to the child to go with him. The child, at first, expressed reluctance but on being induced further, agreed. The appellant then took away the child with him. This taking away was witnessed by the immediate neighbours, Prayag Raj (P. W. 2), Smt. Bachchi (P. W. 3) and Nihal Chand (P. W. 7).

6. On returning to the house, Smt. Rajjo Devi found Rajendra missing. She was informed by the neighbours that the appellant had taken away the child for showing Tazia procession. Smt. Rajjo Devi did not suspect anything wrong in it as the appellant was, after all, a close relation of her husband. But when the child did not return even by 1.30 p.m. she became anxious to know his whereabouts. When, after the day's work, Lok Chand returned home, she told him how Rajendra was said to have been taken away by the appellant. Lok Chand also did not then suspect any foul play in

the matter. But when the child did not return home even for the night, their suspicions were aroused. On the following morning he searched for his son in Mohalla Kakori where his parents resided. He also went to a few relations but found no trace of the missing child. On March 9, 1971, he set out for Konch in search of the child. Reaching Konch on March 10, 1971 at 10.30 a.m., he went straight to the house of the appellant but found him absent. He looked for the appellant and came across him near Bari Mata. He immediately inquired of the appellant about Rajendra. At first, the appellant denied having brought Rajendra from Kanpur. In helplessness, Lok Chand started crying. His wails attracted persons of the locality. Kazi Saeed Uddin (P. W. 1), Ram Prakash (P. W. 15), and Iqram (P. W. 17) were among those persons. On learning what the matter was, they questioned the appellant about the child. Thereupon, the appellant admitted that he had brought Rajendra but added that he had left the child somewhere at Kanpur. The appellant promised to go with Lok Chand, to that place at Kanpur for restoration of the child there. Lok Chand, Kazi Saeed Uddin and the appellant then proceeded together to Kanpur. When they reached Orai on route to Kanpur, the appellant slipped away saying that he would be returning soon after collecting some money from his brother-in-law for travelling expenses. Lok Chand and Kazi for sometime awaited the return of the appellant. When he did not return, they searched for him at Orai, but in vain.

7. Lok Chand then returned to Kanpur and on March 11, 1971 lodged the First Information Report, Ex. ka 8, at Police Station Anwar-ganj, Kanpur at 6.30 p.m. In this report he stated how on March 6, 1971, when he returned home in the evening, he was informed by P. Ws. 2, 3 and 7 that Rajendra (deceased) had been taken away by the appellant from his house on that day in the morning and how the appellant after admitting that he had taken the boy and would restore him at Kanpur, accompanied the informant and Kazi Saeed Uddin (P. W. 1) upto

Orai and thereafter slipped away and disappeared. The motive for kidnapping was also stated. On the basis of this report, a case was registered against the appellant under Sec. 363, Penal Code. On March 12, 1971, Ram Dass (P. W. 20), brother of the appellant, made a report at Police Station Konch that he had seen a dead body floating in the well of Chaubia Balram Singh at Konch. Thereupon Sub-Inspector Ram Chandra Saxena (P. W. 9) of Konch Police went to the well, got the dead body taken out, and prepared the inquest report, Ex. ka 5. He sent an information to Lok Chand. The latter accompanied by Nihal Chand went to Konch and identified the dead body at the mortuary where it was lying for the post-mortem examination.

8. The autopsy was conducted by P. W. 16 Dr. T. D. Singh on March 13, 1971 at 1.30 p.m. The Doctor found the following injuries on the body:

1. Multiple scabbed abrasions in an area of 2" x 1/2" on the right cheek.

2. Abraded contusion 3/4" x 1/3" on the left side of the neck.

3. Contusion 1" x 1/2" on the right front to lateral aspect of the neck.

4. Crescent shaped 1/3" abrasion on the left neck decomposing.

5. Abrasion scabbed in an area 1/2" x 1/4" on the back of the neck.

9. The tongue was found protruding between the teeth. In the opinion of the Doctor, the boy had been throttled to death and thereafter his dead body was immersed in water.

10. The appellant could not be found despite search by the police till his arrest on October 15, 1971 (?).

11. The circumstances on the basis of which the prosecution sought conviction of the appellant are these:

(1) That the accused had a revengeful motive to commit the crime because his parents-in-laws intransigently refused to send his wife, Smt. Shanti with him, and Lok Chand also declined to help the accused in restoration of his wife. On

the evening preceding the day of occurrence, when his parents-in-law refused to send his wife, the accused held out a threat to wreak vengeance upon them in a manner which would make them repent for the rest of their lives. A similar threat was held out to Lok Chand.

(2) On March 6, 1971, at about 7.30 a.m., the appellant was seen inducing and taking away the deceased child from the house of Lok Chand;

(3) On March 6, 1971, the appellant and Rajendra were seen together at about 8 a.m. near Police Station Sisamau by Om Prakash, P. W. 11, a balloon-seller. The appellant obtained one balloon from the witness and handed it over to the child.

(4) (a) On March 10, 1971, at about Noon, at Konch, the appellant confessed before P. Ws. 1, 13, 15, 17 among others that he had brought the child Rajendra and that he would restore him to Lok Chand at Kanpur;

(b) After making this confession and promise for restoration of the child, the appellant accompanied Lok Chand and Kazi Sayeed Uddin en route to Kanpur but on reaching Orai, he slipped away and disappeared on the false excuse of bringing money for travelling expenses.

(5) On March 12, 1971, the dead body of a boy was found floating in a well in the town of Konch. The body and the clothes and shoes on it were later identified by P. Ws. Lok Chand and Nihal Chand to be that of Rajendra, deceased.

(6) According to the medical officer who conducted the autopsy on March 13, 1971, the body was of a boy, aged 11 years, who had been throttled to death four or five days earlier, and thereafter his dead body was immersed in water.

12. The courts below have concurrently found that all these circumstances (excepting No. 3) had been fully established.

13. Mrs. Urmila Sirur, appearing as amicus curiae disputes the correctness of these findings.

14. As regards the motive, her submission is that the appellant would have no conceivable grievance

against Lok Chand merely because the latter expressed his inability to persuade his parents to send Shanti with the appellant. It is urged that the letters, Exs. P-5 and P-6, which are alleged to have been sent by the appellant, were never duly proved; Kunj Behari Lal to whom these letters purport to have been addressed, was not examined. There was no evidence to show as to who had written these letters. It is argued that the appellant must have known that Lok Chand was separate from his parents in residence and mess etc., and consequently, was not in a position to offer his good offices to his parents for restoration of Smt. Shanti to the appellant. It is maintained that these letters might have been manoeuvred by one Parsuram who according to the defence, had illicit relations with Smt. Shanti.

15. It is true that no evidence was led to prove as to who was the scribe of these letters Exts. P-5 and P-6. But the receipt of these letters by the in-laws of the appellant stood established from the testimony of Shanti Devi and her mother, Muniya Devi. It was further established that after the receipt of the second letter, Ext. P-6 the postal stamps on which shows that it was posted at Konch on Feb. 24, 1971 and received at Kanpur on February 25, 1971 — Smt. Shanti, accompanied by her brother did go to Konch, and returned when they discovered that the reported death of the appellant's mother on February 18, 1971 was a ruse. The fact remains that despite repeated efforts made by the appellant to regain the society of his wife, his in-laws refused to send her with him. While disowning responsibility for sending the letters Exts. P-5 and P-6, the appellant himself, during his examination under S. 342, Cr. P. C. admitted that "the people of my Susral (in-laws) bear enmity with me". In answer to question No. 19, he stated that "the witnesses of Konch and Kanpur (meaning P. Ws. 1, 15 and 17) who belong to Konch, and P. Ws. 4, 5, 13 etc. who hail from Kanpur, want that I should leave my wife." It is to be noted that the appellant himself, included Lok Chand in the category of those

persons who as he says, wanted to force the appellant to repudiate his wife. In his eyes, Lok Chand was as much responsible for wrecking his matrimonial home as his parents. It is in the evidence of Muniya Devi, that her daughter, Shanti Devi, generally used to live at Kanpur at the place of her brother, Lok Chand, and she was very fond of her nephew, Rajendra, whom she used to take with her to show pictures, to melas, to her relatives and other places.

16. Viewed against this background, it cannot be said that the courts below were not justified in holding that the appellant had a motive to commit the crimes in question.

17. The courts below have further believed the evidence of P. Ws. Muniya Devi, Shanti Devi and Lok Chand about the threats held out by the appellant on the evening of March 5, 1971, when they declined to send or help him in sending his wife with him. No reason has been shown why we should take a different view of the evidence on this point.

18. The second circumstance is important. To substantiate it, the prosecution examined Prayag Raj, P. W. 2, Smt. Bachchi P. W. 3, and Nihal Chand P. W. 7. The evidence of these three witnesses was to the effect that on March 6, 1971, at about 7.30 a.m., the appellant came to the house of Lok Chand, and after offering an inducement, took away the child Rajendra with him. The houses of these witnesses are located in the immediate neighbourhood of Lok Chand. Their presence at their houses at that time was highly natural and probable. While they are agreed that the appellant came and took away the child with him from the house of Lok Chand, after offering him some inducement, they differ in regard to the precise inducement offered by the appellant to the child. Prayag Raj (P. W. 2) stated that the appellant had said to Rajendra:

"Let us go I will show you Moharram whereupon the boy said that he was going to school, but, after that he went away taking the boy with him."

19. According to Smt. Bachchi, the appellant called out the boy and said:

"Let us go I will show you mela."

20. Nihal Chand (P. W. 7) deposed that the appellant had called out and taken away Rajendra with him with the representation that he would show him the Moharram fair and thereafter leave him back at the house.

21. Mrs. Sirur contends that the last day of the Moharram on which the tazia procession would be taken out was the 8th of March and not the 6th of March, and consequently, an offer to show Tazia procession on the 6th March would be too preposterous to make to a boy of 11 years, particularly within the hearing of neighbours.

22. Doubtless there is some variance or discrepancy on this point in the evidence of these witnesses. May be, this discrepancy crept in because they overheard what was said by the appellant from varying distances. It may also be due to the natural differences in their powers of perception, hearing and memorisation of details. One of them, P. W. 2, Prayag Raj was, according to Smt. Bachchi, hard of hearing.

23. Moreover, the discrepancy is minor. The calendar tells us that the 6th of March would be the 8th day of Moharram and the 8th of March would be the 10th day of Moharram, that is, the last day on which the tazias are taken out in procession. But on the 8th of Moharram corresponding to the 6th of March, there was Mehendi ceremony. On that day, in the evening the tazias are decorated and are exhibited. Moharram lasts ten days.

24. In these circumstances it could not be said that an inducement offered to the child to show him something related to the Moharram would not have worked and passed muster with the over-hearing witnesses who were all Hindus and were not expected to be intimately acquainted with the various ceremonies, rituals and processions connected with the Moharram. Might be, the precise inducement offered was that the appellant would show the child

tazia procession which was to be taken out on the 2nd day thereafter. Be that as it may, the witnesses were unanimous in their evidence that they had seen the appellant taking away the boy with him. All these three were independent witnesses. They had no axe of their own to grind against the appellant. The courts below were therefore right in placing reliance on their testimony with regard to the vital fact of taking away of the child by the appellant.

25. This circumstance indubitably establishes that it was the appellant who had kidnapped the boy on the morning of the 6th from the lawful guardianship of his parents. It further unerringly connects the appellant with the subsequent murder of the child and the disposal of his dead body.

26. No less important was the circumstance that on March 10, 1971, at Konch, the appellant confessed before P. Ws. 1, 13, 15 and 17 that he had brought the child Rajendra. This circumstance is further coupled with the conduct of the accused in pretending to go with Lok Chand and P. W. 1 to Kanpur for restoration of the child and his parting company and disappearance at Orai on the false pretext of bringing money for travelling expenses. The courts below found the testimony of P. Ws. 1, 13 and 15 with regard to this fact entirely trustworthy. P. Ws. 1 and 15 are independent witnesses of Konch. They have no animus against the appellant, whatever. P. W. 15 was a businessman. He was a kacha arhatiya. In this connection, it may be observed that in his examination at the trial, the appellant while denying that he had promised to hand over the boy at Kanpur, admitted that he had parted company with P. W. Lok Chand, Kazi Saeed Uddin and Iqram at Orai and run away. However, he stated that he had done so because Lok Chand had said that he would lodge a report with the police at Orai.

27. Even an extra-judicial confession, if cogently proved to have been made truly and voluntarily, is an efficacious proof of guilt. The

confession or admission made by the appellant before these witnesses with regard to the act of kidnapping the boy is not of a type which is generally introduced as a padding to bolster up a weak prosecution case. We cannot overlook the fact that the appellant was none other than the husband of the sister of Lok Chand, while P. W. 1, P. W. 15 and P. W. 17, were independent witnesses of Konch who attracted by the wails of Lok Chand had questioned the appellant only out of human sympathy. There was absolutely no reason to doubt the veracity of these witnesses.

28. Mrs. Sirur pointed out that there was delay on the part of Lok Chand in going to Konch in search of the boy and this delay cast a doubt on the entire prosecution story. We are not impressed by this argument. We have to see how the mind of Lok Chand would be working in the circumstances of the case. Even if there was estrangement in the relations of the appellant and his in-laws, the rupture was not beyond repair. This is clear from the fact that on receiving the second letter Ex. P-6, falsely reporting the death of the appellant's mother, the in-laws did send Shanti to Konch. There is thus substance in the version of Lok Chand and his wife Rajjo Devi that when on March 6, 1971, they learnt from the neighbours that Rajendra had been taken away by the appellant, they did not immediately suspect anything wrong in the matter. At worst, they might have thought that the appellant was keeping the boy as a hostage for bringing pressure on them to restore his wife. They could never have thought that the appellant would go to the length of murdering the boy. That explains why Lok Chand did not promptly lodge the report with the police before the 11th of March. It was only from the confession made by the appellant at Konch and his conduct in slipping away that he was convinced of foul play on the part of the appellant.

29. Mrs. Sirur addressed some argument with regard to the identification of the dead body. She contended that the body was in an advanced stage of decomposition and

was not identifiable. The best person to throw light on this aspect of the matter was the medical officer who conducted the autopsy. But no question was put to him on this point. The very fact that the medical officer found marks of injuries from which he could definitely opine about the cause of death shows that the decomposition was not so advanced as to defy identification. Furthermore, the clothes and the shoes which were found on the dead body were identified by Lok Chand and Nihal Chand as the same which the deceased was wearing on the day of his disappearance. We therefore, do not find any merit in this contention.

30. For the foregoing reasons, we are of opinion, that all the tell-tale circumstances established by the prosecution, had made the chain so complete that there was no escape from the conclusion that within all human probability, the deceased was kidnapped, murdered and his dead body thrown into the well by none other but the appellant.

31. There remains the question of sentence. The appellant was convicted and sentenced to death by the Sessions Judge on June 30, 1973. Now we are in 1976. The death sentence has been hanging over the appellant's head for the last 21 months. By itself, it is not a circumstance which can mitigate the sentence. Nevertheless, taken in conjunction with the other circumstances of the case, it impels the court to opt for life rather than extinguishing it. According to Dr. T. D. Singh, who conducted the autopsy on the 13th March, 1971, the death of the child had taken place about four days earlier, that is, about the 10th. This shows that initially while kidnapping the child from the keeping of his parents, the appellant had possibly no intention to murder him. He might have originally kidnapped and detained the boy as a hostage to put pressure on his in-laws to send his wife back to him. When for the first two or three days of the kidnapping no one from his in-laws contacted him or made any move to cause restoration of his conjugal

rights, the appellant worked himself to such a frenzy that he decided to murder the child. The precise moment or circumstance that impelled him to take that irreversible decision has not been unravelled. We cannot also lose sight of the fact that under the new Code of Criminal Procedure, 1973, which came into force on April 1, 1974, life imprisonment for murder is the rule and capital sentence, an exception (see S. 354 (3)). Taking into consideration all the circumstances of the case, therefore, we would, while maintaining the conviction of the appellant under Section 302, Penal Code for the murder of Rajendra, commute his death sentence to that of imprisonment for life. Excepting this modification, the appeal is dismissed.

Appeal dismissed.

AIR 1976 SUPREME COURT 2062

(From: Calcutta)*

H. R. KHANNA, V. R. KRISHNA
IYER AND P. K. GOSWAMI, JJ.

Mahendra Singh Dhantwal, Appellant v. Hindustan Motors Ltd. and others, Respondents.

Civil Appeal No. 2574 of 1972,
D/- 7-5-1976.

(A) Industrial Disputes Act (1947), Sections 33 (2) (b) and 33A — Termination of service of employee during pendency of proceeding — Application if necessary when termination is simpliciter — "Misconduct" in Section 33 (2) (b) if must be one enumerated in Standing Orders — Power of Tribunal to go behind order of termination. (1966) 2 Lab LJ 428 (Mad) and AIR 1967 Mad 459, Overruled, A. F. O. O. No. 287 of 1969, D/- 2-6-1965 (Cal), Reversed.

Section 33 (2) (b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso only when he discharges or dismisses a workman for misconduct. Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside

*A. F. O. O. No. 287 of 1964, D/- 2-6-1965—(Cal.).

FT/GT/B780/76/MVJ

the scope of section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee. It is not a correct proposition of law that in case of a complaint under section 33A the Tribunal would be debarred from going into the question whether, notwithstanding the form of the order, in substance, it is an action of dismissal for misconduct and not termination simpliciter. (Paras 21, 25)

Misconduct contemplated in Section 33 (2) (b) need not be a misconduct enumerated in the Standing Orders of the Company. Standing Orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily, the standing orders may limit the concept but not invariably so. (Para 23)

If the Tribunal finds that a particular termination of service of a workman is in truth and substance innocuous or in exercise of a bona fide right under the contract, Section 33 (2) (b) will not be applicable and necessarily there will be no contravention of Section 33A of the Act. (Para 29)

When, therefore, the Tribunal has found as a fact after taking note of the history and the entire circumstances of the case that the termination was on account of misconduct of the employee it is difficult to hold that there is any manifest error of law committed by the Tribunal in reaching that conclusion only because the misconduct, as found, is not within the four corners of the description of the various misconducts mentioned in the company's standing orders. (1966) 2 Lab LJ 428 (Mad) and AIR 1967 Mad 459, Over-

ruled. A. F. O. O. No. 287 of 1964, D/- 2-6-1965 (Cal), Reversed.

(Para 24)

(B) Industrial Disputes Act (1947), Sec. 33 — Action under section is punitive — Tribunal's power to scrutinise the action.

The action under S. 33 being punitive, namely, dismissal or discharge for misconduct, the Tribunal has to oversee the action to guarantee that no unfair labour practice or victimisation has been practised thereby. If the procedure of fair hearing has been observed the Tribunal has to find in an application under Section 33 that a prima facie case is made out for dismissal. If, on the other hand, there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion whether the same is established.

(Para 18)

Cases Referred: Chronological Paras
AIR 1972 SC 1343 = (1972) 3 SCR

606 = 1972 Lab IC 668 30

AIR 1967 Mad 459 = (1966) 2 Lab LJ 899 28

(1966) 2 Lab LJ 428 = 29 FJR 226 (Mad) 28

AIR 1965 SC 1496 = (1965) 2 SCR 148 27, 28

Mr. Naunit Lal and Miss Lalita Kohli, Advocates, for Appellant; Mr. B. Sen, Sr. Advocate, (M/s. M. Mookherjee, Sardar Bahadur Saharya and Vishnu Bahadur Saharya Advocates with him), for Respondent No. 1.

Judgment of the Court was delivered by

GOSWAMI, J.:— This is an appeal at the instance of the workman on certificate of the Calcutta High Court from the decision of the Division Bench reversing the earlier judgment and order of the learned single Judge in an application under Article 226 of the Constitution directed against the award of the First Industrial Tribunal, West Bengal, made under Section 33A of the Industrial Disputes Act.

2. The appellant (hereinafter to be described as the workman) was employed by M/s. Hindustan Motors Ltd. (hereinafter to be described as the company) since August 3, 1949.

On August 3, 1956, the workman entered into an agreement of service with the company wherein the first clause reads as follows:—

"The Employer agrees to and does hereby engage the services of the employee for a period of 5 years beginning with dated 1-6-56 and thereafter until this agreement shall be determined by either party hereto giving to the other 3 months' notice in writing of such intended termination.

Provided that in case employer finds the employee's work satisfactory, employer shall have the option to extend the period of service by a further term of 3 years."

3. The workman went on two months' leave to Banaras for a change some time in 1960. He requested for extension of leave for one month on medical grounds. He actually sent an application on August 8, 1960, along with a medical certificate praying for extension of his leave. The company asked the workman to get himself examined by the company's medical officer within ten days. As the workman was lying ill at Banaras, he could not comply with the directions of the company. On September 5, 1960, he sent another telegram followed by a formal application enclosing a medical certificate for extension of his leave. On September 15, 1960, the company sent a letter to him terminating his services on the ground of habitual absence which is a misconduct under the company's standing orders.

4. At the time of this termination there was an industrial dispute pending between the company and its workmen. Since the company did not ask for approval of its order from the Industrial Tribunal the workman made a complaint to the Tribunal under Section 33A of the Industrial Disputes Act (briefly the Act). The company contested the application. The Tribunal made its award on 27-9-1962, ordering reinstatement of the workman with 50% of his back wages for the period of his forced unemployment as compensation. The Tribunal directed that the award should be given effect to not later than one month

of the publication of the award which was on October 26, 1962.

5. After a little over two months of the publication of the award, to be precise, on February 4, 1963, the company intimated to the workman to rejoin his service. The workman reported for duty the following day on February 5, 1963. On February 16, 1963, the company invoked clause (1) of the agreement which we have set out earlier and terminated the services of the workman by paying three months' salary in lieu of notice.

6. This is the second round of litigation with which we are concerned in this appeal. Since an industrial dispute was pending even on this date of termination of his service and the company did not apply to the Tribunal for approval of the order, the workman made a complaint to the Tribunal, as on the previous occasion, under Section 33A of the Act. The Tribunal accepted the complaint and held as follows:—

"In my opinion, the company has really dismissed the petitioner for a piece of conduct which must have appeared as misconduct in the eye of the company."

The Tribunal observed that the company in substance dismissed the workman for misconduct since the workman became "odious to the company" on account of his earlier success before the Tribunal in his application under S. 33A of the Act. The Tribunal, therefore ordered his reinstatement with full back wages for the period of his forced unemployment as compensation. This time the company did not accept the award although on the earlier occasion the company did not choose to litigate and reinstated him as ordered by the Tribunal.

7. The company moved the Calcutta High Court under Article 226 of the Constitution to quash the award. The learned single Judge refused to interfere with the award holding that "the reason might have been the old reason of dismissal..." The learned Judge further observed that "the circumstances relied on by the Tribunal are not wholly irrelevant and the inference drawn by the

Tribunal cannot be characterised as unreasonable".

8. The company appealed to the Division Bench of the High Court and the appeal was accepted. The Division Bench held as follows:—

"It may be that having regard to the sequence of events that took place in this case the termination of service of the respondent No. 1 by the letter of 16th February 1963 may be regarded as a colourable exercise of the power under the contract of employment or may even be regarded as one of unfair labour practice or mala fide, but the discharge cannot be said to be for any misconduct. There is no evidence for discharge on any specific misconduct. The definite case of the respondent No. 1 has been that it was by way of retaliatory measure that his services were terminated. This may be true and may show that the action on the part of the appellant company was mala fide. But until it is established that there has been a contravention of Section 33 of the Act which would create jurisdiction in the Industrial Tribunal to entertain an application under Section 33A, or in other words, unless it is established that there has been discharge for misconduct, the Tribunal had no jurisdiction to set aside the order of termination in an application under Section 33A."

9. On the application of the workman the High Court granted a certificate to him under Art. 133 (1) (c) of the Constitution. That is how this matter has come before us for a decision.

10. We should at the outset observe that this is not an appeal against the award of the Industrial Tribunal but is only directed against the judgment of the High Court under Article 226 of the Constitution. In an application under Article 226 of the Constitution the High Court was concerned only with the question of jurisdiction of the Tribunal in entertaining the application under Section 33A of the Act. The question of jurisdiction again was intimately connected with the question whether the termination of service was for misconduct of the

workman. The learned single Judge accepted the finding of the Tribunal when it held that the discharge was nothing but dismissal for misconduct and in that view of the matter did not find any justification for interfering with the award. According to the learned Judge, therefore, no question of lack of jurisdiction of the Tribunal arose to merit interference with the award under Article 226 of the Constitution.

11. The Division Bench, however, looked at the matter from a different view point. It assumed that the action of the management was even mala fide and so it could be wrongful and in an appropriate reference under Section 10 of the Act the workman might be able to get proper relief. The High Court, however, came to the conclusion that since clause (1) of the agreement was invoked by the employer it was not a case of discharge for misconduct and that being the position the Tribunal had no jurisdiction to entertain the complaint under Section 33A even though the action of the company might be as a result of unfair labour practice.

12. Mr. Navnit Lal on behalf of the workman has assailed the conclusion of the Division Bench while Mr. Sen submits that the decision is legally unquestionable.

13. The question that arises for consideration in this appeal relates to the applicability of the proviso to Section 33 (2) (b) of the Act as amended in 1956. Section 33 (2) (b) at the material time reads as follows:—

"33 (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute,

(b) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

We may also read Section 33A of the Act as that is the section under which the complaint was originally made by the workman to the Industrial Tribunal.

33A: "Where an employer contravenes the provisions of Section 33 during the pendency of proceedings before a Labour Court, Tribunal or National Tribunal, any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner to such Labour Court, Tribunal or National Tribunal and on receipt of such complaint that Labour Court, Tribunal or National Tribunal shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit its award to the appropriate Government and the provisions of this Act shall apply accordingly."

14. It is clear that the foundation of jurisdiction of the Tribunal to entertain a complaint under Section 33A is the contravention of Section 33 of the Act.

15. Section 33 may be contravened in a variety of ways. We are concerned in this appeal only with one type of contravention, namely, that the employer did not make any application to the Tribunal for approval of the order of termination of service of the workman. There is no dispute between the parties in this appeal that there was an industrial dispute pending before the Tribunal in which the workman was concerned and that the particular termination had nothing to do with that dispute. The only point on which the parties differ is as to the nature of the order of termination of service. The employer claims it to be a termination simpliciter in exercise of its right under a written contract of service entered between the parties in August 1956. The workman on the other hand contends that termination of his service was meted out as a punishment for avenging the defeat of the employer in an earlier litigation under Section 33A at the instance of the workman. In other words the workman contends that the order although purported, ex facie, to be a termination under the

terms of the agreement, is in truth and reality an order of dismissal for misconduct.

16. Originally when the Act was passed in 1947 (Act 14 of 1947) Section 33 imposed a ban on the employer against discharge, dismissal or punishment of a workman during the pendency of proceedings before the Tribunal and other specified authorities "except for misconduct not connected with the dispute." The section underwent a vital change for the employer when the Industrial Disputes (Appellate Tribunal) Act 1950 (Act 48 of 1950) was passed and Section 33 was substituted and a total ban imposed against discharge, dismissal or any punishment of a workman during the pendency of proceedings before the Tribunal and other specified authorities. The reservation of the right to the employer to take action even in case of misconduct, which was there in the original Act, was withdrawn. As time passed, in view of representations from employers, the Parliament became alive to the question of discipline in the industry and reintroduced in an altered form the said right of the employer to take action during the pendency of proceedings before the Tribunal when the Act was amended by the Industrial Disputes (Amendment and Miscellaneous Provisions) Act 1956 (Act 36 of 1956). We have already set out the material provision of Section 33 (2) (b) at the outset which has since restored to the employer the right to take punitive action under specified conditions.

17. To complete the picture we may note in passing that the section was further amended by the Industrial Disputes (Amendment) Act (Act 36 of 1964) with effect from December 19, 1964, whereby some words were inserted in sub-section (2) of Section 33 with which we are not concerned in this appeal.

18. From the provisions of Section 33 it is manifest that punitive action by the employer in whatever form it may be passed is permissible against an ordinary workman, as distinguished from a protected workman, even during the pendency of proceedings before the

Tribunal provided that the employer pays one month's wages and also applies to the concerned Tribunal for approval of his action. Since the action is punitive, namely, dismissal or discharge for misconduct, the Tribunal has to oversee the action to guarantee that no unfair labour practice or victimisation has been practised thereby. If the procedure of fair hearing has been observed the Tribunal has to find in an application under Section 33 that a prima facie case is made out for dismissal. If, on the other hand, there is violation of the principles of natural justice in the enquiry, the Tribunal can go into the whole question relating to the misconduct and come to its own conclusion whether the same is established.

19. The submission of the employer is that since the termination of the workman is in exercise of the right under the written agreement it was not a case of discharge or dismissal for misconduct and there was, therefore, no obligation on the employer to make an application under Section 33 of the Act and hence Section 33 has not been contravened and the application under Section 33A is not maintainable.

20. The question that arises for decision in this appeal is whether if a particular order of termination of service is not on account of misconduct and is merely a termination simpliciter the employer is still required to make an application under Section 33 of the Act.

21. We have no doubt in our mind that Section 33 (2) (b) makes it obligatory upon the employer to make an application to the Tribunal under the proviso only when he discharges or dismisses a workman for misconduct.

22. It is submitted by Mr. Sen that misconduct contemplated in Section 33 (2) (b) must be a misconduct enumerated in the standing orders of the company. We are unable to accept this submission.

23. Standing orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may

commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing orders, it may still be a misconduct in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily, the standing orders may limit the concept but not invariably so.

24. When, therefore, the Tribunal has found as a fact after taking note of the history and the entire circumstances of the case that the termination was on account of misconduct of the employee it is difficult to hold that there is any manifest error of law committed by the Tribunal in reaching that conclusion only because the misconduct, as found, is not within the four corners of the description of the various misconducts mentioned in the company's standing orders. It is not possible, therefore, to accept the submission that the Tribunal committed an error of law or of jurisdiction in entertaining the application under Section 33A.

25. Termination simpliciter or automatic termination of service under the conditions of service or under the standing orders is outside the scope of Section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge addressed to the employee. It is also not a correct proposition of law that in case of a complaint under Section 33A the Tribunal would be debarred from going into the question whether, notwithstanding the form of the order, in substance, it is an action of dismissal for misconduct and not termination simpliciter.

26. The possibility that in an appeal against the award of the Tribunal this Court may have taken a different view about the termination does not affect the present issue.

27. Mr. Navnit Lal relies upon a decision of this Court in the Management of Murugan Mills Ltd. v. Industrial Tribunal Madras, (1965) 2 SCR 148 = (AIR 1965 SC 1496) in

support of his contention that even termination simpliciter is within the sweep of Section 33. That was a case where the workman's services were terminated "because he deliberately adopted go-slow and was negligent in the discharge of his duty." The Supreme Court in that case observed thus:

"His services were therefore terminated for dereliction of duty and go-slow in his work. This clearly amounted to punishment for misconduct and therefore to pass an order under cl. 17 (a) of the Standing Orders in such circumstances was clearly a colourable exercise of the power to terminate the services of a workman under the provision of the Standing Orders." The Supreme Court further observed:

"In these circumstances the case was clearly covered by cl. (b) of Section 33 (2) of the Act as the services of the respondent were dispensed with during the pendency of a dispute by meting out the punishment of discharge to him for misconduct."

The decision is, therefore, not an authority for the extreme proposition advanced by Mr. Navnit Lal.

28. Mr. Navnit Lal also drew our attention to two decisions of the Madras High Court in *Shyamala Studios v. Kannu Devar* (S. S.), (1966) 2 Lab LJ 428 (Mad) and *Sri Rama Machinery Corporation (P.) Ltd. Madras v. N. R. Murthi*, (1966) 2 Lab LJ 899 = (AIR 1967 Mad 459) in support of the above submission. Although the decision of the Supreme Court in *Murugan Mills' case* (AIR 1965 SC 1496) (supra) was noticed by the Madras High Court it does not appear to have correctly appreciated the ratio decidendi of that judgment. We are unable to hold that the Supreme Court in *Murugan Mills' case* (supra) went to the extent of re-writing Section 33 by completely obliterating the concept of misconduct of a workman for which alone in a limited way the right of action for the employer is preserved during the span of pendency of proceedings before the Tribunal in the interest of discipline.

To the extent the Madras decisions state that termination of services need not be for misconduct of the workman in order to attract Sec. 33 (2) (b), we cannot agree.

29. If the Tribunal finds that a particular termination of service of a workman is in truth and substance innocuous or in exercise of a bona fide right under the contract, Section 33 (2) (b) will not be applicable and necessarily there will be no contravention of Section 33A of the Act.

30. In *Air India Corporation, Bombay v. V. A. Rebello*, (1972) 3 SCR 606 = (AIR 1972 SC 1343). This Court had to deal with the validity of an award made under Section 33A although the Labour Court in that case had held that the workman was guilty of misconduct and that his services were terminated for that reason. This Court did not agree with the aforesaid conclusion and dismissed the workman's petition under Section 33A of the Act. In doing so this Court observed as follows:—

"It is noteworthy that the ban is imposed only in regard to action taken for misconduct whether connected or unconnected with the dispute. The employer is, therefore, free to take action against his workmen if it is not based on any misconduct on their part."

31. We are, therefore, clearly of opinion that the single Judge is right in not interfering with the award under Article 226 of the Constitution and the Division Bench is wrong in doing so.

32. It is true that on the face of the order of termination the company invoked clause (1) of the agreement and even so it was open to the Tribunal to pierce the veil of the order and have a close look at all the circumstances and come to a decision whether the order was passed on account of certain misconduct. This is a finding of fact which could not be interfered with under Article 226 of the Constitution unless the conclusion is perverse, that is to say, based on no evidence whatsoever. We are, however, unable to say so having regard to the facts and circumstances described by the Tribunal in its order.

33. It is, however, unexceptionable that if an employer passes an order of termination of service in exercise of his right under a contract or in accordance with the provision of the standing orders and the Tribunal finds that the order is not on account of any misconduct, the question of violation of Section 33 would not arise.

34. There remains, however, another aspect to which the Tribunal did not properly address. The workman in this case had a contract of employment only for 8 years at the most. The reinstatement in his case, therefore, cannot extend beyond a period of eight years from June 1, 1956 and the contract of employment would have automatically terminated on May 31, 1964. The Tribunal awarded reinstatement on March 24, 1964, when even the employer did not bring it to its notice that the contract of employment would terminate in May 1964.

35. Mr. Sen, however, during the course of the argument, hinted at another round of litigation under Section 33C of the Act to contest the claim to reinstatement ordered by the Tribunal.

36. We cannot be oblivious to the plight of this workman in his unequal fight with a big company. He was serving the company since 1949 for about eleven years when he was first dismissed in 1960. He has been involved in litigation since 1960 up-till today except for a lull for eleven days on his reinstatement after the first award. Eleven years in actual service and sixteen years in litigation is a doleful tale by itself.

37. We, therefore, feel that, in the interest of industrial peace and above all to draw a final curtain to this unhappy litigation, we would be justified in quantifying the compensation payable to the workman in this case to a sum of Rs. 20,000/- only in lieu of reinstatement with full back wages as ordered by the Tribunal, which we accordingly order. We may also observe that Mr. Sen, fairly enough, had made it clear before us in the course of hearing that even if the company suc-

ceeded in this Court it would be prepared to pay to the workman a sum of Rs. 10,000/- on compassionate grounds.

38. In the result the judgment of the Division Bench of the High Court is set aside. The award of the Tribunal is varied as stated above. The appeal is allowed accordingly with no order as to costs.

39. CMP. No. 6664 of 1976 on behalf of the company for urging additional grounds is dismissed as not pressed.

Appeal allowed.

AIR 1976 SUPREME COURT 2069

(From: Punjab and Haryana)*

R. S. SARKARIA, AND N. L. UNTWALIA, JJ.

Gajjan Singh, Appellant v. State of Punjab, Respondent.

Criminal Appeal No. 249 of 1972, D/- 3-3-1976.

(A) Penal Code (1860); Ss. 34, 149 and 302 — Charge under Sections 302/149 against eight accused for committing murder in prosecution of common object — Accused B convicted under Section 302 for murder of A by a single rifle shot and accused G was convicted under Section 307 for attempting to murder D by a single rifle shot and also convicted under Sections 302/34 for murder of A — All other accused were acquitted — Conviction of accused G under Secs. 302/34 held could not be sustained.

The mere fact that B and G came together armed with rifles was not sufficient to indicate that they had come having shared a common intention to commit the murder. On the evidence and the facts found the inference of G's sharing the common intention with B for the murder of A is not possible to be drawn. It may be that he had such common intention. But it is difficult to fill the gap between "may" and "must" and to say that G must have shared the common intention for causing the

*(Criminal Appeal No. 54 of 1969, D/- 13-7-1972—(Punj. & Har.)).

GT/GT/A846/76/KSB

death of A. Therefore, the High Court had committed an error of law in sustaining the conviction of G under Sections 302/34 for the murder of A notwithstanding the missing link in the evidence to supply facts to justify the said conviction.

(Para 6)

Mr. Debabrata Mookerjee, Sr. Advocate, Mr. Uma Dutta, Advocate and Mr. T. C. Sharma, Advocate with him, for Appellant; Mr. O. P. Sharma, Advocate, for Respondent.

Judgment of the Court was delivered by

UNTWALIA, J.:— In the occurrence which took place at about 6.00 A. M. on the 23rd of July, 1967 in Village Ubboke one Ajit Singh was killed by a rifle shot fired by Birkha Singh — since dead. In the same occurrence was injured by a rifle shot P. W. 5 Dalvinder Singh. Gajjan Singh the appellant in this appeal by special leave is said to have fired that shot. Birkha Singh was convicted by the trial Judge under Section 302 of the Indian Penal Code and was sentenced to undergo imprisonment for life. The appellant was convicted for the murder of Ajit Singh with the aid of Section 34 of the Penal Code and sentenced to life imprisonment. For attempting to murder Dalvinder Singh he was convicted under Section 307 of the Penal Code and sentenced to undergo rigorous imprisonment for 7 years. Birkha Singh died after his conviction and Gajjan Singh's convictions and sentences which were directed to run concurrently by the trial Judge have been maintained by the High Court of Punjab and Haryana.

2. No argument of any substance could be advanced on behalf of the appellant in so far as his conviction under Section 307 of the Penal Code is concerned. On having appreciated the prosecution case and the evidence in support of it, we found no error either of law or of fact in the appellant's conviction under Section 307 of the Penal Code. The imposition of sentence of 7 years rigorous imprisonment is also justified.

3. We, however, do not find it possible on the facts found on the

basis of the evidence in the case to sustain the appellant's conviction under Sections 302/34 of the Penal Code for the murder of Ajit Singh. Dalvinder Singh is the son of P. W. 4 Arur Singh who was the first informant in the case. There were previous murder cases and security proceedings between the family of Arur Singh and that of the appellant. Indisputably there were previous criminal and civil cases and a bad blood between the parties. The deceased Ajit Singh was a nephew of Arur Singh in the third degree. It has, however, not come in evidence as to whether he had any enmity with the party of the accused or whether he had figured as a helper or witness on the side of Arur Singh or Dalvinder Singh.

4. The prosecution story as told by the eye-witnesses including P. Ws. 4 and 5, in short, is that Arur Singh and his son Dalvinder Singh were present at their haveli where Ajit Singh and P. W. 7 Pritam Singh also came. They were chatting standing in front of the haveli. At about 6.00 A.M. on the date of the occurrence 8 persons are said to have come in a mob, out of them, according to the prosecution case, Birkha Singh (Since dead) and Gajjan Singh (Appellant) were armed with rifles. Out of the other 6 accused who have been acquitted by the trial Judge, one is said to have been armed with a gun and the other 5 with spears. Here we quote the prosecution case from the evidence of Dalvinder Singh himself. It runs as follows:

"They challenged us saying that we will be taught a lesson for the murder of their men and getting their men imprisoned. Ajit Singh looked that side. Birkha Singh fired his rifle hitting Ajit Singh near his left eye and he fell down. Gajjan Singh fired at me hitting near the shoulder and the bullet passed through the back. I also fell down. Ajit Singh died at the spot. The accused continued firing their weapons and the other raised lalkaras that anybody coming near would not be spared. After sometime the accused left the place."

5. More or less to the same effect is the evidence, of the other

eye-witnesses. The High Court has maintained the appellant's conviction with the aid of Section 34 for causing the death of Ajit Singh by stating in its judgment thus:

"According to the prosecution evidence, the appellant and his co-accused, since acquitted and the one who died, had come armed and Birkha Singh fired at Ajit Singh as a result of which he died and Gajjan Singh also fired hitting Dalvinder Singh. After the occurrence they went together carrying their arms. The act of the appellant and Birkha Singh, since dead, in coming armed and firing at Ajit Singh and Dalvinder Singh is such, which shows that they had come to commit the murder having their common intention for the same. Thus Section 34, Indian Penal Code, is applicable in this case and Gajjan Singh deceased had the common intention to do the act of causing the death of Ajit Singh and for causing injuries to Dalvinder Singh."

6. The charge against all the accused was for committing the murder in prosecution of a common object and thus they were all charged with the aid of Section 149 of the Penal Code. If the evidence could justify the conviction of the appellant with the aid of Section 34, there would have been no difficulty in sustaining his conviction. But the mere fact that the members of the mob came together, to be more specific in view of the judgment of the trial Judge, Birkha Singh and Gajjan Singh came together armed with rifles, is not sufficient to indicate that they had come having shared a common intention to commit the murder. Only one shot was fired on the head of Ajit Singh by Birkha Singh. No shot was fired by Gajjan Singh on him. He had no grudge against him. Gajjan Singh did fire a rifle shot on Dalvinder Singh with the intention to kill him but fortunately he escaped death. Admittedly, Ajit Singh was not residing in the Haveli wherein the occurrence took place. It was perchance that he happened to be there. It cannot therefore, be said by any stretch of imagination that the appellant and his companion Birkha had

any pre-arranged plan to kill Ajit Singh. On the evidence and the facts found the inference of Gajjan Singh's sharing the common intention with Birkha Singh for the murder of Ajit Singh is not possible to be drawn. It may be that he had such common intention. But it is difficult to fill the gap between "may" and "must" and to say that Gajjan Singh must have shared the common intention for causing the death of Ajit Singh. In our opinion the High Court had committed an error of law in sustaining the conviction of the appellant under Sections 302/34 for the murder of Ajit Singh notwithstanding the missing link in the evidence to supply facts to justify the said conviction.

7. In the result the appeal is allowed in part. Conviction of appellant Gajjan Singh under Sections 302/34 and the sentence of life imprisonment thereunder are set aside. His conviction under Section 307 and the sentence of 7 years' rigorous imprisonment thereunder are maintained.

Appeal partly allowed.

AIR 1976 SUPREME COURT 2071

(From: Allahabad)*

P. N. BHAGWATI AND R. S. SARKARIA, JJ.

Harnam, Appellant v. State of U. P., Respondent.

Criminal Appeal No. 277 of 1974, D/- 10-10-1975.

(A) Penal Code (1860), S. 302 — Murder — Sentence — Accused 16 years of age — It is not appropriate to impose sentence of death. (Criminal P. C. (1974), Section 354 (3)).

In view of the current sociological and juristic thinking on the subject, it would be legitimate for the Court to refuse to impose death sentence on an accused convicted of murder if it finds that at the time of commission of the offence, he was under 18 years of age. Thus where

*(Criminal Appeal No. 498 of 1973, and Capital Sentence No. 13 of 1973, D/- 22-2-1974—(All.)).

the accused was just around 16 years of age at the time when he committed the offence, he would be entitled to the clemency of penal justice and it would not be appropriate to impose the extreme penalty of death on him. AIR 1974 SC 799, Followed. (Paras 5, 6)

Cases Referred: Chronological Paras AIR 1974 SC 799 = 1974 Cri LJ 683 4, 5

Mr. A. N. Mulla, Sr. Advocate, (Mr. N. S. Das Behal, Advocate with him), for Appellant; Mr. O. P. Rana, Advocate, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— This appeal, by special leave, is limited only to the question of sentence. The appellant has been sentenced to death for an offence under Section 302 of the Penal Code. The question is: Should the extreme penalty of death be commuted to one of life imprisonment? To answer the question it is necessary to state a few facts.

2. The appellant and a few others were tried in the Court of the Sessions Judge, Unnao for offences under Section 148 and Section 302 read with Section 149 of the Indian Penal Code. The learned Sessions Judge, on an appreciation of the evidence, found that the appellant, Sheo Dayal, Mihi Lal, Dularey and Mewa Lal had formed an unlawful assembly and in pursuance of its common object, the appellant had intentionally caused the death of one Ram Kumar by inflicting on him a severe injury with a banka severing his head from the body and then carried away the head in an angaucha in a most brutal and inhuman fashion. On this finding, the learned Sessions Judge convicted the appellant, Sheo Dayal, Mihi Lal, Dularey and Mewa Lal of offences under Section 148 and Section 302 read with Sec. 149 and sentenced each of them to rigorous imprisonment for one year for the former offence and to death for the latter. The appellant, Sheo Dayal, Mihi Lal, Dularey and Mewa Lal preferred an appeal to the High Court against the order of conviction and sentence recorded against them and their case was also referred to the High Court for confirmation of the death sentence. The High Court

agreed with the findings reached by the learned Sessions Judge and confirmed the conviction of Sheo Dayal, Mihi Lal, Dularey and Mewa Lal under Section 148 and Section 302 read with Section 149 but reduced their sentence to one of life imprisonment for the offence under Section 302 read with Section 149 and so far as the appellant was concerned, the conviction was converted to one under Section 302 and the sentence of death was maintained. The appellant thereupon preferred an application for special leave and on that application, special leave was granted by this Court limited only to the question of sentence.

3. Now, there can be no doubt that the crime committed by the appellant was a most reprehensible and heinous crime which disclosed brutality and callousness to human life and no extenuating circumstances could be pointed out on behalf of the appellant which would assuage the conscience of the Court and persuade it not to inflict the extreme penalty of death on the appellant. The only circumstance on which reliance could be placed on behalf of the appellant for mitigating the rigour of the punishment to be inflicted on him was his tender age at the time of the commission of the offence. The record of the case shows that the appellant was about sixteen years of age at the time when he committed this brutal crime. The question is: whether this could be regarded as a valid circumstance for invoking the clemency of penal justice?

4. The legislative history in regard to the subject of capital punishment shows that there has been significant change in thinking and approach since India became free. Prior to the amendment of Section 367 (5) of the Code of Criminal Procedure by Act 26 of 1955, the normal rule was to impose sentence of death on a person convicted for murder and, if a lesser sentence was to be imposed, the Court was required to record reasons in writing. But by Act 26 of 1955 this provision in Section 367 (5) was omitted, with the result that the Court became free to award either death sentence or life

imprisonment and no longer was death sentence the rule and life imprisonment the exception. Then again, a further progress was made in the same direction by Sec. 354 (3) of the Criminal Procedure Code, 1973. That section provides that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence. It will be seen that the unmistakable shift in the legislative emphasis is that for murder, life imprisonment should be the rule and capital punishment, the exception to be resorted to only for special reasons. It is only where, in view of the peculiar facts and circumstances, there are special reasons that death sentence may be awarded; otherwise life sentence should be the ordinary rule. This legislative provision in the new Code of Criminal Procedure clearly shows, as pointed out by Krishna Iyer, J., in *E. Anamma v. State of Andhra Pradesh*, AIR 1974 SC 799 = (1974 Cri LJ 683) "that the disturbed conscience of the State on the vexed question of legal threat to life by way of death sentence has sought to express itself legislatively, the stream of tendency being towards cautious, partial abolition and a retreat from total retention." The seminal trends in current sociological thinking and penal strategy, tampered as they are by humanistic attitude and deep concern for the worth of the human person, frown upon death penalty and regard it as cruel and savage punishment to be inflicted only in exceptional cases. It is against this background of legislative thinking which reflects the social mood and realities and the direction of the penal and processual laws that we have to consider whether the tender age of an accused is a factor contra-indicative of death penalty.

5. The Law Commission, in the 35th Report made by it on capital punishment, fully considered whether the Indian Penal Code should specify the minimum age of the offender who can be sentenced to

death and after examining the position under the Children's Acts of various States, it expressed the following opinion:

"We feel that, having regard to the need for uniformity, to the views expressed on the subject, and to the consideration that a person under 18 can be regarded as intellectually immature, there is a fairly strong case for adopting the age of 18 as the minimum for death sentence. We are aware that cases will occasionally arise where a person under 18 is found guilty of a reprehensible killing, or, conversely, a person above 18 is found to be immature and not deserving of the highest punishment. A line has, however, to be drawn somewhere and we think that 18 can be adopted without undue risk.

We, therefore, recommend that person who is under the age of 18 years at the time of the commission of the offence should not be sentenced to death. A provision to that effect can be conveniently inserted in the Indian Penal Code as Section 558."

The Law Commission in its 42nd Report on the Indian Penal Code agreed with this recommendation of the previous Law Commission vide paragraph 3.34 of the 42nd Report of the Law Commission. The Central Government appears to have accepted this recommendation and a provision to that effect is to be found in the Indian Penal Code (Amendment) Bill, 1972. This being the current sociological and juristic thinking on the subject, it would be legitimate for the Court to refuse to impose death sentence on an accused convicted of murder, if it finds that at the time of commission of the offence, he was under 18 years of age. Krishna Iyer, J., also pointed out in *E. Anamma v. State of Andhra Pradesh* (supra) that "where the murderer is too young — the clemency of penal justice helps him", and a murderer who is below 18 years of age at the time of the commission of the offence would certainly be "too young."

6. The appellant in the present case was, as pointed out above, just around 16 years of age at the

time when he committed the offence and, therefore, in the light of the above discussion he would be entitled to the clemency of penal justice and it would not be appropriate to impose the extreme penalty of death on him. We accordingly commute the sentence of death imposed on the appellant and convert it to one of life imprisonment.

Sentence reduced.

AIR 1976 SUPREME COURT 2073

(From: Madhya Pradesh)*

A. ALAGIRISWAMI, P. K. GO-SWAMI AND N. L. UNTWALIA, JJ.

Smt. Shaharyar Bano and another, Appellants v. Sanwal Das, Respondent.

Civil Appeals Nos. 2003 and 2194 of 1970, D/- 6-10-1975.

(A) Specific Relief Act (1963), Section 10 — Agreement to sell a house — Specific performance of — What was agreed to be sold was only portion in occupation of vendors — Agreement not including portion let out to tenants — Claim of vendee in respect of portion let out to tenants must fail — Mere use of words "entire house" in agreement is immaterial when vendee knew that portion let out to tenants was referred to and understood as a separate house. F. A. No. 26 of 1965, D/- 8-9-1969 (Madh. Pra.) Partly Reversed. (Paras 4, 7, 8)

Mr. S. V. Gupte, Sr. Advocate, (M/s. S. S. Khanduja, P. N. Bhalgotra and R. C. Agarwala, Advocates, with him) (In Civil Appeal No. 2003 of 1970) and Mr. Hardyal Hardy, Sr. Advocate, (Mr. S. K. Bisaria, Advocate with him) (In C. A. No. 2194 of 1970), for Appellants.

Judgment of the Court was delivered by

A. ALAGIRISWAMI, J.:— The appellants were the defendants in a suit filed by the respondent for specific performance of an agreement

* (F. A. No. 26 of 1965, D/- 8-9-1969 — (Madh. Pra.)).

GT/AT/D825/75/SSG

entered into by them to sell a house belonging to them in Bhopal. The agreement, Ex. P-1, is dated 17th September 1959 and reads as follows:

"Today i.e. on 17-9-1959, one house in which I am living situate at Gojarpura, I agree to sell the entire house apart from the side-portion of the door which has been given to the maternal uncle according to the religious law of MOHAMMADANISM, for a consideration of Rupees 31,375/- (i.e. thirty one thousand three hundred and seventy five rupees) to Seth Sanwaldas son of Motilal Sarraf Chouk with the consent of my sister. The entire door is included in the said house. I have realised a sum of Rs. 2000/- (i.e. two thousand) as an earnest money. No other (person) has a right (in that house) and there is no necessity of any advice. Tomorrow morning you consult your pleader and get PACCI receipt executed and shall have no objection.

Finis.

Sd/- Shaharyar Bano | daughters of
Begum | late Sardar
Akbar Khan

Sd/- Sarwar Bano

Witness:— Sd/- Ramnarayan Singh
Chouk (in Hindi)
Sd/- Ramprakash (in English)."

The trial Court dismissed the suit holding that though the appellants executed an agreement of sale in favour of the plaintiff by which they agreed to sell only the house in which they were residing and the gate adjoining the said house, it was not proved that the property to be sold included the open plot of the land between the gate and the other house occupied by the tenants and also did not include such other house and hence a decree for specific performance cannot be passed to the extent of all the four properties for which specific performance was prayed for. It however ordered the defendants to return the sum of Rs. 2000/- received by them at the time of agreement.

2. Before the High Court it was argued that the agreement, Ex. P-1 was too vague and therefore unenforceable. The High Court took

the view that the terms of the agreement were quite clear and the trial Court was wrong in refusing to pass a decree for specific performance. Another argument advanced before the High Court was that although the defendants at the time of entering into the agreement considered themselves to be the sole owners of the whole house, they later on discovered that there were other co-sharers also and that they were therefore incapable of carrying out the terms of the contract. The respondent stated before the High Court that he relinquished all claims for such further performance or for any damages or compensation either for deficiency or for loss or damage which may be sustained by him through the default of the defendants on that ground. In the result the High Court gave a decree for specific performance of the contract and for a sale-deed of the whole house, except the portion which has been shown in the sketch map attached to the plaint as having been expressly exempt from sale, regarding the right, title and interest of the defendants and that the defendants would not be liable to compensate the plaintiff for any portion of the property that may go out of his hands on account of the claim of other co-sharers which may be proved in the house.

3. Before us three points were urged (1) that there was no concluded contract, (2) reservation of rights of other co-sharers, and (3) a decision on what exactly was the property agreed to be conveyed. Points 1 and 2 do not really call for much comment nor are they susceptible to much argument in their support. The contract, Ex. P-1 is quite clear and definite. The fact that the vendee was asked to consult his pleader and get pacci receipt executed did not make the contract dependent upon the vendee consulting his pleader and getting the pacci receipt. The fact that he did not return thereafter to get pacci receipt does not make the contract any-the-less binding on the appellants. As regards the rights of the co-sharers, it appears that some of them applied to be added as parties in this suit and on the plaintiff's objection their applications were dismissed. We do

not see how it affects right of the plaintiff to get the decree for specific performance of the agreement with him if he is prepared to take what the defendants agreed to convey to him and took the risk of its turning out to be less than what they had agreed to sell to him. That is in effect what the High Court has provided and we see no flaw in this.

4. The most important point is what was it that was agreed to be sold. It appears that the 'premises' in question, to use that colourless term because of the confusion which the use of the word 'house' has led to in this case, seems to consist of three portions and a passage. In one of the portions the defendants were residing. That was to the right-hand side of the passage. At the end of the passage was another portion which had been leased to tenants, and to the left hand side of the passage was the portion which is specifically excepted from the agreement as having been given to the maternal uncle of the defendants. The claim of the plaintiff was for the house occupied by the defendant as well as the house which was let out to the tenants and the passage as a whole. According to the defendants only the house which they were occupying was agreed to be sold. It is because of this confusion that the trial Court refused to give a decree for specific performance on the ground that the agreement was vague. The High Court took the view that the agreement included the portion occupied by the defendants as well as the portion let out to the tenants, in other words that the defendants had agreed to sell all what they owned in these premises except the portion to the left of the passage which had been given to their maternal uncle. We have carefully gone through the evidence and are of the view that what was agreed to be sold was only the portion which was in the occupation of the defendants and the agreement did not include the portion which was let out to the tenants. It follows that the passage would be common to the portion in the occupation of the defendants as well as the portion let out to the tenants.

5. In the plaint as originally filed the plaintiff had only stated that the defendants had contracted to sell to him a house. By a later amendment a map was attached to the plaint and both the portions were claimed. After the amendment of the plaint the 1st defendant specifically stated that the plaintiff has included in the site plan and in the boundaries described in the plaint two houses, that the portion described on the western side of the site plan is entirely a separate house and has nothing to do with the alleged agreement. She also stated that the passage was not included in the agreement. That all the witnesses as well as parties proceeded on the basis that the portion occupied by the defendants was one house and the portion let out to the tenants was another house would be obvious from the evidence which we will presently set out.

6. Though the plaintiff in his evidence says that he questioned the 1st defendant about the entire house which she wanted to sell, he explained it by saying that the entire house meant the door, sahan (probably open courtyard) beyond the door and the double storey which was in the outer portion of the house in which she resides he does not say anything about the house in the occupation of the tenants. In cross-examination he stated that two houses are not there, there is only one house containing three sahan (open courtyard), outer double storeyed (house) of the western side is not the separate house but it is the portion of this very house. He admits that the defendants told him that there were tenants in the outer double storeyed portion. This is important because the agreement, Ex. P-1 mentions only the house in which the defendants were living. It does not mention the portion which was in the occupation of the tenants and it was for the plaintiff to have made sure if he wanted his agreement to include the portion in the occupation of the tenants to have it specifically mentioned. P. W. 2 states that when he went to the defendants in order to bargain about the purchase of the house they told him that they wanted to sell the sa-

han together with the double storeyed building, meaning thereby the portion in the occupation of the tenants. But in cross-examination he speaks of the front double storeyed house (meaning the portion in the occupation of the tenants) and the house towards the right (meaning the portion in the occupation of the defendants) P. W. 3 states that the defendants told him that they wanted to sell sahan of the inner side adjacent to the main gate, double storeyed house behind the sahan, the house in which they were living and two sahan to its back side. But even he did not say, when Ex. P-1 was written and read over, that there should be mention about the portion occupied by the tenants. He also says that inside the door after passing through the sahan one has to go into the houses showing thereby that the portion in the occupation of the tenants and the portion in the occupation of the defendants were treated as two different houses. D. W. 1 states that besides the residential home of Shaharyar Bano (1st defendant) there was a khandhar (dilapidated portion of a house) and one house also in her property and this second house was at the last end of the passage which was in front of the residential house of Shaharyar Bano. Nothing was elicited in his cross-examination to establish anything to the contrary, D. W. 3 who was once in occupation as a tenant of the portion now in dispute stated that he was a tenant in the separate house from the residential house of Shaharyar Bano and that for going to the house in which he was living, he was required to go through the passage from inside the main gate, and the house in which Shaharyar Bano resides and the house in which he was living as a tenant were separate. He was not even cross-examined.

7. It is therefore obvious that everybody concerned in the matter proceeded on the assumption that there were two houses, one occupied by defendants and another in the occupation of the tenants. The agreement mentions the house in which the defendants were living as the subject matter of the agreement. The words 'entire house' cannot in any

way militate against this fact. It will only be the entire house in which the defendants were living. As we stated earlier, the plaintiff was aware of the fact that there was a portion of the premises which was referred to and understood as a separate house by all those concerned and which was in the occupation of the tenants. If the agreement was to include that portion also it was his duty to have it specifically mentioned in the agreement. Not having done so he has got to fail in his claim regarding that portion of the house.

8. In the result the appeal is allowed in part and the decree of the High Court would be modified by excluding the portion in the occupation of the tenants, which is shown as B, C, D, E as well as the two rooms shown as 'R' inside room and 'R' room in Ex. P-7. As mentioned earlier, the passage from the road through the gate at the eastern end will be common to the portions in respect of which the plaintiff will now get a decree for specific performance, as well as the portion which will be excluded from the decree passed by the High Court, and will continue to belong to the defendants/appellants. In the circumstances there will be no order as to costs.

9. Civil Appeal No. 2194 of 1970 filed by the respondent in Civil Appeal No. 2003 is dismissed as withdrawn.

Appeal partly allowed.

AIR 1976 SUPREME COURT 2076

(From: Calcutta)*

V. R. KRISHNA IYER AND A. C. GUPTA, JJ.

Income-tax Officer 'A' Ward, Calcutta and another, Appellants v. Ramnarayan Bhajnaragarwala, Respondent.

Civil Appeal No. 318 of 1971, D/- 25-9-1975.

(A) Income-tax Act (1961), S. 251 — Remand by Appellate Assistant

*(Appeal No. 233 of 1963, D/- 3-6-1969—(Cal.)).

GT/AT/D774/75/KSB

Commsisioner — Income-tax Officer directed to determine ownership of bank deposit standing in name of assessee — Duty of Income-tax Officer to decide matter without undue delay — Delay of 5 years condemned.

Dicta:— "Five years to dawdle over the decision of a small matter directed by an appellate authority amounts to indiscipline subversive of the rule of law. We hope that the administration, takes serious notice of delays caused by tax officers' lethargy, under some pretext or other, in speeding up enquiries into incomes and finalizing assessments."

(Para 2)

(B) Income-tax Act (1961), Sections 147 and 148 — Proceedings for reassessment — "Reasonable belief" of Income-tax Officer is the 'sine qua non' for initiation of such proceedings — Jurisdiction of Income-tax Officer challenged on ground of absence of such belief — High Court in appeal without deciding the question disposing case or certain assumptions — Case remanded to High Court for fresh hearing. (Section 251).

(Para 3)

Mr. S. P. Nayar and Mr. B. B. Ahuja, Advocates, for Appellant; Mr. S. T. Desai, Sr. Advocate, (Mr. H. S. Parihar and Mr. I. N. Shroff Advocates with him), for Respondent.

The Judgment of the Court was delivered by

KRISHNA IYER, J.:— This is really a case where litigation would have been avoided, had the concerned Income-tax Officer carried out the directions issued by the Appellate Assistant Commissioner, with quick dispatch to determine the ownership of the deposit in the bank account as between the respondent before us and his nephew Madanlal.

The Facts:

2. There was a Bank account in which a huge sum was seen as lying in deposit. The assessing authority proceeded on the footing that the amount represented the income of one Madanlal, in whose name the Bank account stood. He contested his ownership and urged that really this sum belonged to his uncle who is the respondent before us. Any way his contention was overruled by the Income-tax Officer, but,

in appeal, the Appellate Assistant Commissioner set aside the order and directed that the Income-tax Officer do determine the real ownership of the bank deposit. This was done in September 1970. It is admitted before us that, although we are in October 1975, the Income-tax Officer has not yet determined the real ownership of the deposit as between the uncle and the nephew. There is no valid reason why the Income-tax Officer should have delayed so long and indeed administrative officers and tribunals are taking much longer time than is necessary, thereby defeating the whole purpose of creating quasi-judicial tribunals calculated to produce quick decisions, especially in fiscal matter. Five years to dawdle over the decision of a small matter directed by an appellate authority amounts to indiscipline subversive of the rule of law. We hope that the Administration, takes serious notice of delays caused by tax officers' lethargy, under some pretext or other, in speeding up enquiries into incomes and finalizing assessments. The mere fact that a Writ Petition was pending in the High Court, especially in the background of no stay having been granted shows that the alibi of a High Court proceeding cannot be successfully put forward by the Income-tax Officer for his slow motion in settling the question directed by his Appellate Officer. Law must move quick not merely in the Courts but also before tribunals and officers charged with the duty of expeditious administrative justice. We emphasize this because if the Income-tax Officer had fixed the ownership of the deposit years ago, may be the respondent before us might not have had to go up in litigation in High Court and the Income-tax Department itself would not have had to proceed against him.

3. We have no doubt that either the uncle or nephew must pay the tax under normal circumstances and they cannot play off one against the another to defeat the claims of the Revenue. Even so, High Court has disposed of this case in Appeal before the Division Bench on certain assumptions and representations, for which counsel for the Income-tax De-

partment was largely responsible. The result is that there has been no investigation into the basic question raised before the High Court by the respondent that the Income-tax Officer had no jurisdiction to start proceedings under Section 148 on the score that he had no 'reasonable belief', which is the sine qua non for the initiation of such proceedings. This question remains to be decided by the High Court. We, therefore, set aside the judgment of the High Court but remand the Appeal to the High Court for a fresh hearing on the question as to whether the foundational fact of reasonable belief is satisfied in this case or not.

4. However, if the Income-tax Officer at least at this late stage will bestir himself to adjudicate upon the ownership of the bank deposit and if he holds that the nephew Madanlal is the owner of such deposit, the Writ Appeal before the High Court may not have to be proceeded with — of course, subject to appeals that may be available to Madanlal. We direct that the Income-tax Officer determine the ownership of the bank deposits within six months from today, and thereafter only the Appeal before the High Court need be considered. We may observe in conclusion that Shri S. T. Desai, counsel for the respondent has fairly assured us that, so far as his client is concerned, all co-operation will be available to enable the Income-tax Officer to determine who the owner of the Bank deposit is. Indeed he is interested in this subject-matter and we hope that such evidence as the Income-tax Officer requires from him will be readily forthcoming. With this direction we allow the Appeal and remand the case to the High Court for fresh disposal in the light of our observations. No order as to costs.

Case remanded.

AIR 1976 SUPREME COURT 2078 =
1976 TAX. L. R. 518

(From Bombay: (1968) 70 ITR 450)

H. R. KHANNA AND P. K.

GOSWAMI, JJ.

Hukam Chand Mills Ltd. Indore,
Appellant v. Commissioner of In-
come-tax Bombay, Respondent.

Civil Appeal Nos. 1062-1066 (NT)
of 1970, D/- 19-3-1976.

(A) Income-tax Act (1922), Sec-
tions 66A (2) and 4 — Question of
fact — What is — Apportionment of
profits accruing or arising in British
India. (1968) 70 ITR 450 (Bom), Re-
versed.

The question as to what propor-
tion of the profits of the sales arose
or accrued in British India is essen-
tially one of fact depending upon
the circumstances of the case. In the
absence of some statutory or other
fixed formula, any finding on the
question of proportion involves some
guess work. As long as the propor-
tion fixed by the Tribunal is based
upon the relevant material, it should
not be disturbed. (Para 4)

Held on the facts and circum-
stances of the case that it is just and
equitable to apportion 15% of the
profits of sales (of textiles) effected
through canvassing by assessee's re-
presentatives in British India and
through brokers and agents in Bri-
tish India, as accruing or arising in
British India and 7½ per cent of the
profits of sales effected to British
Indian merchants and brokers during
their visit or at the time of their
visit of assessee's place of business,
as accruing or arising in British
India. (1968) 70 ITR 450 (Bom), Re-
versed. (Para 5)

Cases Referred: Chronological Paras
AIR 1967 SC 1907 = 67 ITR 79 2

Mr. S. T. Desai, Sr. Advocate,
(Mrs. A. K. Verma, Advocate, for M/s.
J. B. Dadachanji & Co., Advocates
with him), for Appellant; Mr. B.
Sen, Sr. Advocate (Mr. S. P. Nayar,
Advocate with him), for Respondent.

The Judgment of the Court was
delivered by

KHANNA, J.:— This judgment
would dispose of five Civil Appeals
Nos. 1062 to 1066 which arise out of

DT/DT/B16/76/VSS

references under Section 66 (1) of the Indian Income-tax Act, 1922 made at the instance of the assessee-appellant.

2. The assessee-appellant, Humkum Chand Mills Ltd. Indore, is a public limited company. It owns a textile mill at Indore and carries on the business of manufacture and sales of textiles. These appeals have a long history and are concerned with the income of the appellant during the calendar years 1941, 1942, 1943, 1944, 1945 and 1946, the relevant assessment years for which were 1942-43, 1943-44, 1944-45, 1945-46, 1946-47 & 1947-48. In those years the assessee effected sales of textiles to merchants in the then British India. Question which arose for consideration was as to what part of the income arising out of those sales transactions accrued or arose in British India. As the questions of law involved in each of the appeals were identical, the facts relating to the assessment year 1942-43 only were taken into consideration. According to the finding of the Income-tax Officer in that year the price of the textiles sold by the assessee in British India aggregated to Rs. 14,80,059. This amount consisted of the following four categories:

(a) Sales in pursuance of business canvassed by company's representatives in British India, also described as item (3) Rs. 6,46,028

(b) Sales to British Indian merchants through brokers and agents in British India, also described as item (4) Rs. 2,91,891

(c) Sales to British Indian merchants and brokers during their visit at Indore, also described as item (5) Rs. 2,86,224

(d) Sales to British Indian merchants at the time of their own or their broker's visit at Indore, also described as item (9) Rs. 2,55,916

Total: Rs. 14,80,059

Profits from those sales held at 31.12 per cent amount to Rupees 4,60,560. Profit attributable to operations carried out in British India were held by the Appellate Assistant Commissioner to be one-third of Rupees 4,60,560, i.e. Rs. 1,53,520. In doing so the Appellate Assistant Commissioner acted upon the analogy of

Rule 33 of the Indian Income-tax Rules, 1922. We need not set out the finding of the Income-tax Officer. The Tribunal substantially agreed with the Appellate Assistant Commissioner. At the instance of the assessee the following two questions were inter alia referred to the High Court:

"(2) Whether on the facts and in the circumstances of the applicants' case, the Tribunal was right in holding that in respect of sales of Rupees 14,80,059/- the profit was correctly determined by application of Rule 33 and one-third of the profits so determined could be said to accrue or arise in British India?

(3) Whether on the facts and in the circumstances of the applicants' case, the Tribunal was right in holding that a proportionate part of the profits determined on sales grouped under items 3, 4, 5 and 9 in the assessment order by the application of Rule 33 was assessable to income-tax?"

The High Court answered question No. (3) in favour of the assessee. In view of its finding on question No. (3), the High Court did not answer question No. (2). The Commissioner of Income-tax then came up in appeal to this Court and the decision of this Court is reported in 67 ITR 79 = (AIR 1967 SC 1907). This Court held that the answer to question No. (3) should be in the negative as the property in goods passed to the purchaser in British India and proportionate part of the profits of these sales accrued in British India and as such was assessable to Indian Income-tax. The case was remitted to the High Court to answer question No. (2) in accordance with law. On remand the High Court held that the profits were correctly determined by the application of Rule 33 and one-third of the profits so determined could be said to arise or accrue in British India. When the matter came up in appeal before this Court, it was found that the High Court had not taken into account the relevant circumstances for answering question No. (2). It was also stated by counsel for both the parties that Rule 33 was not applicable to the facts of the case. This Court accordingly directed the Ap-

pellate Tribunal to submit a supplementary statement of the case to this Court. Supplementary statement of the case has now been received.

3. The Tribunal found that in respect of the sales in categories (a) and (b) amounting to Rs. 9,37,919, it was just and equitable to apportion 15 per cent of the profits to have arisen and accrued in British India. Regarding sales in categories (c) and (d) for a total amount of Rs. 5,42,140, the Tribunal held that $7\frac{1}{2}$ per cent of the profits could be said to have accrued and arisen in British India. As the profits were found to represent 31.12 per cent of the turnover the profits in respect of the turnover of Rs. 9,37,919 comprised in categories (a) and (b) were calculated at the rate of $4\frac{1}{2}$ per cent (i.e. 15 per cent of 31.12 per cent). The profits in British India were thus found to be Rs. 42,200, profits accruing and arising in British India in respect of sales turnover of Rs. 5,42,140 comprised in categories (c) and (d) at the rate of $2\frac{1}{4}$ per cent ($7\frac{1}{2}$ per cent of 31.12 per cent) were found to be Rs. 12,200. The total profits accruing or arising in British India to the assessee company in the assessment year 1942-43 were thus worked out to be Rs. 54,400. The above finding of the Tribunal has been arrived at on consideration of the facts of the case. The modus operandi in respect of the sales of various categories was found by the Tribunal to be as under:

"(a) Sales of Rs. 6,46,028

(i) The assessee's paid representatives at Bombay canvassed the sales, on behalf of the assessee, to merchants in British India.

(ii) The orders were sent by British Indian merchants to the assessee at Indore.

(iii) The assessee accepted the orders at Indore, prepared the contracts and signed them at Indore and forwarded the same to customers in British India.

(iv) The customers signed the contracts in British India.

(v) The contracts were signed on company's forms.

(vi) The contracts bore British Indian stamps.

(b) Sales of Rs. 2,91,891

(i) The brokers in British India, described as freelance brokers, transmitted the offers to the company at Indore.

(ii) The offers were made to the company on the brokers' own forms.

(iii) The brokers were not engaged by the assessee-company and such orders were placed by the brokers in the normal course of their business.

(iv) The customers signed the contracts in British India.

(c) Sales of Rs. 2,86,224

(i) These sales were made to British Indian merchants who went to Indore to negotiate and place orders.

(ii) The orders were accepted at Indore.

(iii) The contracts bore British Indian stamps.

(iv) The customers signed the contracts in British India.

(d) Sales of Rs. 2,55,916

(i) These sales were made to British Indian merchants on their or their brokers' personal visits to Indore.

(ii) The offers were taken direct at Indore.

(iii) Contracts for such sales were made in the same manner as stated hereinbefore."

The Tribunal also gave a finding that the assessee maintained an organisation in British India, that that organisation was interested in bringing to the notice of the British Indian merchants, brokers and consuming public the goods manufactured by the assessee-company and that the ground work for sales effected in these groups was done in British India.

4. Nothing has been urged before us either on behalf of the assessee-appellant or on behalf of the revenue-respondent to assail the finding of the Tribunal in the supplementary statement of case. The question as to what proportion of the profits of the sales in categories (a), (b), (c) and (d) arose or accrued in British India is essentially one of fact depending upon the circumstances of the case. In the absence of some statutory or other fixed formula, any finding on the question of proportion involves some element of

guess work. The endeavour can only be to be approximate and there cannot in the very nature of things be great precision and exactness in the matter. As long as the proportion fixed by the Tribunal is based upon the relevant material, it should not be disturbed.

5. We accordingly accept the appeals, discharge the answer given to question No. (2) by the High Court and hold that the profit which arose and accrued in British India to the assessee-appellant for the assessment year 1942-43 was Rs. 54,400. We also hold that it is just and equitable to apportion 15 per cent of the profits of sales in categories (a) and (b) as accruing or arising in British India and 7½ per cent of the profits of sales in categories (c) and (d) as accruing or arising in British India. The parties in the circumstances shall bear their own costs.

Appeals accepted.

AIR 1976 SUPREME COURT 2081 =

1976 TAX. L. R. 521

(From: Calcutta)*

A. C. GUPTA AND JASWANT SINGH, JJ.

Commissioner of Income-tax (General) Calcutta, Appellant v. Ashoka Marketing Ltd., Calcutta, Respondent.

Civil Appeal No. 792 of 1971, D/- 19-3-1976.

(A) Income-tax Act (1922), S. 66 (2) — Application for reference — Dismissal without 'speaking order'.

Where the High Court had issued a rule nisi on the application under Section 66 (2) for reference, it was wrong in dismissing the same without a 'speaking order.' The High Court should have stated the reasons on which it dismissed the application. (Para 4)

(B) Income-tax Act (1922), Ss. 23, 66 (2) — Question of concealment of income — Question of law or fact — Application for reference under Section 66 (2) — Whether maintainable.

*(Income Tax Ref. No. 78 of 1969, D/- 16-9-1969—Cal.)

DT/DT/B17/76/VBB

1976 S. C./131 X G—7

Whether or not an assessee has concealed its income is a question to be decided on the facts of a case, and where the decision that the income was not concealed is based on the assessee's agreement with its allied concern which the Tribunal accepted as true, no question of law really arises from the order of the Tribunal, and the order of the High Court dismissing the application under Section 66 (2) for reference cannot be said to be wrong. (1974) 97 ITR 161 (Mad), Ref: ITR No. 78 of 1969, D/- 16-9-1969 (Cal), Affirmed.

(Para 5)

Cases Referred: Chronological Paras

(1974) 97 ITR 161 (Mad) 5

1972 Tax LR 1048 = (1971) 80 ITR 26 (SC) 5

Mr. S. T. Desai Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Appellant; Mr. B. Sen, Sr. Advocate, (M/s. Bishamber Lal), for Respondent.

Judgment of the Court was delivered by

GUPTA, J.:— The respondent, a limited company, acts as selling agent of various companies and also carries on business in shares, jute and speculation. During the previous year ending on August 31, 1951 relevant to the assessment year 1952-53 the respondent had transactions in jute which resulted in a profit of Rs. 59,91,721/-. The respondent claimed that this sum comprised of Rs. 40,05,825/- which was the profit earned by and paid to M/s. Dalmia Jain & Co. Ltd. (hereinafter referred to as D. J. C. for the sake of brevity) and Rs. 14,30,561/1 paid to M/s. Dalmia Cement and Paper Marketing Co. Ltd. (hereinafter referred to as D. C. P. M.) being the profit earned by them. The Income-tax Officer rejected the respondent's claim holding that these two sums were really profit that accrued to the respondent. On appeal before the Appellate Assistant Commissioner the respondent did not press its claim in respect of Rs. 40,05,825/- and confined its objection to the inclusion of Rs. 14,30,561/- in its total income. The Appellate Assistant Commissioner having overruled this objection the respondent preferred an appeal to the Tribunal which also was dis-

missed. The respondent then sought a reference under Section 66 (1) of the Income-tax Act, 1922 of the question "whether in the facts and circumstances of the case the Tribunal was right in holding that the profit of Rs. 14,30,561/- on jute transactions were the profits of the assessee company liable to be included in its total income." The Patna High Court by its judgment and order D/- 27-1-1966 answered the question in the negative, in favour of the respondent and against the department, on the view that the material on record did not justify the rejection of the respondent's claim that the sum of Rs. 14,30,561/- was not its income but that of D. C. P. M.

2. In the meantime, the Income-tax Officer had by his order dated March 29, 1964 levied a penalty of Rs. 20 lakhs under Section 29 (1) (c) of the Act for concealment of income to the extent of Rupees 54,36,386/- composed of the two sums mentioned above. On appeal by the respondent against the order imposing penalty, the Appellate Assistant Commissioner, Calcutta, took note of the decision of the Patna High Court excluding Rs. 14,30,561/- from the respondent's total income and reduced the penalty to Rs. 15 lakhs which, it was found, was attributable to the sum of Rs. 40,05,825/-. Before the Appellate Assistant Commissioner it was contended on behalf of the respondent that both the aforesaid amounts were added to the respondent's total income under similar circumstances, and as the Patna High Court had excluded Rs. 14,30,561/- as being the income of D. C. P. M., the sum of Rupees 40,05,825/- should also be held as the income of D. J. C. and not respondent's. It was further argued that the respondent did not challenge the inclusion of Rs. 40,05,825/- before the Appellate Assistant Commissioner in the assessment proceeding as the respondent had the proportionate tax on this amount reimbursed from D. J. C. which was an allied concern. The Appellate Assistant Commissioner was of opinion that any internal arrangement between the respondent and its allied concern was not relevant for decid-

ing whether the sum was the respondent's income and that, as the respondent had not questioned the inclusion of this amount in its total income, the matter had become final and the respondent was not entitled at this stage to reopen the question. The Appellate Assistant Commissioner also mentioned several circumstances why the amount in question should be considered as the respondent's income.

3. On appeal by the respondent the Appellate Tribunal, 'B' Bench, Calcutta, came to a different conclusion proceeding on the following steps of reasoning. Penalty proceeding being separate and distinct from the assessment proceeding the respondent was entitled to lead additional evidence to show that the sum of Rs. 40,05,825/- assessed as its income was really not so. The assessability of Rs. 40,05,825/- depended on the sufficiency of material justifying the assessment. The nature and procedure in regard to the transactions with D. J. C. and D. C. P. M. were identical, and as the Patna High Court had held that the material relied on for the assessment of Rs. 14,30,561/- was not sufficient, it must also be held that there was no material to justify the conclusion that Rs. 40,05,825/- was the respondent's income. The respondent accepted the assessment of the said sum in its hands because D. J. C. agreed to reimburse the respondent for the tax paid on its behalf and there was no valid reason for holding that this amount was the concealed income of the respondent. The department had not brought on record any material to show that the case involving Rupees 40,05,825/- stood on a different footing from the other case where the material was considered inadequate to support the assessment of the sum in the respondent's hands. Accordingly the Tribunal set aside the penalty of Rs. 15 lakhs. The Commissioner of Income-tax (General), Calcutta, thereupon applied under Sec. 66 (1) of the Act for reference of the following three questions to the High Court.

"1. Whether, on the facts and in the circumstances of the case the Tribunal was right in placing upon

the Department the onus to prove by positive evidence that the sum of Rs. 40,05,825/- represented concealed income of the assessee when the assessee itself had conceded that the said sum was its income?

2. Whether, on the facts and in the circumstances of the case the Tribunal was right in treating the sum of Rs. 40,05,825/- on the same footing as the sum of Rs. 14,30,561/- and in setting aside, on that view, the penalty order passed in this case?

3. Whether, in any event, on the facts and in the circumstances of the case, the Tribunal was right in setting aside the said order of penalty?"

The Tribunal rejected the application on the view that no question of law arose from the order of the Tribunal. The Commissioner thereafter applied under Section 66 (2) to the High Court for an order requiring the Income-tax Appellate Tribunal to draw up a statement of the case and to refer the aforesaid questions of law to the High Court for determination. On this application a rule nisi was issued on 28-4-1969. On September 16, 1969 the High Court discharged the rule and dismissed the application without however giving any reasons. The present appeal by special leave is directed against this order of the High Court.

4. Mr. Desai, learned counsel for the appellant, submitted that the High Court having issued a rule nisi on the application under Section 66 (2) was wrong in dismissing the same without a speaking order. We agree that the High Court should have stated the reasons on which it dismissed the application; however, as we have heard the counsel on either side on the merits of the case, we do not think it would be proper to send the matter back to the High Court only on that ground. We therefore propose to dispose of the appeal on merits.

5. It was argued before the Tribunal in the penalty proceeding that merely because the respondent did not press its objection to the assessment of the sum of Rs. 40,05,825/- in its hands, it could not be said that it was admitted that the amount was the concealed income of the res-

pondent. Before the Tribunal the explanation offered by the respondent in respect of the aforesaid sum was:

"To avoid protracted appeal proceedings, a compromise was entered into between the assessee company and D. J. C. Ltd., whereby the sum would be assessed in the assessee's hands and omitted from the assessment of Dalmia Jain Company Limited, the latter undertaking to meet the tax liability in respect of such inclusion "the balance of the profit being retained by the company." Such an arrangement was possible because D. J. Co. Ltd. was one of the companies in the Sahu Jain Group." It appears, however, from the Tribunal's order that it excluded the sum of Rs. 40,05,825/- from the respondent's total income "only because D. J. C. agreed to reimburse the assessee for the tax liability met on its behalf." Mr. Desai pointed out that the judgment of the Patna High Court on the basis of which the Tribunal in the assessment proceeding had held that the sum of Rupees 14,30,561/- could not be treated as the concealed income of the respondent was later reversed by this Court. (See Commr. of Income-tax, Bihar and Orissa v. Ashoka Marketing Ltd., (1971) 83 ITR 26 = (1972 Tax LR 1048 SC)) Mr. Desai submitted that the argument that Rs. 40,05,825/- could not be assessed in the hands of the respondent for the reasons given in the aforesaid judgment of the Patna High Court no longer held good after that judgment had been set aside. Mr. Desai relied on the decision of the Madras High Court in Ayyamperumal Nadar v. Commr. of Income-tax, Madras, (1974) 97 ITR 161 (Mad) to contend that the materials gathered at the stage of assessment proceeding cannot be altogether overlooked in the penalty proceeding and submitted that the Tribunal must therefore be held to have misdirected itself in thinking that the department had failed to bring any material to show that the amount in question was the respondent's concealed income. However, as pointed out in the order of the Tribunal rejecting the application under Section 66 (1), the Tribunal's decision in the assessment proceeding did not rest on any legal issue but really on the

explanation given by the respondent that it did not question the inclusion of Rs. 40,05,825/- in its total income because of the understanding with D. J. C. to which we have referred above. Mr. Desai submitted that the alleged understanding or agreement with D. J. C. appeared only from what the assessee's counsel stated before the Tribunal, and there was no material on record in support of that statement. Assuming that the fact of agreement with D. J. C. appeared only in counsel's statement, there is nothing on record to suggest that the department challenged the truth of the statement or questioned the propriety of acting on it. The agreement with D. J. C. is a fact appearing from the order of the Tribunal, and that is sufficient for the present purpose. Whether or not an assessee has concealed its income is a question to be decided on the facts of a case, and in the present case the decision is based on the respondent's agreement with D. J. C. which the Tribunal accepted as true. That being so, no question of law really arises from the order of the Tribunal, and the order dismissing the application under Section 66 (2) cannot be said to be wrong.

6. The appeal is dismissed but in the circumstances of the case without any order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2084 =
1976 TAX. L. R. 1627

(From: Madras)*

A. N. RAY, C. J., M. H. BEG AND
JASWANT SINGH, JJ.

C. A. Galiakotwala & Co. (P)
Ltd. Madras, Appellant v. State of
Madras, Respondent.

Civil Appeal No. 1191 of 1973,
D/- 22-3-1976.

(A) Central Sales Tax Act (1956),
Section 3 (a) and (b) — Inter-State
sale — Appropriation of goods to
contract — Place — Determination.

Appellant a dealer in cotton having
its place of business in Madras

*(T. C. No. 197 of 1968, D/- 7-11-
1972—Mad.)

AT/DT/B18/76/GGM

State entered into an agreement with certain Mills in Madras State for supply of cotton. The appellant placed orders with sellers at Bombay for purchase of cotton and the appellant directed its Bombay sellers to despatch the goods to the mills as consignees. The Bombay seller sent the consignment to the mills but the railway receipts were sent by the Bombay seller to the appellant. The appellant then endorsed the same in favour of the mills after collection of the substantial portion of the sale price. On a question whether the sales by appellant to mills were inter-State sales under Section 3 (a) of the Central Sales Tax Act or second sales under State sales under Section 3 (b). Held that since the railway receipts were sent by the Bombay sellers to the appellant and the appellant thereafter endorsed the same to the mills, there could not be an unconditional appropriation of goods at Bombay towards the contract entered into between the appellant and the mills. The property in the goods passed only when the mills took delivery of the railway receipts from the appellant. Consequently the State Sales Tax Authorities had jurisdiction to assess the transaction for sale by the appellant to the mills under Section 3 (b) of the Central Act. (Para 5)

(B) Central Sales Tax Act (1956),
Section 8 (5) — Declared goods —
Exemption — G. O. No. 3602 —
Applicability — Exemption applies
only in cases where assessee pays a
tax under Section 4 of Madras General
Sales Tax Act in respect of local
sales preceding inter-State transaction.
(Madras General Sales Tax Act
(1959), S. 4). (Para 6)

C. K. Viswanatha Iyer, Sr. Advocate,
(Mrs. G. Gopalakrishnan, Advocate,
with him), for Appellant; Mr. S. T. Desai, Sr. Advocate, (Mr. A. V. Rangam and Miss A. Subhashini, Advocates, with him), for Respondent.

Judgment of the Court was delivered by

RAY, C. J.:— This appeal by special leave is from the judgment dated 7 November, 1972 of the High Court of Madras.

2. The principal question in this appeal is whether the sales of cotton by the appellant to the mills at Tirunelveli and Karur were inter-State sales under Section 3 (a) of the Central Sales Tax Act called the Central Act or are second sales under State Sales under Section 3 (b) of the Central Act.

3. The appellant has its place of business at Coimbatore. The Mills are situated within the State of Madras. The Mills entered into an agreement with the appellant for purchase of cotton. The appellant in turn placed orders with its sellers at Bombay for purchase of cotton. The appellant directed its Bombay sellers to despatch the goods to the mills as consignees. The Bombay seller sent the consignment to the mills but the railway receipts were sent by the Bombay seller to the appellant. The appellant then endorsed the same in favour of the mills after collection of the substantial portion of the sale price.

4. The appellant contended that the consignments were sent directly by the Bombay seller to the mills, and, therefore, these were direct inter-State sales by the Bombay seller to the mills and that the property in the goods passed to the mills when the goods were loaded at Bombay. The Sales Tax Authorities found that the Mills were the last purchaser and therefore these were inter-State sales between the appellant and the Mills.

5. A most significant feature is that the railway receipts were sent by the Bombay seller to the appellant, and the appellant thereafter endorsed the same to the mills. It is, therefore, apparent that there could not be an unconditional appropriation of the goods at Bombay towards the contract entered into between the appellant and the mills. The property in the goods passed only when the mills took delivery of the railway receipts from the appellant. The Bombay seller dealt with the railway receipts in such a way that it is proved that the intention of the appellant to part with the goods in any event is not until substantial payment is made by the mills. The

Bombay seller had no privity of contract with the mills. The Bombay seller sold the goods to the appellant. The sale by the Bombay seller to the appellant was an inter-State sale. The sale by the appellant to the mills cannot be said to have caused the inter-State movement of goods. The mere fact that the goods were consigned by the Bombay seller to the mills in accordance with the direction of the appellant will not make the transactions inter-State sales. The sale by the Bombay seller to the appellant occasioned the movement of goods. The High Court was correct in holding that the sale by the Bombay seller to the appellant is an inter-State sale and the sale by the appellant to the mills is not an inter-State sale. Therefore, the State Sales Tax Authorities had jurisdiction to assess the transaction for sale by the appellant to the mills under Section 3 (b) of the Central Act.

6. The appellant raised a second contention that the appellant is entitled to the benefit of Government Order No. 3602 which exempts from sales tax declared goods sold in the course of inter-State trade or commerce where tax has been levied or collected in respect of sales or purchase of such declared goods under Section 4 of the Madras General Sales Tax Act, 1959 called the Madras Act. The Government Order No. 3602 was issued in exercise of powers conferred by Section 8 (5) of the Central Act. The appellant contended that the mills paid the tax on their purchases of cotton and the same transaction could not be brought to charge in the hands of the appellant as inter-State sale. If the transaction attracts levy of tax under the Central Act it is not taxable under the Madras Act. If the mills had paid tax under the impression that their purchases are taxable under the Madras Act that will not enable the appellant to claim the benefit of the exemption. The exemption applies only to cases where the claimant has paid tax himself under Section 4 of the Madras Act in respect of local sales preceding the inter-State transactions. The appellant in the present case did not

pay tax under Section 4 of the Madras Act. The High Court, therefore, correctly held that the appellant was not entitled to claim exemption under the Government Order.

7. The third contention of the appellant was that the appellant was entitled to exemption in respect of turnover under Section 6 (2) of the Central Act. Section 6 (2) of the Central Act lays down that where a sale in the course of inter-State trade or commerce of goods of the description referred to in Sec. 8 (3) of the Central Act has occasioned the movement of goods from one State to another or has been effected by a transfer of documents of title to such goods during their movement from one State to another, any subsequent sale to a registered dealer during such movement effected by a transfer of documents of title to such goods shall not be subject to tax under the Act. A dealer claiming exemption for subsequent sale during the movement of goods from the State to another is required by Section 6 (2) of the Central Act to furnish to the prescribed authority in the prescribed manner a certificate duly filled and signed by the registered dealer by whom the goods were purchased containing the particulars. In the present case, the appellant would be entitled to exemption on production of appropriate form by the Bombay seller and by showing that the buyer is a registered dealer. The appellant produced the form from Bombay seller but did not prove that his buyer was a registered dealer in cotton. Therefore, the Tribunal rightly held that the appellant was not entitled to exemption under Section 6 (2) of the Act.

8. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2086 =

1976 TAX. L. R. 1629

(From Allahabad: 1975

U. P. T. C. 101)

H. R. KHANNA AND P. K. GOSWAMI, JJ.

Homely Industries, Appellant v. The Sales Tax Officer, Sector-V, Kanpur, Respondent.

Civil Appeals Nos. 1176-77 of 1971, D/- 24-3-1976.

(A) U. P. Sales Tax Act (15 of 1948), Sections 7-C (3) and 7 (3) — Interpretation of Section 7-C (3) — Assessment — Challenge on ground of non-service of further notice for production of documents upon legal representatives of deceased proprietor — Held, not maintainable.

Where the assessee had submitted the returns and since the Sales Tax Officer was not prepared to accept the returns as correct and complete, he served a notice on the sole proprietor of the assessee, when he was alive, to produce documents and books of accounts under the proviso to Section 7 (3), no valid objection could be taken under Section 7-C (3) that a further notice for production of documents and accounts should have been served on the legal representatives. The legal representatives would have been entitled to a notice to produce documents and evidence if the deceased had not earlier been served with a similar notice during his lifetime. The orders of assessment cannot, therefore, be held to be invalid on account of non-service of notice for production of documents upon the legal representatives. (Paras 12 and 13)

If a person dies after furnishing a return and his return, which was submitted, is not accepted by the Officer as correct or complete, the obligation to give a reasonable opportunity to prove the correctness and completeness of the return under Section 7 (3) read with the proviso cannot be given a go-by if the person who submitted the return dies without a notice having been given for such an opportunity. The word "may" in Section 7C (3) does not clothe the Sales Tax Officer with arbitrary power of assessment with-

out notice to the legal representative to produce evidence or documents which, if the dealer were alive, he would have been entitled to do under Section 7 (3) read with the proviso.

(Para 16)

(B) U. P. Sales Tax Act (15 of 1948), Section 8 — Recovery proceedings without service of demand notice — Illegal. 1975 U. P. T. C. 101 (All), Reversed on facts.

Before a certificate proceeding can be instituted under sub-s. (2) of Section 8 a notice of demand under sub-sec. (1) thereof is a condition precedent. There can be no recovery without service of a demand notice.

Where such notice has not been served on the legal representatives of the deceased assessee, the recovery proceedings are not maintainable in law and are invalid and the same along with the certificates are liable to be quashed: AIR 1969 SC 667, Distinguished. 1975 U. P. T. C. 101 (All), Reversed on facts. (Para 19)

Cases Referred: Chronological Paras
AIR 1969 SC 667 = 72 ITR 617
20, 22

Mr. S. C. Manchanda, Sr. Advocate, (M/s. J. D. Jain, Ujjal Singh and Miss Kawaljit Miglani, Advocates, with him), for Appellant; Mr. G. N. Dikshit, Sr. Advocate, (Mr. O. P. Rana, Advocate, with him), for Respondent.

Judgment of the Court was delivered by

GOSWAMI, J.— These are two appeals on certificates by the High Court of Allahabad from the judgments and orders of March 17, 1970.

2. The facts may briefly be stated:

The appellant Homely Industries is registered under the Uttar Pradesh Sales Tax Act (briefly the Act), its sole proprietor was one Rashidul Hasan. He died on December 10, 1968, leaving behind three adult sons, namely, Syed Mohd. Ibrahim, Syed Mohd. Ismail and Syed Mohd. Ilias. The business was carried on by Rashidul Hasan under the name and style of Homely Industries. At the time of his death the assessment proceedings relating to the assessment years 1960-61 and 1961-62 were pending before the Sales Tax Officer on remand from the Assistant Commissioner (Judicial), Sales Tax, in

pursuance of his order dated October 26, 1966.

3. It is said that after the death of Rashidul Hasan the business was continued by the sons by forming a partnership and Nazir Husain continued as the munim and also appeared before the Sales Tax Officer in the pending proceedings.

4. On December 10, 1968, Syed Mohd. Ibrahim, as legal heir and partner, sent an application through Nazir Husain informing the Sales Tax Officer, Kanpur, in connection with the two assessment proceedings that his father had expired on December 10, 1968 and that it was not possible for them to proceed with the case on that day.

5. It appears that the Sales Tax Officer during the lifetime of Rashidul Hasan had addressed a notice to Homely Industries calling upon it to appear in person or through pleader, or authorised representative on November 29, 1968, and to produce all books of accounts, cash memos, bills, receipts, bank pass-books, statement of income and expenditure and other documents which it may desire to produce in connection with the assessment. This notice was served on November 20, 1968, on the son of the proprietor of Homely Industries.

6. It appears that a number of adjournments were taken after the death of Rashidul Hasan. Sometimes on the application of the munim and once even on the application of the son, Syed Mohd. Ismail, to enable the assessee to make an effective representation. While as many as six adjournments were granted on the application of Nazir Husain and once of the son of the deceased between 19-12-1968 and 26-4-1969, on the last date a further application by Nazir Husain for adjournment was rejected by the Sales Tax Officer and an ex parte order of assessment was made on April 28, 1969.

7. The Sales Tax Officer initiated recovery proceedings in pursuance of the assessment orders and the demand was sought to be realised from the sons of the deceased proprietor by coercive measures. That led to two writ applications before the High Court of Allahabad

challenging the assessment orders and the recovery certificates issued under Section 8 of the Act. The High Court rejected the applications and granted certificates under Article 133 (1) (a) of the Constitution.

8. It is contended by Mr. Manchanda on behalf of the appellant that the assessment orders are invalid as they were made against a dead person. Secondly, he submits that a proper and valid service of a demand notice is a condition precedent for fixing liability on the person from whom the tax is sought to be recovered and in this case there was no service of notice on the heirs and legal representatives prior to the attempt of recovery through a coercive process.

9. With regard to the first submission, the learned counsel draws our attention to Section 7C of the Act which reads as follows:—

"7C (1). Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person, to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person, or any penalty which would have been payable by him under this Act, if he had not died.

(2) Where a person dies before the service upon him of the notice, if any, issued in pursuance of Section 7, his executor, administrator or other legal representative shall, on the serving of the notice aforesaid, comply therewith and the Assessing Authority may proceed to assess the turnover of the deceased person as if such executor, administrator or other legal representative were the assessee.

(3) Where a person dies without having furnished a return which he has been required to furnish under the provisions of Section 7 or having furnished a return which the Assessing Authority has reason to believe to be incorrect or incomplete, the Assessing Authority may determine the turnover of such person and assess the tax payable by him on the basis of such determination, and for this purpose may, by notice require from the executor, administrator or other legal representative of

the deceased person any accounts, documents, or other evidence which he might under the provisions of this Act have required from the deceased person.

(4) & (5) x x x"

10. Relying upon Section 7C (3), it is submitted that no notice as required under that sub-section was served on the legal heirs and representatives to produce accounts, documents and other evidence for the purpose of determination of the turnover and assessment of tax. Counsel submits that after death of the father no assessment order could be passed without notice under Section 7C (3) upon the heirs and legal representatives of the deceased assessee.

11. It is true that the Sales Tax Officer did not accept the returns submitted by the dealer. It was, therefore, incumbent under the proviso to Section 7 (3) of the Act to give a reasonable opportunity to the dealer for the purpose of proving the correctness and completeness of the returns already submitted. If the returns were accepted as correct there was no necessity for giving any opportunity to the dealer as the case will then be governed by Section 7 (3) of the Act. Mr. Manchanda, therefore, submits that under Section 7C (3) read with the proviso to Section 7 (3) it was obligatory on the part of the Sales Tax Officer to give a reasonable opportunity to the legal representatives to produce the documents and accounts before completion of the assessment. Admittedly no notice under Section 7C (3) had been served on the legal representatives. It is, therefore, submitted that the orders of assessment are invalid.

12. Although the submission on the first blush is attractive it does not bear a close scrutiny. This is a case where the assessee had submitted the returns and since the Sales Tax Officer was not prepared to accept the returns as correct and complete, he served a notice on the sole proprietor of the assessee, when he was alive, to produce documents and books of accounts under the proviso to Section 7 (3). We have already referred to the said notice which was served on the son of the

proprietor on November 20, 1968, calling upon the dealer to produce the accounts on November 29, 1968. It was, therefore, an obligation on the part of the dealer to produce documents, books of accounts and other evidence to prove before the Sales Tax Officer that the returns were correct. This being the factual position about service of notice on the deceased while he was alive, there was no legal entitlement to any further notice to the dealer even if the sole proprietor were alive.

13. Under Section 7C (3) the Sales Tax Officer may by notice require from the legal representative of the deceased such accounts, documents or other evidence as "he might under the provisions of the Act have required from the deceased person." The Sales Tax Officer had already demanded by notice from the deceased while he was alive production of documents and the books of accounts. Hence no valid objection can be taken under Section 7C (3) that a further notice for production of documents and accounts should have been served on the legal representatives. The legal representatives would have been entitled to a notice to produce documents and evidence if the deceased had not earlier been served with a similar notice during his lifetime. Section 7C (3) does not entitle the legal representatives to any notice which the deceased, if alive, would not have been entitled to under the provisions of the Act. Since there was no obligation under the Act for service of a second notice on the dealer, if he were alive, the legal representatives were not entitled to a notice as claimed under Section 7C (3) of the Act. The orders of assessment cannot, therefore, be held to be invalid on account of non-service of notice for production of documents upon the legal representatives in this case. Besides we find that the legal representatives were aware of the proceedings and took several adjournments and if they did not choose to produce any further evidence it was entirely their fault and they cannot blame the Officer when the request for adjournment was not granted after so many requests had already been acceded to. We, however, ex-

press no opinion on the merits of their claim.

14. Mr. Dikshit appearing on behalf of the respondent strenuously contends that the word "may" in Section 7C (3) makes it optional for the Sales Tax Officer to give or not to give notice to the legal representative for production of documents after death of an assessee. We are unable to accede to this submission.

15. The scheme of the relevant provisions of the Act is as follows:—

Omitting the non-essentials for the purpose of this case, under sub-section (1) of Section 7 a return is required to be submitted by a dealer showing his turnover. Under sub-section (2) of Section 7, if the Sales Tax Officer is satisfied that the return submitted by a dealer is correct and complete he shall assess the tax on the basis of that return. Under sub-section (3) of Section 7 read with the proviso, if, according to the Officer, the return submitted by a dealer is incorrect or incomplete, he shall make, what is called, a best judgment assessment after making such enquiry as he considers necessary but must, under the proviso thereto, give a reasonable opportunity to the dealer to prove the correctness and completeness of the return submitted by him.

16. So far as material for the purpose of this case, Section 7C (3), properly construed, provides, inter alia, that if a person dies after furnishing a return and his return, which was submitted, is not accepted by the Officer as correct or complete, the obligation to give a reasonable opportunity to prove the correctness and completeness of the return under Section 7 (3) read with the proviso cannot be given a go-by if the person who submitted the return dies without a notice having been given for such an opportunity. The word "may" in Section 7C (3) does not clothe the Sales Tax Officer with arbitrary power of assessment without notice to the legal representative to produce evidence or documents which, if the dealer were alive, he would have been entitled to do under Section 7 (3) read with the proviso. The submission of

Mr. Dikshit is, therefore, devoid of substance.

17. In the view we have taken that no fresh notice to the legal representatives was called for prior to the passing of the assessment orders in this case, we are not called upon to decide whether the legal representatives had waived their right to notice as urged in the alternative by Mr. Dikshit.

18. We may now deal with the second submission of Mr. Manchanda that no recovery proceedings could be instituted unless a notice of demand had been served on the legal representative under Section 8 of the Act. That section reads as under:—

"8 (1). The tax assessed under this Act shall be paid in such manner and in such instalments, if any, and within such time, not being less than fifteen days from the date of service of the notice of assessment, as may be specified in the notice. In default of such payment, the whole of the amount then remaining due shall become recoverable in accordance with sub-section (2).

(2) Any tax or other dues payable to the State Government under this Act shall be recoverable as arrears of land revenue."

19. It is clear that before a certificate proceeding can be instituted under sub-section (2) of Section 8 a notice of demand under sub-sec. (1) thereof is a condition precedent. There can be no recovery without service of a demand notice. It is admitted that such notice has not been served on the legal representatives. That being the position the recovery proceedings are not maintainable in law and are invalid and the same along with the certificates are liable to be quashed.

20. Mr. Dikshit has drawn our attention to a decision of this Court in *Sahu Rajeshwar Nath v. Income-tax Officer, C. Ward, Meerut* 72 ITR 617 = (AIR 1969 SC 667) and submitted that this decision is an authority for the proposition that no notice on the legal representative is required under the law prior to the institution of recovery proceedings by certificate.

21. In that case this Court was considering the liability of a partner of an unregistered firm which was the assessee and a notice under Section 29 of the Income-tax Act, 1922, had been served on the unregistered firm and all the tax assessed against the firm was sought to be recovered from the partner in proceedings under Section 46 (2) of the Income-tax Act. It was contended on behalf of the partner that a fresh notice of demand upon the partner was necessary under the law and in its absence the recovery proceedings were invalid. This Court repelled the contention holding that although the unregistered firm was the assessee the partner was liable under Section 25 of the Partnership Act and since the appellant, therein, conceded that he was a partner of that firm during the accounting year, no separate notice under Section 29 of the Income-tax Act upon the partner was necessary. It was further held that the notice contemplated under Section 29 of the Income-tax Act, 1922, was to the assessee or to any other person liable and "any other person liable under Section 29" meant "liable under the Income-tax Act" and not under any other law such as the Partnership Act.

22. That was a case where no question arose about the liability of the appellant therein under the provisions of the Income-tax Act such as Section 24B of the Income-tax Act, 1922, which is almost identical with Section 7C (1) of the Act and that because of that under Section 29 of the Income-tax Act a notice of demand was obligatory as a condition precedent to the institution of certificate proceedings for recovery of the dues as arrears of land revenue. The aforesaid decision of this Court in *Sahu Rajeshwar Nath's case* 72 ITR 617 = (AIR 1969 SC 667) (supra) is, therefore, of no assistance to the learned counsel.

23. In the result the judgments of the High Court are affirmed but the orders with regard to the recovery proceedings, which are invalid, are set aside. The appeals are partly allowed. There will be, however, no order as to costs.

24. We should observe that we express no opinion about the ap-

peals which are said to be pending before the Assistant Commissioner (Judicial), Sales Tax.

Appeals partly allowed.

AIR 1976 SUPREME COURT 2091

(From: Awards of Industrial Tribunal Gujarat)*

Y. V. CHANDRACHUD, P. K. GO-SWAMI AND P. N. SHINGHAL, JJ.

Civil Appeal No. 1951 of 1975:—

The Alembic Glass Industries Ltd., Baroda, Appellant v. The Workmen, Respondents.

Civil Appeal No. 631 of 1976:—

Jyoti Limited Baroda, Appellant v. The Workmen and others, Respondents.

Civil Appeals Nos. 1951 of 1975 and 631 of 1976, D/- 30-7-1976.

(A) Employees' State Insurance Act (1948), Ss. 61, 49 (k) Proviso (1) — Demand for sick leave — Scheme of benefits under the Act does not cover — Provisions of Section 61 do not apply — Tribunal empowered to award sickness benefit.

Scheme of benefits admissible under the Employees' State Insurance Act cannot be said to cover the workmen's demand for sick leave. S. 61 of the Act cannot thus be said to be applicable. The Act does not in fact deal with the question of sickness leave. Where the Tribunal grants 7 days sick leave to the workmen with full pay with dearness allowance with facility of accumulation for certain years, provisions of S. 61 of the Act cannot be said to be applicable for the reason that the benefits granted are not similar to those admissible under the Act. (1965) 2 Lab LJ 149 (SC) and AIR 1963 SC 1332, Rel. on.

(Para 7)

Held on facts that the Tribunal had examined the question regarding the adequacy of the sickness benefit under the provisions of the Act with reference to the reports of the

*(From the Awards of Industrial Tribunal, Gujarat in Ref. I.T. Nos. 30 of 1974 and 158 of 1974 Published in Guj. Govt. Gazette, D/- 23-10-1975 and 15-4-1976 respectively).

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National Commission of Labour, 1969, the Labour Laws Review Committee and the Norms Committee of Gujarat State, which showed that the benefit could not be said to be adequate for it worked out to about half the average wage of a workman, and even that amount was not admissible for the first two days of sickness except in the case of a spell of sickness following, at an interval of not more than 15 days, the spell of sickness for which the sickness benefit was last paid. There was no justification for the argument that the rate of benefit at about half the wage of workman, under the Act, should be considered sufficient so as to deny the workman the benefit of sick leave on full emoluments for a period of 7 days when he was certified by a competent medical officer to be ill for that or a longer period.

(Para 8)

Cases Referred: Chronological Paras
(1965) 2 Lab LJ 149 (SC) 7
AIR 1963 SC 1332 = (1964) 1 SCR 234 7

M/s. V. B. Patel, I. N. Shroff and H. S. Parihar, Advocates (In C. A. No. 1951 of 1975) and Mr. S. T. Desai, Sr. Advocate, (M/s. A. P. Hathi, Mrs. S. Bhandare, M. S. Narasimhan, K. C. Sharma, A. K. Sharma and A. K. Mathur, Advocates with him (In C. A. No. 631 of 1976), for Appellants; Mr. V. M. Tarkunde, Sr. Advocate, (M/s. H. L. Hathi and P. C. Kapur, Advocates with him), for Respondents (In C. A. No. 1951/75 and for Respondent 1 (1) C. A. No. 631/76); M/s. S. S. Khanduja, S. K. Jain and Mrs. Laxmi Arvid, Advocates, for Respondent No. 1 (2) (In C. A. No. 631/76).

The Judgment of the Court was delivered by

SHINGHAL, J.:— These two are companion appeals by special leave. They have been heard together at the instance of the learned counsel for the parties, and will be disposed of by a common judgment.

2. Appeal No. 1951 of 1975 is directed against the award of the Industrial Tribunal, Gujarat, dated September 24, 1975, in the dispute between the Alembic Glass Industries Ltd., Baroda, and its workmen, while appeal No. 631 of 1976 arises

out of the Tribunal's award in the dispute between Jyoti Limited, Baroda, and its workmen. Speaking broadly, the dispute in both cases related to the workmen's demand for 10 days sick leave, with retrospective effect, and its accumulation over a period of three years i.e. upto 50 days. The workmen particularly felt aggrieved because by virtue of the first proviso to Section 49 of the Employees' State Insurance Act, 1948, hereinafter referred to as the Act, they were not entitled to the sickness benefit for the first two days of sickness except in the case of a spell of sickness following, at an interval of not more than 15 days, the spell of sickness for which sickness benefit was last paid. It was also a grievance that the benefit under the scheme of the Act was much less than the normal earnings of an employee and was not beneficial to the workmen.

3. The demand was resisted by the Companies in both cases. In the case of the Alembic Glass Industries Ltd. it was contended that the Act provided more than adequate sickness benefits, and any additional benefit would place unproductive financial burden on the industry and would have an all round adverse effect on other industries. It was also urged that Section 99 of the Act gave wide powers to the Employees' State Insurance Corporation to enhance the benefit and it was therefore the proper authority to examine the demand. The Company also contended that there was no practice of giving any such sick leave in the industries in Baroda or in the State of Gujarat. In the case of Jyoti Ltd. an objection was taken that the reference was incompetent and the Tribunal had no jurisdiction to entertain it. It was also pointed out that the benefit of sick leave of 7 days per year was initially given to the workmen under an award dated August 29, 1958 which contained a specific direction that it would be automatically discontinued when the benefits of the Employees State Insurance scheme would become available to the workmen, and also that the reasonableness of the demand could not be examined by the Tribunal. An objection was also taken

that the workmen had benefited a lot under the entire scheme of the Act and it would not be reasonable and proper to confer any additional benefit as the demands would place a heavy financial burden on the Company which it could not bear. The demand, according to the Company, would create an absurd position inasmuch as a worker would receive more wages by remaining absent than on duty. The Company also pleaded that the demand for sickness leave could not be granted retrospectively or allowed to accumulate.

4. While the reference in the case of Jyoti Ltd., Baroda, was still pending, the Tribunal gave its award dated September 24, 1975 in the case of the Alembic Glass Industries Ltd. The Tribunal, inter alia, awarded 7 days sick leave with full pay and dearness allowance to the workmen of that Company in a year, with the facility of accumulation upto 21 days. It was stated before the Tribunal, on behalf of the workmen of Jyoti Ltd., that the arguments advanced and the contentions made in the case of the Alembic Glass Industries may be considered as those made in their case also. The reference in the case of Jyoti Ltd. proceeded accordingly and resulted in the award dated March 9, 1976 to which reference has been made above. The award was on the lines of the earlier award in the case of the Alembic Glass Industries case, except that the direction regarding 7 days sick leave was given retrospective effect from January 1, 1975. The Company applied for and obtained special leave to appeal as aforesaid, with the further direction that the appeal may be heard along with the identical matter (in the Alembic Glass Industries case). This is why these two have become companion appeals and are being disposed of together.

5. The controversy in these cases is whether the benefits admissible under the Act in the matter of the grant of sick leave are such as to justify the rejection of the workmen's demand and the setting aside of the Tribunal's awards in that respect.

6. It has been argued by the learned counsel for the appellants that as the benefits of Sections 47 and 49 of the Act are already admissible to workmen in Baroda with effect from December 14, 1969, and they are quite adequate, the Tribunal committed an error of law in granting the additional benefits mentioned above. Reference in this connection has been made to Section 61 of the Act which provides that when a person is entitled to any of the benefits provided by the Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment. The argument was raised in the Tribunal, but was rejected.

7. A similar question arose for consideration in the Hindustan Times Ltd., New Delhi v. Their Workmen, (1964) 1 SCR 234 = (AIR 1963 SC 1332) and was answered as follows by this Court.—

"Mr. Pathak has tried to convince us that in view of the provisions of the Employees' State Insurance Act, 1948, no provision need be made about sickness leave at all. That this Act has been applied, to the Company and that the workmen of the Company get the benefit of this Act is not disputed. It is difficult to see however how the benefit that the workmen will get under this Act can affect the question of sickness leave being provided for the workmen. This Act it has to be noticed does not provide for any leave to the workmen on the ground of sickness. It provides in Section 46 (1) (a) for periodical treatment of any insured person in case of his sickness if certified by a duly appointed medical practitioner. It is unnecessary to mention here the several provisions in the Act; viz., Sections 47, 48 and 49 which deal with the eligibility of workmen for sickness benefit and the extent of the benefit that may be granted. Section 56 of the Act provides for medical benefits to the insured workmen or in certain cases to the members of his family. It appears to us clear however that in providing for periodical payments to an insured worker in case of sickness (sickness benefit) or for medical treatment or attendance

to him or the members of his family, the legislature did not intend to substitute any of these benefits for the workmen's right to get leave on full pay on the ground of sickness." The matter came up again for consideration by this Court in Technological Institute of Textiles v. Its Workmen, (1965) 2 Lab LJ 149 (SC) and it was held as follows with specific reference to the first proviso to Section 49 of the Act according to which a person qualified to claim sickness benefit is not entitled to it for the initial waiting period of two days except in the case of continuous illness of the nature mentioned therein,—

"With regard to sick leave, the argument on behalf of the appellant was that benefits were granted by the Employees' State Insurance Act, but that is not a bar to the demand of the workmen for sick leave. The reason is that, the first proviso to Section 49 of the Employees' State Insurance Act states that a person qualified to claim sickness benefit shall not be entitled to the benefit for an initial waiting period of two days except in the case of a spell of sickness following at an interval of not more than fifteen days, the spell of sickness for which benefit was last paid. It is apparent that the Employees' State Insurance Scheme does not cover all contingencies of sickness and in any event the first two waiting days are not covered. In our opinion, the tribunal was, therefore, justified in its view that the workmen are entitled to 7 days' sick leave with wages on production of a medical certificate."

It would thus appear that the Scheme of the benefits admissible under the Act cannot be said to cover the workmen's demand for sick leave to the extent allowed by the Tribunal. S. 61 of the Act cannot thus be said to be applicable for the simple reason that the benefits granted by the Tribunal are not similar to those admissible under the Act. The Act does not in fact deal with the question of sickness leave.

8. The other question regarding the adequacy of the sickness benefit under the provisions of the Act has been examined by the Tribu-

nal with reference to the reports of the National Commission of Labour 1969, the Labour Laws Review Committee and the Norms Committee of Gujarat State, which go to show that the benefit cannot be said to be adequate for it works out to about half the average wage of a workman, and even that amount is not admissible for the first two days of sickness except in the case of a spell of sickness following, at an interval of not more than 15 days, the spell of sickness for which the sickness benefit was last paid. It has to be appreciated that a workman is prevented from earning the normal daily wages during the period of his illness and there is no justification for the argument that the rate of benefit at about half his wage, under the Act, should be considered sufficient so as to deny him the benefit of sick leave on full emoluments for a period of 7 days when he is certified by a competent medical officer to be ill for that or a longer period. Sickness is a serious misfortune to a workman for it not only prevents him from earning his normal wages, but is a drain on his meagre financial resources by way of additional expenditure on food, nursing and visits to the medical centre etc.

9. It has not been disputed before us that the "region-cum-industry" basis is suitable in cases like the present for examining any controversy regarding the workman's demand for additional benefits, but it has been argued by the learned counsel for the appellants that the award of the benefit of sick leave to the workers of the two Companies could not be justified on that basis. We find that the Tribunal has examined this aspect of the controversy also, and we have no reason to disagree with the view which it has taken. As has been stated, the Act came into force in the region concerned on December 14, 1969, and it has not been disputed before us that till then it was the practice in the glass industries to grant sick leave with wages for periods varying from 6 to 10 days. In fact in the case of the Alembic Glass Industries Ltd., Baroda, the Tribunal made an award for 7 days sick leave on full pay and dearness allowance in 1958, subject to

the condition that the benefit would cease to apply when the benefits of the Act became available to the workmen. The benefit of sick leave was therefore lost when the Act was made applicable to the region from December 14, 1969. That was obviously under a mistaken impression of the sickness benefit which the Act allowed for, as has been shown, it does not deal with all aspects of the demand for sickness benefit and does not, at any rate, provide for the grant of leave on full emoluments during the period of the workmen's physical incapacity to earn his normal wages because of his sickness. It therefore appears that the Tribunal could not be said to have erred in restoring the benefit which the workmen were receiving under the award of 1958, for it was taken away under the mistaken impression that it had been adequately replaced by the new provisions on the coming into force of the Act.

10. The appellants have filed a statement (Ex. 7) containing information regarding the companies which have provided the benefit of sick leave to its workmen in the region. It shows that even though the Act was applicable to the workers of the Precision Bearings India Ltd., Baroda, Hindustan Brown Bovari Ltd., Baroda, the Associated Cement Companies Ltd., and M. S. University Press, Baroda, the benefit of sick leave has been allowed to the workmen of those companies. It is therefore futile to contend that the benefit should not be admissible on the ground that it had not been allowed by other companies in the region. We also find that such a benefit has been allowed in the case of glass industries by Shree Vallabh Glass Works Ltd., Vallabh Vidyanagar, Ogale Glass Works Ltd., Oglewadi and Vijay Glass Works, Bombay. Even the Alembic Glass Industries Ltd. has allowed 6 days sick leave in a year to its employees in Bangalore and it is permissible to accumulate it upto 12 days in addition to the current year's leave, under a settlement dated July 17, 1969, which is being continued even after the coming into force of the Act. Learned counsel for the appellants have invited our attention to the case between the

Textile Labour Assn. and the Ahmedabad Millowner's Assn. where the demand for sick leave was refused but, as the Tribunal has pointed out, the demand there was for a month's leave every year in addition to 15 days casual leave and pay in lieu of privilege leave. The Full Bench of the Industrial Court in that case considered the paying capacity of the mills also, and held that the additional leave demanded by the workmen would be very much beyond the paying capacity of the industry. As against this, the Tribunal has examined the financial capacity of the two companies in question, and has given adequate reasons for holding that they are in good financial position and can bear the additional burden of sick leave. Learned counsel for the appellants have in fact not advanced any argument to the contrary.

11. Mr. S. T. Desai has raised the argument, in the case of Jyoti Ltd., Baroda, that the Tribunal laboured under a misconception that the sickness benefit would be lost for the first two days of sickness under the first proviso to Section 49 of the Act, that the Tribunal should not, in any view of the matter, have given the benefit of 7 days sick leave and that the workmen did not deserve anything more than sickness benefit for the first two days also. According to him, what has been awarded by the Tribunal is additional privilege leave for 7 days in the garb of sick leave. The argument is however futile because, as has been stated, the Tribunal has correctly examined the controversy and given adequate reasons for allowing the benefit of 7 days sick leave in the manner set out in the award. Such a leave could not be categorised as privilege leave as, by its very nature, it would be admissible only in the case of actual sickness certified by a registered medical practitioner.

12. It would thus appear that the appellants have not been able to show that the awards in question are illegal or unjust, or would adversely affect the economy or the industrial peace, or lead to imbalance in the conditions of service in other industrial establishments. It appears,

however, that it was not necessary, in the circumstances of the case, to award the benefit of the sick leave with retrospective effect from January 1, 1975, in the case of Jyoti Ltd., Baroda.

13. The appeals therefore fail and are dismissed, except that the award in the case of Jyoti Ltd., Baroda, is made effective from the date of its commencement. The appellant companies shall pay to the workmen the costs of these appeals; one set of counsel's fees.

Appeals dismissed.

AIR 1976 SUPREME COURT 2095

(From: Gujarat)*

Y. V. CHANDRACHUD, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.

Farid Ahmed Abdul Samad and another, Appellants v. The Municipal Corporation of the City of Ahmedabad and another, Respondents.

Civil Appeal No. 481 of 1976, D/- 29-7-1976.

(A) Bombay Provincial Municipal Corporations Act (1949), Ss. 284J, 284N, Schedules B and C and Appendix I — Provisions of Land Acquisition Act are part of the Bombay Act — Compulsory acquisition of land — Personal hearing — Denial — Effect — Order of acquisition is invalid from its inception. Special Civil Appln. No. 2355 of 1974, D/- 31-3-1975 (Guj), Reversed.

Section 5A of the Land Acquisition Act is clearly a part of the Bombay Provincial Municipal Act in terms of Appendix I. Section 284-N referentially incorporates in the Bombay Act certain provisions of the Land Acquisition Act as detailed in Appendix I according to which all sections in Land Acquisition Act except sub-section (2) of Section 17 are bodily incorporated. When, therefore, Section 5A of the Land Acquisition Act is applicable under Appendix I of the Bombay Act and there is nothing to show expressly

*(Spl. Civil Appln. No. 2355 of 1974, D/- 31-3-1975—(Guj)).

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or by necessary implication that the said section or any part of it is excluded under Section 284N or under any other provision in Chapter XVI as a whole the right to personal hearing under the Bombay Act cannot vanish or be defeated. Even assuming that Schedules B and C are part of Chapter XVI, Schedule C does not even by necessary implication rule out a right to personal hearing. Nor is the appeal provided for in Schedule B, a substitute for a right to personal hearing and as such cannot by necessary implication oust the applicability of Section 5A of the Land Acquisition Act. It cannot be said that because of sub-section (4) of Section 284N, Section 5A should be held inapplicable in the case of an acquisition proceeding under the Bombay Act. Where therefore order for acquisition is passed without granting any personal hearing it is a case of absolute non-compliance with a mandatory provision under Section 5A of the Land Acquisition Act which is clearly applicable in the matter of acquisition under the Bombay Act. Such an order being at inception invalid, its invalidity cannot be cured by its approval of the Standing Committee or by its confirmation of the State Government. Special C. A. No. 2355 of 1974, D/- 31-3-1975 (Guj), Reversed.

(Paras 17, 18, 20,
22, 23 and 24)

**(B) Land Acquisition Act (1894),
Section 5-A — Personal hearing —
Denial — Effect.**

The heart of Section 5-A of the Land Acquisition Act is the hearing of objections and under sub-section (2) of that section a personal hearing is mandatorily provided for. Section 5-A does not rest on a person's demand for personal hearing. The matter may be different if a person whose property is acquired abandons the right to a personal hearing. Provision of appeal is also not a substitute for personal hearing provided for under Section 5-A of the Land Acquisition Act.

(Paras 10, 18, 22
and 26)

Cases Referred: Chronological Paras

AIR 1974 SC 1868 = (1975) 1 SCR
597 26

Mr. G. L. Sanghi, Sr. Advocate, (M/s. K. J. John, S. H. Kureshi and D. N. Mishra, Advocates with him), for Appellants; M/s. I. N. Shroff and H. S. Parihar, Advocates (for No. 1) and Mr. M. N. Shroff, Advocate (for No. 2), for Respondents.

The Judgment of the Court was delivered by

GOSWAMI, J.:— The only question that arises in this appeal by special leave is whether the order of acquisition passed by the Municipal Commissioner under Section 284J of the Bombay Provincial Municipal Corporations Act, 1949, as applicable to Gujarat is invalid and void for non-compliance with Section 5A of the Land Acquisition Act, 1894.

2. The Municipal Corporation of the city of Ahmedabad (briefly the Corporation) by its resolution of December 15, 1966, authorised its Commissioner under Section 284I of the Bombay Provincial Municipal Corporations Act 1949 (briefly the Bombay Act) to provide housing accommodation for the poorer classes. In pursuance of this authority of the Corporation the Commissioner passed the impugned order of compulsory acquisition on October 9, 1967, under Section 284J of the Bombay Act in respect of 33,357 sq. yds. of land of final plots Nos. 11 to 25 of Town Planning Scheme No. V of Dariapur, Kazipur Ward.

3. Out of this area the land belonging to the appellants measures about 1694 sq. yds. It is averred by the appellants that this area is "predominantly a commercial area and is almost fully built upon."

4. The aforesaid order of compulsory acquisition was published in the official gazette of January 25, 1968 and in the local newspapers of February 10/11, 1968. Individual notices were also served on the concerned parties in accordance with law inviting objections from the owners including the appellants which were lodged in due course. These objections were submitted to the Standing Committee by the Commissioner with his suggestions and the Committee by its resolution No. 1942 of January 21, 1969, approved the said order of compulsory acquisition. The State Government

thereafter confirmed the said order on January 6, 1972.

5. The appellants had requested for a personal hearing with regard to their objections and their grievance is that the same was denied to them. It is common ground that no personal hearing was given to the appellants with regard to their objections by the Commissioner. Even so, a period of nearly five years was taken in the process of finalising the order.

6. After confirmation of the order of acquisition by the Government there is a provision for appeal under Schedule B to the Bombay Act. The appellants preferred an appeal to the City Civil Court at Ahmedabad and amongst several other grounds raised the question of the denial of personal hearing to them. The learned Judge of the City Civil Court did not accede to the contention and by his order of April 10, 1974, held that the principles of natural justice were satisfied in this case inasmuch as they had been given an opportunity to submit their objections to the acquisition.

7. The appellants then took the matter to the High Court of Gujarat under Article 227 of the Constitution where the same grievance as to the denial of personal hearing was reiterated. The High Court by its order of March 31, 1975, refused to interfere with the order holding that Section 5A of the Land Acquisition Act was duly complied with. The High Court also held that the City Civil Court Judge was right in rejecting the submission since "no oral hearing was ever claimed in the objection." Hence this appeal, by special leave, which was ordered by this Court to be expedited.

8. From a perusal of the judgment of the City Civil Court as well as that of the High Court we are of opinion that there was no proper appraisal of the real issue in the matter. It appears that both the City Civil Judge and the High Court were only concerned with whether the rules of natural justice were complied with in the matter of acquisition of the land in question. We, think, as will be shown below, that the

City Civil Court and the High Court are not right in their approach.

9. We find that there is reference to Section 5A of the Land Acquisition Act in the order of the High Court and it is apparently assumed by the High Court that the said section is applicable. All the same the High Court erroneously thinks that no personal hearing was necessary and the section is fully complied with by mere submission of the written objection particularly because "no oral hearing was ever claimed."

10. Mr. Sanghi submits that so far as the appellants are concerned they did request for a personal hearing and that there is no denial by the respondents of their averment to that effect in their special leave petition. The City Civil Judge also noted in his judgment that "some of the appellants had in terms demanded a personal hearing in their objections memorandum." Be that as it may Section 5A of the Land Acquisition Act does not rest on a person's demand for personal hearing. The matter may be different if a person whose property is acquired abandons the right to a personal hearing with which aspect we are not concerned in this appeal.

11. Although the judgment of the High Court, as stated earlier, apparently rests on the assumption that Section 5A of the Land Acquisition Act is applicable, Mr. Shroff appearing on behalf of the respondents submits that that section is unavailable in the case of acquisition under the Bombay Act. Mr. Sanghi also, fairly enough has not taken advantage of the assumption in the judgment and has submitted by drawing our attention to the various provisions of the Act that Section 5A is clearly attracted in a matter of acquisition under the Bombay Act.

12. We will, now, examine the rival contentions with regard to the applicability of Section 5A of the Land Acquisition Act.

13. The title of Chapter XVI of the Act is "Improvement Schemes" and opens with Section 270. There are various sub-headings in this Chapter and we are concerned in

this appeal with only a few sections under the sub-title "Provision of housing accommodation for the poorer classes." This sub-title in the Chapter opens with Section 284I:

284I. (1) "If the Corporation, upon consideration of a representation from the Commissioner or other information in its possession, is satisfied that within any area in any part of the City it is expedient to provide housing accommodation for the poorer classes and that such accommodation can be conveniently provided without making an improvement scheme, it shall cause such area to be defined on a plan and pass a resolution authorising the Commissioner and the Commissioner shall thereupon be empowered to provide such accommodation."

x x x x x
14. Section 284J provides that "the Commissioner may for the purposes of the foregoing section on behalf of the Corporation (a) acquire any land including any buildings thereon as a site for the erection of buildings for the poorer classes."

x x x x x
15. Section 284K provides as follows:—

284K. (1) "Land for the purposes of the foregoing section may be acquired by the Commissioner by agreement upon obtaining the requisite sanction under Section 77, or he may, with the sanction of the Standing Committee, be authorised to acquire land for those purposes by means of a compulsory acquisition order made and submitted to the State Government and confirmed by it in accordance with the provisions of Schedule C to this Act."

x x x x x
(3) The provisions of Schedule B to this Act shall have effect with respect to the validity and date of operation of a compulsory acquisition order made under this section."

x x x x x
16. The next important section is Section 284N which reads as under:—

284N. "The Land Acquisition Act, 1894 (in this and the next succeeding sections referred to as 'the Land Acquisition Act') shall to the extent set forth in Appendix I regulate and ap-

ply to the acquisition of land under this Chapter, otherwise than by agreement, and shall for that purpose be deemed to form part of this Chapter in the same manner as if enacted in the body hereof, subject to the provisions of this Chapter and to the provisions following, namely:—"

x x x x x
17. Thus, Section 284N referentially incorporates in the Bombay Act certain provisions of the Land Acquisition Act as detailed in Appendix I to the Bombay Act. Out of those provisions we are only concerned with Part II (Acquisition) of the Land Acquisition Act containing Sections 4 to 17 including Section 5A. According to Appendix I all the sections in Part II of the Land Acquisition Act except sub-section (1) of Section 4, Section 6 and sub-section (2) of Section 17 are bodily incorporated in the Bombay Act. Those provisions are deemed to be part and parcel of the Bombay Act. Hence Section 5A is clearly a part of the Bombay Act in terms of Appendix I.

18. It is true Section 284 N provides that the incorporated provisions of the Land Acquisition Act are subject to the provisions of Chapter XVI and to those contained in Section 284N itself. That is to say, if there is any inconsistency between a provision in Chapter XVI of the Bombay Act or in Section 284N itself and that in the Land Acquisition Act, the former will prevail over the the grafted provisions of the Land Acquisition Act. This is, however, not to say that where Section 5A is deemed to be part of the Bombay Act, there is a further requirement to show in the Bombay Act an express provision for affording an opportunity of personal hearing. This is the error into which, earlier, the City Civil Judge fell. The heart of Section 5A of the Land Acquisition Act is the hearing of objections and under sub-section (2) of that section a personal hearing is mandatorily provided for. When, therefore, Section 5A of the Land Acquisition Act is applicable under Appendix I of the Bombay Act and there is nothing to show expressly or by necessary implication that the said section or

any part of it is excluded under Section 284N or under any other provision in Chapter XVI as a whole the right to personal hearing under the Bombay Act cannot vanish or be defeated.

19. Mr. Shroff fairly and, in our opinion, rightly concedes that there is no express ouster of Section 5A of the Land Acquisition Act under the provisions of Chapter XVI of the Bombay Act. He, however, submits that there is a special machinery under Section 284K of the Act disclosed in Schedule C and in Schedule B attached to the Bombay Act and since Section 284N is subject to the provisions of Chapter XVI these Schedules form part of the Chapter. Assuming that Schedule C and Schedule B are part of Chapter XVI we are unable to read in the provisions contained in these two Schedules any exemption from the right to personal hearing mandatorily required under Sec. 5A of the Land Acquisition Act.

20. It is true that the mode of acquisition of land for housing accommodation is provided for under Section 284K and that the order of compulsory acquisition made by the Commissioner has to be confirmed by the State Government in accordance with the provisions of Schedule C to the Bombay Act. Broadly, clause 2 of Schedule C provides that before submitting the order to the State Government the Commissioner, inter alia, has to publish the order in the official gazette and in three or more newspapers. The Commissioner has also to serve on persons specified in clause 2 (b) notices calling for objections, etc. Clause 3 provides that upon compliance with the provisions of clauses 1 and 2 the Commissioner shall submit to the Standing Committee any objections received under clause 2 and any suggestions he may wish to make in that respect. Under clause 4 the Standing Committee shall after consideration of any such objections and suggestions make such modification in respect of such order as it may think fit and the Commissioner shall thereafter submit the order as modified by the Standing Committee to the State Government for confirmation. It is

manifest that the procedure under the scheme of Schedule C will be breached if the Commissioner does not afford a personal hearing to the objectors even in order to be able to fortify his suggestions which he has to submit to the Standing Committee along with the objections. Since the Standing Committee is entitled to have his properly considered suggestions which may enable it even to modify the order of acquisition it is necessary that the Commissioner gives a personal hearing to the objectors before he is able to make his suggestions worthy in the context of the objections lodged. Otherwise it will be only an empty formality and the suggestions will be devoid of much of practical utility to the Committee. Schedule C, therefore, does not even by necessary implication rule out a right to personal hearing.

21. Clause 2 of Schedule B provides for an appeal to a Judge of the City Civil Court in Ahmedabad and elsewhere to a Judge of the District Court whose decision shall be final. Mr. Shroff submits that provision for an appeal against the acquisition order after confirmation by the State Government provides for appropriate remedy before a judicial Tribunal. This also, says Mr. Shroff, goes to indicate, by necessary implication, that personal hearing required under Section 5A of the Land Acquisition Act is dispensed with and the remedy provided for under the provisions of the Bombay Act read with the two Schedules is exhaustive and necessarily excludes the application of Section 5A of the Land Acquisition Act and with it the right of personal hearing provided thereunder.

22. We should make it clear that provision for appeal is not a complete substitute for a personal hearing which is provided for under Section 5A of the Land Acquisition Act. This will be evident from a perusal of clause 3 of Schedule B itself. The character of the appeal contemplated under clause 3 (ii) of Schedule B is only with regard to the examination of the following aspects:—

(1) whether the order or approval of the plan is within the powers of the Bombay Act, and

(2) whether the interests of the appellant have been substantially prejudiced by any requirement of this Act not having been complied with.

The appeal is confined under clause 3 of Schedule B to the examination of only the twin aspects referred to above. There is no provision for entertainment of any other relevant objection to the acquisition of land. For example a person whose land is acquired may object to the suitability of the land for the particular purpose acquired. He may again show that he will be at an equal disadvantage if his land and house have to be acquired in order to provide accommodation for the poorer people as he himself belongs to the same class of the indigent. He may further show that there is a good alternative land available and can be acquired without causing inconvenience to the occupants of the houses whose lands and houses are sought to be acquired. There may be other relevant objections which a person may be entitled to take before the Commissioner when the whole matter is at large. The Commissioner will be in a better position to examine those objections and consider their weight from all aspects and may even visit the locality before submitting his report to the Standing Committee with his suggestions. For this purpose also a personal hearing is necessary. The appeal court under the Schedule B to the Bombay Act, on the other hand, is not required under clause 3 to entertain all kinds of objections and it may even refuse to consider the objections mentioned earlier in view of the truncated scope of the hearing under clause 3 (ii) as noted above. We are, therefore, unable to accept the submission that the appeal provided for under Schedule B is a complete substitute for a right to personal hearing and as such by necessary implication ousts the applicability of Section 5A of the Land Acquisition Act.

23. Mr. Shroff further submits that under the Appendix I, inter alia, Section 17 (4) of the Land Acquisition Act is made applicable in an acquisition proceeding under the Bombay Act. It is, therefore, submitted that under Section 284N,

sub-section (4) any acquisition under the Bombay Act is treated as an acquisition u/s. 17(1) of the Land Acquisition Act and since S. 17(4) of the Land Acquisition Act is also brought in under the said Appendix, Section 5A of the Land Acquisition Act, by necessary implication, should be held as excluded from the purview of the Bombay Act. We are unable to accept this submission. Even under Section 17 (4) of the Land Acquisition Act the appropriate Government has to direct, in a case of urgency, that the provisions of Section 5A shall not apply. There is no automatic exclusion of Section 5A even under the Land Acquisition Act. That being the position there is no substance in the contention that because of sub-section (4) of Section 284N, Section 5A should be held inapplicable in the case of an acquisition proceeding under the Bombay Act.

24. We are clearly of opinion that Section 5A of the Land Acquisition Act is applicable in the matter of acquisition of land in this case and since no personal hearing had been given to the appellants by the Commissioner with regard to their written objections the order of acquisition and the resultant confirmation order of the State Government with respect to the land of the appellants are invalid under the law and the same are quashed. It should be pointed out, it is not a case of failure of the rules of natural justice as such as appeared to be the only concern of the High Court and also of the City Civil Court. It is a case of absolute non-compliance with a mandatory provision under Section 5A of the Land Acquisition Act which is clearly applicable in the matter of acquisition under the Bombay Act.

25. We should also point out that the acquisition order must be an order valid under the law and the question of appeal arises only after confirmation of the order by the State Government. If the order is at inception, invalid, its invalidity cannot be cured by its approval of the Standing Committee or by its confirmation of the State Government.

26. Besides, hearing of objections under Section 5A of the Land

Acquisition Act to be given by the Commissioner under the Bombay Act cannot be replaced by a kind of appeal hearing by the City Civil Judge. The Bombay Act having assigned the duty of hearing objections to the Commissioner, he alone can hear them and not the City Civil Judge even assuming that all objections could be entertained by him in appeal. (See *Shri Mandir Sita Ramji v. Lt. Governor of Delhi*, (1975) 1 SCR 597 = (AIR 1974 SC 1868).

27. Beneficial schemes under welfare legislation have to be executed in accordance with law which creates the schemes. The end does not always justify the means and it is no answer that the object of the scheme is such that it justifies the implementor of the law to be absolutely oblivious of the manner of enforcement even though the manner is an integral part of the scheme, imposing under the law, restrictions on the rights of individuals. Beneficial laws have to be simple and self-contained. To introduce provisions of another Act referentially in vital matters creates avoidable difficulties and litigation highlighted by the case in hand.

28. It is refreshing that this Court disposed of this matter within about four months of granting of special leave.

29. In the result the appeal is allowed and the judgment of the High Court is set aside and with it the appellate order of the City Civil Judge also falls. The Commissioner shall give a personal hearing to the appellants as required under subsection (2) of Section 5A of Land Acquisition Act and, thereafter, dispose of the matter in accordance with law. In the circumstances of the case we will, however, make no order as to costs in this appeal.

Appeal allowed.



AIR 1976 SUPREME COURT 2101

(From Allahabad: 1975 U. P. T. C. 22)

A. C. GUPTA AND JASWANT SINGH, JJ.

M/s. Karam Chand Thapar and Bros. (Coal Sales) Ltd., Appellant v. State of Uttar Pradesh and another, Respondents.

Civil Appeals Nos. 928 and 929 of 1975, D/- 21-7-1976.

(A) Central Sales Tax Act (1956), S. 9 (1) Proviso and S. 8 (as amended in 1963) — Applicability of proviso to Section 9 (1) — Benefit of rate mentioned in Section 8 (1) — Declaration referred to in Section 8 (4) (a) — Necessity — U. P. Sales Tax Act (15 of 1948), Section 22 — Original assessment order failing to consider proviso to Section 9 (1) of Central Act — Order, if apparently erroneous — Rule of fair play — Applicability.

Assessee a company carrying on business as coal agents and registered under the U. P. Sales Tax Act and the Central Sales Tax Act with the Sales Tax Officer at Moradabad in Uttar Pradesh used to arrange supply of coal from collieries situated in West Bengal and Bihar to consumers in Uttar Pradesh. The collieries used to send the coal by rail and the railway receipts were prepared either in the name of the Company or in the name of the consumers. The collieries sent the bills and invoices in respect of the coal despatched to Uttar Pradesh to the Company's head office in Calcutta. In the assessment year 1966-67, the Company filed quarterly returns. In cases where the railway receipts had been prepared in the name of the Company but subsequently endorsed in favour of the consumers in Uttar Pradesh, the turnover amounted to Rs. 5,59,172/32 p. The Sales Tax Officer held that this turnover was not taxable in Uttar Pradesh. Intaking this view the Sales Tax Officer proceeded upon the observations in a judgment of the Allahabad High Court in the Company's own assessment case for the year 1965-66. However, in several subsequent decisions, the High Court held that in a case where a registered dealer ef-

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fecting a second sale in the course of inter-State trade and commerce, sales tax on the turnover was to be realised in the State where the dealer effecting the sale was registered. The Sales Tax Officer thought that there was an apparent error in the order of assessment made on 27-3-1971 exempting the aforesaid turnover which in view of the proviso to Section 9 (1) of the Central Act was taxable in Uttar Pradesh. In proceeding under Section 22 of the U. P. Act, an order was passed on 26-3-1974 rectifying the mistake in the earlier assessment order and it was served on the Company on 31-3-1974. The Company challenged the order dated 26-3-1974 by a writ petition in the High Court which was dismissed giving rise to this appeal. The dispute turned on whether the proviso to Section 9 (1) was applicable to the case.

Held (1) that there was no valid distinction between declared goods and other goods for purpose of the applicability of Proviso to Sec. 9 (1) except for the purpose of the rate of tax. It could not be argued that declared goods purchased by a dealer for re-sale need not be specified in his certificate of registration. There was no valid reason why the Company could not have obtained a declaration in Form C as required by the proviso to Section 9 (1). Therefore, the order of assessment dated 27-3-1971 was wrong. 1975 U.P.T.C. 22 (All), Affirmed. (Para 8).

Section 9 (1) of the Central Act contains a General rule that the tax payable by any dealer under this Act shall be levied and collected in the State from which the movement of the goods commenced. The proviso to Section 9 (1) qualifies this rule in the case of a subsequent sale which is not exempt from tax under Section 6 (2). In absence of any claim of exemption under Section 6 (2), the declaration referred to in Section 8 (4) (a) is necessary for the dealer to avail of the benefit of the rate of tax mentioned in Sec. 8 (1). In view of sub-section (1) and sub-section (3) of Section 8, all sales to a registered dealer other than the Government, whether of declared goods or other goods, are covered by sub-section (1) of Section 8. Clause

(a) was omitted from sub-section (3) of Section 8 by the Amendment Act (8 of 1963) presumably because it was considered unnecessary to retain clause (a) to deal with declared goods when clause (b) apparently covered all goods, both declared and other than declared. (Para 8)

(2) that the original order of assessment dated 27-3-1971 was apparently erroneous within Section 22 of the U. P. Act in that it failed to take into consideration the proviso to Section 9 (1) of the Central Act. The judgment of the High Court which the Sales Tax Officer followed in making the assessment for the year in question did not concern itself with the proviso to Section 9 (1). 1975 U.P.T.C. 22 (All), Affirmed. (Para 10)

(3) that the Company's rights had not been affected by the order under Section 22 of the U. P. Act being communicated to it after the expiry of three years from the date of the order because the limitation for an appeal under Section 9 of the U.P. Act from that order did not begin to run before the communication of that order. Hence, the well-known rule of fairplay that the rights of a party cannot be affected by an order until he has notice of it would not apply to the present case. AIR 1961 SC 1500 and AIR 1975 SC 2085. Referred, 1975 U.P.T.C. 22 (All), Affirmed. (Para 11)

(B) Constitution of India, Article 136 — New point — Question, one of fact, if can be raised before Supreme Court in appeal.

When in rectification proceeding under Section 22 of the U. P. Sales Tax Act, the assessee never claimed before the Sales Tax Officer that the sales were not to registered dealers; and the only ground taken was that no declaration was required to be filed in the case of declared goods, the former claim of the assessee made for the first time in writ petition and further raised in appeal before Supreme Court was a question of fact and it could not be allowed to be raised in appeal before Supreme Court. (Para 9)

Cases Referred: Chronological Paras
AIR 1975 SC 2085 = (1975) 2 SCC 779 11

1973 U.P.T.C. 466 (All) 4
 AIR 1961 SC 1500 = (1962) 1 SCR 11
 676

Mr. F. S. Nariman, Sr. Advocate (Mr. D. N. Misra and O. C. Mathur, Advocates of M/s J. B. D. and Co. with him), for Appellant; Mr. S. C. Manchanda, Sr. Advocate, (Mr. O. P. Rana, Advocate with him), for Respondents.

Judgment of the Court was delivered by

A. C. GUPTA, J.:— The appellant in Civil Appeal No. 928 of 1975, M/s. Karam Chand Thapar and Brothers, is a limited company incorporated under the Companies Act, (referred to hereinafter as the Company), and the six branches of the Company at Allahabad, Moradabad, Kanpur, Varanasi, Gorakhpur and Lucknow are the appellants in Civil Appeal No. 929 of 1975. The Company carries on business as coal agents and is registered under the Uttar Pradesh Sales Tax Act, 1948 and the Central Sales Tax Act, 1956 with the Sales Tax Officer at Moradabad in Uttar Pradesh. We shall refer to these two statutes as the U. P. Act and the Central Act for the sake of brevity. The Company used to arrange supply of coal from collieries situate in West Bengal and Bihar to consumers in Uttar Pradesh. The collieries used to send the coal by rail and the railway receipts were prepared either in the name of the Company or in the name of the consumer in Uttar Pradesh on whose behalf the order for supply of coal was placed. The collieries sent the bills and invoices in respect of the coal despatched to Uttar Pradesh to the Company's head office in Calcutta; the Company forwarded the railway receipts to the consumers in cases where the receipts were in the names of the consumers and endorsed the receipts that were in the Company's name in favour of the consumers for whom the coal had been despatched. These two appeals, brought on certificates of fitness granted by the Allahabad High Court, arise out of two writ petitions filed in the High Court respectively by the Company and its aforesaid branches. The petition filed by the Company, leading to Civil

Appeal 928, is directed against an order made under Section 22 of the U. P. Act giving rise to the question whether Section 9 (1) of the Central Act was applicable to the case enabling the State of Uttar Pradesh to levy and collect Central Sales Tax in respect of subsequent sales of coal effected by the Company to consumers in Uttar Pradesh by endorsement of the documents of title, in the other writ petition, filed by Company's six branches, the applicability of Section 9 (1) of the Central Act was one of the points raised in the High Court, but this was the only point urged before us in Civil Appeal No. 929. The assessment year in question in Civil Appeal 928 is 1966-67, and that in Civil Appeal 929 is 1969-70. As the Company's appeal covers the question involved in the other case and raises two additional questions, we shall state only the facts of Civil Appeal 928 to indicate how these questions arise.

2. In the assessment year 1966-67, the Company filed quarterly returns showing its turnover of coal in two categories:

(a) turnover in cases where the railway receipts had been prepared in the names of the consumers amounting to Rs. 30,07,439/02 p., and

(b) turnover in cases where the railway receipts had been prepared in the name of the Company but subsequently endorsed in favour of the consumers in Uttar Pradesh amounting to Rs. 5,59,172/32p.

The dispute in this case relates to the amount of Rs. 5,59,172/32p. which according to the Company could not be taxed in the State of Uttar Pradesh. Before we proceed further, it would be convenient to set out the relevant provisions of the two Acts. Taking the Central Act first, Sec. 2 (c) defines "declared goods" as the goods declared under Section 14 to be of special importance in inter-State trade or commerce. Section 14 which declares certain goods to be of special importance in inter-State trade or commerce mentions coal as one of them. Under Section 3 a sale or purchase of goods is deemed to take place in the course of inter-State trade or commerce if the sale or purchase, (a) occasions the movement of goods from one State to an-

other; or (b) is effected by a transfer of documents of title to the goods during their movement from one State to another. The sales we are concerned with in this case were of this second type. Sub-section (1) of Section 6 provides that subject to the other provisions of the Act, every dealer shall be liable to pay tax under this Act on sales of goods effected by him in the course of inter-State trade or commerce. Sub-section (2) of Section 6 states that notwithstanding what is provided in sub-section (1), any subsequent sale of goods effected by a transfer of documents of title to the goods,—(A) to the Government, or (B) to a registered dealer other than the Government, if the goods are of the description referred to in sub-section (3) of Section 8, shall be exempt from tax under this Act. There are two provisos to this sub-section, but it is not necessary to refer to them. Section 7 (1) requires every dealer liable to pay tax under this Act to apply for registration. Sub-section (3) of Section 7 provides that if the application is in order, the prescribed authority shall register the applicant and grant to him a certificate of registration in the prescribed form which shall specify the class or classes of goods for the purpose of sub-section (1) of Section 8. Rule 3 of the Central Sales Tax (Registration and Turnover) Rules, 1957, states that an application for registration under Section 7 shall be made in Form A, and Form A requires the purpose or purposes for which the goods or classes of goods are purchased by the dealer in the course of inter-State trade or commerce to be specified; as would appear from the Form, 're-sale' is one such purpose. Rule 5 (1) of the Rules provides that the certificate of registration must be in Form B. Section 8 (1) provides that every dealer who in the course of inter-State trade or commerce, (a) sells to the Government any goods; or (b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3) of this section, shall be liable to pay tax under this Act at the rate of three per cent of his turnover. Sub-section (2) of Sec. 8 states that the tax payable by any

dealer on his turnover relating to the sale of goods in the course of inter-State trade or commerce which does not fall within sub-section (1) shall be — (a) in the case of declared goods, at the rate applicable to the sale or purchase of such goods inside the appropriate State, and (b) in the case of goods other than declared goods, at the rate of ten per cent or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher. The goods referred to in clause (b) of sub-section (1) are specified in sub-section (3) of this section as goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for re-sale by him. Sub-section (4) of Section 8 says that the "provisions of sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner — (a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority", Rule 12 (1) of the Rules states inter alia that the declaration referred to in sub-sec. (4) of Section 8 shall be in Form C. Clause (b) of sub-section (4) is not relevant to the present purpose. Section 9 (1) reads:

"9. (1) Levy and collection of tax and penalties. The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within cl. (a) or clause (b) of Section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of sub-sec. (2), in the State from which the movement of the goods commenced:

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods, the tax shall, where such sale does not fall within sub-section (2) of Section 6, be levied and collected in the State from which the registered dealer ef-

fecting the subsequent sale obtained or, as the case may be, could have obtained, the form prescribed for the purposes of clause (a) of sub-section (4) of Section 8 in connection with the purchase of such goods."

3. The dispute in this case turns on whether the proviso to Section 9 (1) is applicable to the case. Reference may also be made to Section 15 which provides the restrictions and conditions in regard to the tax on sale or purchase of declared goods within a State. The tax on sale or purchase of such goods inside the State is not to exceed three per cent of the price thereof, and such tax is not to be levied at more than one stage.

4. The only provision of the U. P. Act which is relevant is Sec. 22 which is in these terms:

"22. Rectification of mistakes.—

(1) The assessing, appellate, revising or additional revising authority may, at any time within three years from the date of any order passed by it, rectify any mistake apparent on the record:

Provided that no such rectification, which has the effect of enhancing the assessment shall be made unless the authority concerned has given notice to the dealer of his intention to do so and has allowed him a reasonable opportunity of being heard.

(2) Where such rectification has the effect of enhancing the assessment, the authority concerned shall serve on the dealer a revised notice of demand in the prescribed form and therefrom all the provisions of the Act and the rules framed thereunder shall apply as if such notice had been served in the first instance."

The Sales Tax Officer had accepted the contention that the turnover amounting to Rs. 5,59,172/32 p. was not taxable in Uttar Pradesh. In taking this view the Sales Tax Officer appears to have proceeded upon the observations in a judgment of the Allahabad High Court in the Company's own assessment case for the year 1965-66. However, in several subsequent decisions, the High Court held that in a case where a registered dealer effected a second sale in the course of inter-State

trade and commerce, sales tax on the turnover was to be realised in the State where the dealer effecting the sale was registered. In one of these cases, *M/s. Singhal and Co. v. State*, 1973 U.P.T.C. 466 (All) it was pointed out that the earlier decision of the High Court had completely overlooked the proviso to Section 9 (1) of the Central Act. The Company being admittedly a registered dealer under the Central Act and liable to pay tax under that Act, the Sales Tax Officer thought that there was an apparent error in the order of assessment made on 27-3-1971 exempting the turnover amounting to Rs. 5,59,172/32p. which in view of the proviso to Section 9 (1) of the Central Act was taxable in Uttar Pradesh. Accordingly, he proposed to rectify the error under Section 22 of the U. P. Act, and on March 21, 1974 he issued a notice to the Company requiring it to appear before him on March 25, 1974. In response to the notice a representative of the Company appeared, contended against the proposed rectification, and also filed a written objection. The Sales Tax Officer recorded an order on March 26, 1974 overruling the objections and rectified the order of assessment dated March 27, 1971. A copy of the order passed on March 26, 1974 rectifying the mistake in the earlier assessment order was served on the Company on March 31, 1974. The Company challenged the order dated March 26, 1974 by a writ petition in the Allahabad High Court which was dismissed giving rise to this appeal.

5. Mr. Nariman appearing for the appellants in these appeals pressed the following grounds:

(1) the proviso to Section 9 (1) of the Central Act has no application to goods declared to be of special importance in inter-State sales or commerce under Section 14 of the Central Act;

(2) Section 22 of the U. P. Act was not applicable as there was no mistake apparent on the face of the record; and

(3) in any event, the order made under Section 22 of the U. P. Act was barred by limitation.

6. The argument that the proviso to sub-section (1) of Section 9 does not apply to declared goods proceeds as follows: sub-section (1) (b) and sub-section (2) (a) of Sec. 8 of the Central Act deal with two different types of goods. Sub-section (1) (b) speaks of goods of the description referred to in sub-section (3), and sub-section (2) relates to declared goods. Sub-section (3) of Section 8 only mentions the goods referred to in sub-section (2) (b) which are goods of the class or classes specified in the certificate of registration of the dealer purchasing the goods as being intended for re-sale. Sub-s. (4) requires a declaration for the purposes of sub-section (1) (b), and as sub-section (1) (b) does not speak of declared goods, the declaration referred to in sub-section (4) would not be necessary in the case of sale or purchase of declared goods.

7. We fail to see any valid distinction between declared goods and other goods for the purpose of the applicability of sub-section (1) of Section 8. The distinction was made by Mr. Nariman inferentially from the Central Sales Tax (Amendment) Act (8 of 1963) which omitted with effect from April 1, 1963, clause (a) from sub-section (3) of Section 8 as it stood prior to that date. Sub-section (3), it may be recalled, specifies the goods referred to in Section 8(1) (b). Prior to April 1, 1963, Section 8 (3) listing such goods, stated in clause (a)—

"(a) in the case of declared goods; are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for re-sale by him." Clause (b) of Section 8 (3) then began with the words: "in the case of goods other than declared goods, are". By the same Amendment Act (8 of 1963) the opening words of clause (b), "in the case of goods other than declared goods", were consequentially omitted, also with effect from April 1, 1963. The omission of clause (a) is the basis of the argument that declared goods are altogether outside the purview of sub-section (2) and, therefore, of sub-section (1) of Section 8, and, as the declaration referred to in sub-

section (4) of Section 8 was required where sub-section (1) of the section was applicable, it was not possible for the company to obtain such a declaration.

8. The contention seems to us untenable. Section 9 (1) of the Central Act contains a general rule that the tax payable by any dealer under this Act shall be levied and collected in the State from which the movement of the goods commenced. The proviso to Section 9 (1) qualifies this rule in the case of a subsequent sale which is not exempt from tax under Section 6 (2), and states that the tax on such subsequent sale would be levied and collected in the State from which the registered dealer effecting the subsequent sale obtained or could have obtained the form prescribed for the purposes of Section 8 (4) (a). No exemption under Section 6 (2) is claimed in this case. The declaration referred to in Section 8 (4) (a) is necessary for the dealer to avail of the benefit of the rate of tax mentioned in Section 8 (1). Under Section 7 (3) the certificate of registration granted to a dealer has to specify the class or classes of goods for the purposes of Section 8 (1). Rule 3 of the Central Sales Tax (Registration and Turnover) Rules, 1957 requires an application for registration under Section 7 to be made in Form A, and Form A requires the purpose for which the goods or class of goods are purchased by the dealer to be specified; re-sale is one of the purposes mentioned in Form A. Thus Section 7 (3) makes no distinction between declared goods and other goods; it is impossible to argue therefore that declared goods purchased by a dealer for re-sale need not be specified in his certificate of registration. Reading sub-section (1) and sub-section (3) of Section 8 together, it is clear that all sales to a registered dealer other than the Government, whether of declared goods or other goods, are covered by sub-section (1) of Section 8. Clause (a) was omitted from sub-section (3) of Section 8 by the Amendment Act (8 of 1963) presumably because it was considered unnecessary to retain clause (a) to deal with declared goods when

clause (b) apparently covered all goods, both declared and other than declared. The Act and the rules and the prescribed forms make no distinction between declared goods and other goods except for the purpose of the rate of tax. There is no valid reason why the Company could not have obtained a declaration in Form C as required by the proviso to Section 9 (1). It follows therefore that the order of assessment dated March 27, 1971 was wrong as it held, contrary to the proviso to Section 9 (1), that the sales in question were not taxable in the State of Uttar Pradesh where the Company was registered as a dealer under this Act.

9. Another point sought to be made against the applicability of the proviso to Section 9 (1) was this. The proviso refers to the form prescribed for the purpose of Section 8 (4) (a) which should contain a declaration duly filled and signed by the registered dealer to whom the goods were sold. It was argued that as the declaration was required only where the sale was to a registered dealer, and as there was no finding in this case that the sales were to registered dealers, the proviso was not attracted. It appears, however, that the Company never claimed before the Sales Tax Officer that the sales were not to registered dealers; in the written objection filed before the Sales Tax Officer pursuant to the notice under Section 22 of the U. P. Act, the only ground taken was that no declaration was required to be filed in the case of declared goods. The point was taken for the first time in the writ petitions. We do not think we should allow this question, which is one of fact, to be raised at this stage.

10. The next question is whether this error in the original order of assessment can be called an apparent error within the meaning of Section 22 of the U. P. Act. There is no dispute that an apparent error means a patent mistake, an error which one could point out without any elaborate argument. The order of assessment relating to the assessment year in question, 1966-67, was made on March 27, 1971 by the Sales Tax Officer relying on a judg-

ment of the Allahabad High Court on a writ petition made by the Company questioning the validity of the assessment in respect of the assessment year 1965-66. In that judgment the High Court held, referring to the provisions of Section 9 (1) of the Act, that

"the Sales Tax authorities in the State of U. P. had no jurisdiction to make any assessment even if there was any inter-State sale which could be liable to tax in the hands of the petitioner Company. The only State which could levy tax could be either Bihar or West Bengal. The impugned assessment order passed by the Sales Tax Officer, Moradabad, is therefore clearly without jurisdiction and is liable to be quashed."

In this Judgment there is no reference to the proviso to Section 9 (1). It appears from the Judgment under appeal that the High Court in a number of later decisions held that in view of the proviso, tax on a subsequent sale by a registered dealer in the course of inter-State trade or commerce was to be levied and collected in the State where the dealer effecting the subsequent sale was registered. We are of the view that the order of assessment dated March 27, 1971 was apparently erroneous in that it failed to take into consideration the proviso to Section 9 (1). It is not that the order dated March 27, 1971 was in accordance with law when it was made but the subsequent decisions of the High Court took a different view of the law. For the reasons we have given above, it was patently erroneous when it was made, but in view of the observations of the High Court in the case relating to the assessment of an earlier year, the Sales Tax Officer felt that he had to dispose of the assessment case for the year 1966-67 in the manner he did. The Judgment of the High Court which the Sales Tax Officer followed in making the assessment for the year in question did not concern itself with the proviso to Section 9 (1).

11. The next, and the last, question is whether the order dated March 22, 1974 rectifying the assessment order made on March 27, 1971 was barred by limitation. Under Section 22 (1) of the U. P. Act any

mistake apparent on the record may be rectified at any time within three years from the date of the order. It is not disputed that the other requirements of Section 22 have been complied with. The Company's representative appeared before the Sales Tax Officer pursuant to the notice served on them on March 25, 1974, and the objections to the proposed rectification were heard. There is no dispute that the order rectifying the mistake was recorded by the Sales Tax Officer on March 26, 1974, and this order was communicated to the appellant on March 31, 1974. According to Mr. Nariman, the order of rectification must be held to have been made on March 31, 1974 when it was communicated to the assessee which was beyond three years from the date of the order of assessment. Mr. Nariman relied on the well known rule of fair play that the rights of a party cannot be affected by an order until he has notice of it. In *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer*, (1962) 1 SCR 676 = (AIR 1961 SC 1500) this Court considering the meaning of the words "the date of the award" occurring in Section 18 of the Land Acquisition Act, 1894 observed:

"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way.

..... where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the order must mean either actual or constructive communication of the said order to the party concerned." Following this decision, this Court held in a subsequent case under the

Indian Forest Act, 1927, *Madan Lal v. State of U. P.*, (1975) 2 SCC 779 = (AIR 1975 SC 2085) that the right of appeal given by Section 17 of the Forest Act should be deemed to be the date when the party aggrieved by an order came to know of that order from which an appeal was sought to be preferred. But how have the Company's rights been affected in this case? Section 9 of the U. P. Act gives a right of appeal to "any dealer objecting to any order made by the assessing authority, other than an order mentioned in Section 10-A within thirty days from the date of service of the copy of the order. In this case the Company was not affected by the order under Section 22 being communicated to it after the expiry of three years from the date of the order because the limitation for an appeal from that order did not begin to run before the communication of the order. The provisions of Section 9 of the U. P. Act make that clear.

12. The appeals therefore fail and are dismissed. Considering the circumstances, we direct the parties to bear their own costs here and in the High Court.

Appeals dismissed.

AIR 1976 SUPREME COURT 2108

(From: 1972 Tax LR 2347 (Gui))

H. R. KHANNA AND P. K. GO-SWAMI, JJ.

State of Gujarat (Commissioner of Sales Tax, Ahmedabad), Appellant v. M/s. Variety Body Builders, Respondent.

Civil Appeals Nos. 1492 and 1493 of 1971, D/- 26-4-1976.

(A) Contract Act (1872), S. 10—**Construction of contract — Written contract — Intention of parties to be gathered from its terms and conditions.**

It is well settled that when there is a written contract it will be necessary for the Court to find out therefrom the intention of the parties executing the particular contract. That intention has to be primarily gathered from the terms and condi-

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tions which are agreed upon by the parties. (Para 8)

(B) Sale of Goods Act (1930), Section 4 — Sale of goods — There must be agreement for sale of very goods in which eventually title passes.

To constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. On the true interpretation of the expression 'sale of goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes. AIR 1958 SC 560, Rel. on. (Para 35)

(C) Sale of Goods Act (1930), Section 4 — Contract of sale and works contract — Distinction — Contract by assessee to build railway coaches on under-frames supplied by Railway Administration on certain terms and conditions — Materials and labour of Contractor as well as that of Railway were required to be put in for production of completed coach — Contract held to be in essence and reality a works contract. (Bombay Sales Tax Act (3 of 1953), Section 2 (13)).

The word contractor appearing in the preamble of a written contract is not decisive on the question whether it is a contract of sale or works contract. The entire document with all the relevant and material clauses throwing light upon the real intention of the parties and the real nature of the transaction must be given due weight in coming to a conclusion one way or the other.

(Paras 37, 47)

Held on a consideration of the material terms and conditions in the agreement that it was a works contract and not a contract for the sale of railway coaches on their completion. AIR 1974 SC 2309, Dist. AIR 1972 SC 744; (1970) 26 STC 38 (SC) and (1968) 21 STC 245 (SC) and AIR 1965 SC 1396, Rel. on. 1972 Tax LR 2347 (Guj), Affirmed.

(Paras 40, 41, 44 and 54)

Cases Referred: Chronological Paras

AIR 1974 SC 2309 = (1975) 35	STC
24 = 1974 Tax LR 2444	45
AIR 1972 SC 744 = (1972) 29	STC
438 = 1972 Tax LR 1853	48
(1970) 26 STC 38 = (1970) 1	SCWR
672	53
(1968) 21 STC 245 (SC)	50
AIR 1967 SC 547 = (1967) 19	STC
13	48
AIR 1965 SC 1396 = (1965) 16	STC
240	52
AIR 1965 SC 1655 = (1965) 16	STC
364	45
AIR 1958 SC 560 = (1958) 9	STC
353	35

Mr. S. T. Desai, Sr. Advocate, (Mr. M. N. Shroff, Advocate with him), for Appellant; Mr. V. S. Desai, Sr. Advocate, (M/s. Vimal Dave, Ram Phal, Ganpat Rai and Mrs. Sheil Sethi and Miss Kailash Mehta, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

GOSWAMI, J.:— This judgment will govern both the appeals.

2. These two appeals by special leave are directed against the common judgment of the Gujarat High Court in Sales Tax Reference No. 5 of 1969 relating to two periods, namely, (1) from 24th October, 1955 to 31st March, 1956 and (2) from 1st April, 1956 to 31st March, 1957.

3. The Tribunal had earlier delivered a common judgment in two revision applications No. 121 and No. 122 of 1961 and made a composite reference to the High Court under the Bombay Sales Tax Act stating the following question for answer:—

"Whether on the facts and in the circumstances of the case the three contracts for construction of coaches on the under-frames supplied by the Railway Administration, the contracts containing similar terms were contracts for sale of goods and not works contracts?"

4. The facts appearing from the statement of case are as follows:—

The respondent, M/s. Variety Body Builders, Baroda, entered into three contracts with the Western Railway Administration for construction of railway coaches on the under-frames supplied by the said Railway Administration. The three

contracts were reduced into writing and contained the terms and conditions under which the contracts were to be performed. The first agreement dated September 17, 1954 was for construction of 25 N. G. coaches. The second agreement dated July 11, 1955, was in respect of construction of 6 T.L.R. coaches. The third agreement dated January 14, 1956, was for construction of 25 N.G. coaches. The Sales Tax Officer held that the transactions relating to the construction of the said coaches were transactions of sales of these coaches by the respondent. On that basis the respondent was assessed at Rs. 2,72,803/8/- for the first period and at Rs. 3,82,820/- for the second period. The respondent's appeals to the Assistant Commissioner of Sales Tax were unsuccessful. The revision applications of the respondent before the Deputy Commissioner of Sales Tax and later before the Tribunal met with the same fate. The Tribunal, however, referred the question of law as set out earlier to the High Court and the High Court answered the same in favour of the respondent and hence these appeals by special leave.

5. The only question with which we are concerned in these appeals is whether the contracts entered into by the respondent with the Railway Administration for construction of railway coaches are contracts for sale of goods or works contracts.

6. Since the three contracts are substantially similar the High Court and the authorities below took note of the recitals of the third contract dated January 14, 1956, and we will also take the same into consideration.

7. Mr. S. T. Desai appearing on behalf of the appellant and Mr. Ram Phal appearing on behalf of the respondent took us through all the clauses of the agreement and pressed their rival viewpoints. Mr. Desai submits that from the totality of the conditions laid down in the agreement the contract is one for sale, being transfer of property in the railway bogies as a unit of goods and, therefore, the transaction is liable to sales tax. Mr. Ram Phal, on the other hand, relying on the same terms and conditions in the contract,

submits that it is a pure and simple works contract and not a contract for sale of goods.

8. It is well settled that when there is a written contract it will be necessary for the Court to find out therefrom the intention of the parties executing the particular contract. That intention has to be primarily gathered from the terms and conditions which are agreed upon by the parties. We will, therefore, immediately turn our attention to the agreement in question.

9. The preamble of the agreement shows that it is an agreement entered into between the Railway Administration and the respondent described as "the contractor."

10. The first clause describes the "nature of work." It states "the contractor hereby agrees to undertake the building of 25 Narrow Gauge Third Class Bogie Coaches... ..on I.R.S. under-frames to be provided by the Western Railway to the design indicated.....at the rate of.....Rs. 19141/- only. The said work of building bodies will be carried out by the contractor in the area of premises of the Western Railway Workshop at Pratapnagar Baroda or at such other location as may be mutually agreed upon." It also appears in the second part of clause (1) that each employee working under the contractor "for this work" will have a gate pass issued in his favour on a deposit of Rs. 5/- for each gate pass. It is also stated in the second part of clause (1) that "all gate passes issued to the contractor are returnable within a week of termination of the contract."

11. Clause (3) provides for security deposit "for the due fulfilment and completion of this contract." Clause (3) further says that the security deposit will be retained by the Administration "for the due performance of and observance of the terms and conditions of this contract" and the same is liable to forfeiture "in the event of any breach on the part of the contractor of the terms and conditions of this contract."

12. Clause (4) provides for deduction of 10 per cent from each progressive bill submitted by the contractor and the security deposit

shall be refunded to the contractor "only on successful completion or termination of this contract."

13. Clause (9) provides that constructional material and fittings must be supplied by the contractor which should be ordinarily as per the Railway's standard. "The provision of the hand-brake arrangements in the Guard's compartment will be done by the Railway."

14. Clause (11) says that the contractor is required to supply carpentry labour for equipping coaches with electric lights, fans, switches and regulators. The appropriate Railway staff will work in association with the contractor's staff to an extent required for the installation of electrical equipment and all electrical fittings will be supplied by the Railway.

15. Clause (13) provides for removal of rubbish debris or temporary structure at contractor's own cost on the expiration of the contract or in the event of earlier termination of the contract.

16. Clause (14) says that the contractor shall provide all essential equipment, tools and plant for satisfactory execution of the work.

17. By clause (15) "The contractor is required to deliver a minimum number of two coaches per month starting from the expiry of six months from the date of signing this agreement."

18. Clause (16) says that "in the event of the contractor failing to carry out and complete the work within the period stipulated as herein before provided the contractor shall be liable to pay to the Administration by way of ascertained and liquidated damages a sum equivalent to one per cent of the value of the work in arrears for each and every month or part of a month by which the contractor shall be in default upto a maximum of 20% of the value of the contract but the contractor shall not by reason of the recovery by any means by the Administration of such damages be relieved from his other obligations and liabilities under the contract.....The recoveries may be made from the security deposit or running bills or any sums due to the contractor."

19. Clause (17) may be set out:

"The contractor shall be responsible for the safe custody of carriages under construction as well as of the material supplied by the Administration for the purpose till the material or the carriages are taken over by the Administration. Dates of completion of the building work will be deemed to be the respective dates on which the Chief Mechanical Engineer or his authorised representative certifies each coach as having been built to his satisfaction."

20. Clause (18) provides that the Railway authorities are free to inspect the work. "The Chief Mechanical Engineer or his authorised representative will be the sole judge to determine whether the standard of workmanship is according to the Railway's requirement and whether any part or parts of the carriage require replacement due to bad or indifferent workmanship."

21. Clause (19) provides that "the contractor shall not under any circumstances sub-let this contract either in part or in full without the previous consent in writing of the Chief Mechanical Engineer....."

22. Clause (20) provides for termination of the contract by giving one month's notice to the contractor "in the event of the contractor failing to execute the contractual duties with diligence, competence and expedition."

23. Clause (21) provides for the duration of the contract which in the normal course be in force for a period of 16 months from the date of signing of the same. There is also provision therein for allowing such additional time as the Administration may consider to be justified by the circumstances of the case.

24. Clause (22) provides for contractor's liability for damages in the event of failure to execute the work with diligence and expedition or in complying with any orders given by the Chief Mechanical Engineer or his authorised representative from time to time.

25. Clause (23) provides that "the contractor will present bill through District Mechanical Engineer, Pratapnagar for payment on the basis of certified completion in terms

of coaches completed and handed over to him."

26. Clause (25) states that "if during the continuance of this agreement the contractor shall die or be adjudicated insolvent or if the contractor being a company shall enter into liquidation whether voluntary or compulsory..... this agreement shall absolutely cease and determine and the legal representative of the contractor or/his assignee in insolvency or (in the case of a company) the liquidators shall have no interest whatsoever under this agreement other than in respect of a claim for the money due for the work done under this contract and for the return of the security deposit subject to the provisions herein contained....."

27. Clause (30) makes provision for fair wages to the labourers engaged by the contractor.

28. Clause (31) says that the contractor shall have to abide by safety rules.

29. Clause (32) provides that the contractor shall not employ children under 15 years of age.

30. Clause (33) says that the contractor shall comply with the provisions of the Payment of Wages Act and the rules made thereunder.

31. Clause (34) provides that "the contractor shall pay a nominal rent of Re. 1/- per mensem for the area which may be allotted to him for the purposes of building the coaches."

32. Clause (35) provides for water and conservancy charges to be paid by the contractor.

33. Clause (36) provides for supply of electrical energy to the contractor on payment.

34. Clause (38) says that certain conditions of tender shall be deemed to be incorporated in the agreement. These tenders are, however, not before us.

35. Before we proceed further we may observe that for the meaning of the expression "sale of goods" we will have to derive assistance for the legal connotation of those words from the provisions of the Sale of Goods Act, 1930. As has been held by a Constitution Bench of this Court in the State of Madras v. Gannon

Dunkerly & Co. (Madras) Ltd., (9 STC 353) = (AIR 1958 SC 560) "that, both under the common law and the statute law relating to sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter..... On the true interpretation of the expression 'sale of goods' there must be an agreement between the parties for the sale of the very goods in which eventually property passes."

36. Bearing in mind the above legal concept of the sale of goods we will have to consider whether the terms of the contract, which we have set out earlier, can be construed in favour of a contract for sale of the railway coaches, which were constructed by the respondent.

37. Mr. Desai is right when he submits that the word contractor appearing in the preamble is not decisive on the question. As we have stated earlier, the entire document with all the relevant and material clauses throwing light upon the real intention of the parties and the real nature of the transaction must be given due weight in coming to a conclusion one way or the other.

38. The following material features in the agreement immediately draw our attention so far as may be relevant in considering whether the contract is one of sale or contract of work and labour:

(1) Undertaking by the contractor work of building bodies on under-frames supplied by Railway according to design provided by Railway (Cl. 1 (a)).

(2) Security deposit by contractor for due fulfilment and completion of the contract (Clause 3).

(3) Confiscation or forfeiture of security deposit in the event of any breach by the contractor of terms and conditions of the contract (Cl. 3).

(4) Deduction of 10% from each progressive bill of contractor to cover any likely loss, damage etc. (Clause 4).

(5) Import licence and foreign exchange arrangements by contractor (Clause 6).

(6) Supply, including manufacture, assembly, fitting, fixing and finishing, of all constructional materials and fittings including timber by the contractor (Clause 9).

(7) Provision of hand-brake arrangements in the Guard's compartment by Railway (Clause 9).

(8) Supply of electrical fittings by Railway (Clause 11).

(9) Railway staff working in association with contractor's staff for installation of electrical equipment. (Clause 11).

(10) Use of Railway site provided for the work and for no other purpose. (Clause 12)

(11) Removal of rubbish, debris, or temporary structure at contractor's own cost. (Clause 13)

(12) Earlier termination of contract also envisaged. (Clause 13)

(13) Essential equipment to be provided by contractor for execution of the work. (Clause 14)

(14) At least two coaches to be delivered per month after expiry of six months from the signing of the contract. (Clause 15)

(15) Contractor's liability to pay liquidated damages in the event of failure to carry out and complete the work within stipulated period. (Clause 16)

(16) Provision for running bills. (Clause 16)

(17) Responsibility of contractor for safe custody of carriages under construction as well as of the materials supplied by Railway till they are taken over by Railway. (Clause 17)

(18) Date of completion of building work on the date of certification by Railway's representative to his satisfaction. (Clause 17)

(19) Right of inspection of the work by Railway at all times and of maintenance of control over standard of workmanship requiring rectification of work and replacement of materials when ordered. (Clause 18)

(20) No subletting of contract wholly or in part without the previous written consent of Chief Mechanical Engineer. (Clause 19)

(21) Authority to terminate contract by one month's notice in the

event of the contractor's lack of diligence, competence and expedition in executing contractual duties. (Clause 20)

(22) Any losses incurred by Railway and occasioned through failure of contractor to comply with contractual obligations will be deducted from security deposit. (Clause 20)

(23) Contract to be in force for 16 months unless extended on reasonable ground subject to waiver of loss or damage by Railway. (Clause 21)

(24) Contractor's liability for damages for failure to execute the work with diligence and expedition or to comply with orders of Railway Administration. (Clause 22)

(25) Bills to be submitted by contractor on the basis of certified completion in terms of coaches completed and handed over to the District Mechanical Engineer. (Clause 23)

(26) Contractor, his heirs, executors or administrators to indemnify Railway Administration from and against all claims including claims under the Workmen's Compensation Act, Payment of Wages Act, Factories Act, etc. (Clause 24)

(27) In case of contractor's insolvency or death, agreement shall absolutely cease and determine and the legal representatives of the contractor or the liquidators shall have no interest whatsoever under the agreement other than in respect of a claim for the money due for the work done under the contract and for the return of the security deposit subject to the provisions of the agreement. (Clause 25)

(28) Arbitration clause in the event of any dispute in connection with the contract. (Clause 28)

(29) Contractor to pay fair wages to labourers employed. (Clause 30)

(30) Contractor to abide by safety rules. (Clause 31)

(31) No employment of children under 15 years by contractor. (Cl. 32)

(32) Responsibility of contractor under Payment of Wages Act. (Clause 33)

(33) Nominal rent of Re. 1/- per month for occupation of the Railway area for the purpose of building the coaches. (Clause 34)

(34) Contractor to pay to the Railway conservancy charges and for supply of electrical energy. (Clauses 35 and 36)

39. Reading the agreement as a whole and bearing in mind the above features, is it possible to conclude that what is contracted is to sell the railway coach constructed by the contractor to the Railway? In that event the railway coach when constructed must be as a unit the property of the contractor. But has the assessee alone contributed to the result? There were materials supplied by Railway. There was labour supplied by Railway. It is different from the case of a bus-body fitted into the chassis with all materials supplied by the contractor and all skill and labour contributed by the contractor.

40. A contracts to sell a certain Article to B. A must be the owner of the article and B must be at the receiving end having no interest in the article prior to passing of the property therein. Is the contractor owner of the railway coach when it was completed? The answer must be in the negative. Apart from the fact that the under-frame is not of the contractor (which may in a given case be a neutral factor) not all his materials nor all his labour and skill contributed to the coach. The Railway supplied men and materials although the substantial portion is of the contractor. This goes to bring out the intention of the parties in that they were intent upon performance of the work, the manner of the work, the quality of the materials used in the work and upon completion of the work in the most efficient way resulting ultimately in a completed coach. The intention of the parties at the time of entering upon the contract was not to transfer any completed railway coach by the contractor to the Railway. The end-product, being the railway coach, is the result of work, labour and materials of the contractor as well as of the Railway as also of the latter's constant supervision and control.

41. From the totality of the material terms and conditions in the agreement set out above, it is not possible to hold that the parties in-

tend that the contractor transfers the property in the railway coach to the Railway after its completion. The essence of the contract or the reality of the transaction as a whole indicates that the contract is a contract for work and labour.

42. Mr. Desai submits that clauses 15, 17 and 23 in particular make it absolutely clear that the property in a unit, in the shape of a completed railway coach, passes only on handing over of the same to the District Mechanical Engineer after the same has been completed and the specified authority certifies the coach as having been built to his satisfaction. He particularly draws our attention to the word "deliver" in clause 15 and the words "taken over" in clause 17 and "handed over" in clause 23. According to Mr. Desai these three clauses clearly disclose the intention of the parties that a railway coach as a unit, after its completion, is contracted to be handed over by the respondent to the Administration. The contract, therefore, that is entered in terms of the agreement is one of contract of sale of goods and not a works contract, says Mr. Desai.

43. Although the submission on the first blush is attractive and appears to be of some force, it will not bear close scrutiny. Perusal of clause 17 itself upon which great reliance has been placed by Mr. Desai shows that "dates of completion of the building work will be deemed to be the respective dates on which the Chief Mechanical Engineer or his authorised representative certifies each coach as having been built to his satisfaction." It is also apparent from the contract that the contractor has to complete two coaches each month after the expiry of the first six months of the contract. It is also clear that the contractor has to get payment by submitting running bills on completion of the coaches every month. In the above context when clause 17 refers to a fictional completion of the building work on the date of certificate by the Chief Mechanical Engineer or his authorised representative there is no requirement for a further ritual of delivery or handing over to which reference is made in clauses 15 and

23 respectively. The work is undertaken in the Railway premises. Materials are brought to the railway premises. People are admitted on gate passes for building the railway coaches on the under-frames supplied by the Administration. Some materials, such as electrical goods, were supplied by the Railway. Besides, there is co-operation of Railway's labour with the contractor's labour in construction of the coach. The hand-brake arrangements in the Guard's compartment are also agreed to be done by the Railway. Regular inspection of the contractor's work is carried out at all times and instructions to rectify defects have to be carried out immediately. Unless a close inspection of the work is carried out from day to day, it may be difficult to rectify defects after the work progresses. All this would go to show that the predominant element in the contract is the work and labour aspect and supply of materials is only accessory although the materials were definitely necessary for execution of the work. There is yet another important clause which throws a flood of light on this issue. Clause 25 deals with the contractor's insolvency or death. It is agreed between the parties, as per clause 25, that if the contractor dies, his legal representatives shall have no interest whatsoever in this agreement save in respect of a claim for the money due for the work already done under the contract and for the return of the security deposit subject to other provisions. This would also clearly show that the contract is a works contract and unfinished work would become the property of the Railway and the legal representatives will be entitled only to claim for the value of the work done. There is no provision in the agreement in that event for handing over of the unfinished railway coach by the respondent or his legal representatives or assignees to the Railway Administration. The Railway Administration automatically becomes the owner of the unfinished property which was lying in its premises. This is another reason why no exaggerated importance can be assigned to the words "delivery" and "handed

over" in clauses 15 and 23 respectively as urged by Mr. Desai.

44. This is, therefore, not a contract where it can be said that there is an agreement to supply a completed railway coach which when produced will be the property of the contractor. Along with those of the contractor's, materials and labour of Railway are also required to be put in for production of the completed railway coach. It is a contract primarily for work and labour and that element predominantly runs through the entire document from the preamble to the end as seen above.

45. Mr. Desai very strenuously relies upon a recent decision of this Court in *T. V. Sundram Iyengar and Sons v. State of Madras*, 1975-35 STC 24 = (AIR 1974 SC 2309) to which my learned brother was a party. That was a case relating to the contract for supply of bus bodies constructed and fitted to the chassis provided by the customer. This Court held that the rule laid down in *Patnaik and Co. v. State of Orissa*, 1965-16 STC 364 = (AIR 1965 SC 1655) was applicable to the facts of the two cases that came up for consideration in the above decision. This Court held that the property in the materials used by the assesseees in constructing the bus bodies never passed to their customers during the course of construction and that it was only when the complete bus with the body fitted to the chassis was delivered to the customer that the property in the bus body passed to the customer. This Court, therefore, held that the supply of bodies constituted a sale and the assesseees were liable to sales tax. The conclusion of this Court in *T. V. Sundram Iyengar's case* (supra) is brought out clearly in the following passage:

"The salient features of the dealings between the two assesseees with whom we are concerned and their customers as they emerge from the facts given above are that the property in the material used by the assesseees in constructing the bus bodies never passed to their customers during the course of construction. It was only when the complete bus with the body fitted to the chassis was delivered to the customer that the property in the bus body passed

to the customer. There was nothing to prevent the assessee from removing a plank, or other material after fixing it to a chassis, and using it for a different purpose or for a different bus body."

46. This Court in several decisions quoted with approval the following passage from Halsbury's Laws of England, Third Edition, Volume 34, at page 6, with regard to the distinction between a contract of sale and a contract for work and labour:

"A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of the materials nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

47. It can be treated as well settled that there is no standard formula by which one can distinguish a contract of sale from a contract for work and labour. There may be many common features in both the contracts, some neutral in particular contract, and yet certain clinching terms in a given case may fortify a conclusion one way or the other. It will depend upon the facts and circumstances of each case. The question is not always easy and has for all time vexed jurists all over.

48. In *Commr. of Commercial Taxes, Mysore v. Hindustan Aeronautics Ltd.*, 1972-29 STC 438 = (AIR 1972 SC 744) a bench of five Judges of this Court, to which my learned brother was a party, had to deal with a works contract with re-

gard to manufacture and supply of railway coaches. This Court after consideration of all the facts in that case and the salient features of the contract came to the conclusion that it was a pure works contract. The Court further held that the case was in line with the decision in *State of Gujarat v. Kailash Engineering Co.*, 1967-19 STC 13 = (AIR 1967 SC 547). Indeed Kailash Engineering's case (supra) was relied upon by the respondent before us. It was held in that case that as the terms of the contract indicated transaction was clearly a works contract and did not involve any sale.

49. Mr. Desai strenuously contends that clause (29) of the contract in Kailash Engineering's case (supra) distinguishes that case from the case at hand. Clause 29 was a specific provision for certain contingencies in case of loss, theft or destruction of the materials or plant. This special provision was to the effect that the liability of the contractor was not to be diminished in any way notwithstanding the fact that the materials and plant became the property of the Railway as soon as they were brought to the Railway premises. We, however, do not see much point in this submission. In that case since the plant and materials were brought on the site where the coaches were to be constructed the ownership is said to have vested in the Railway. In the present case also substantially the same result follows. The agreement here shows that when the contractor dies, his legal representatives or assignees have no interest in the contract which terminates and they will be only paid for the value of the work done. This would mean the property constructed upto that point was impliedly agreed upon to be vested in the Railway as and when materials were worked into the chassis. This is the implication of the agreement and not merely on the theory of accretion. At any rate the passing of property in this case is ancillary to the primary contract for execution of the work.

50. In the *State of Madras v. Richardson and Cruddas Ltd.*, 1968-21 STC 245 (SC) this Court was dealing with a contract for fabrica-

tion and installation of steel structures for a sugar factory in the State of Mysore. In the course of the judgment this Court observed as follows:—

"It had, therefore, to be established that the consideration was received under a contract to sell specific goods for a price, and property in the goods contracted to be sold passed to the society, when the goods were delivered in pursuance of the contract. If the contract was for completing the stipulated work and for that purpose to use materials belonging to the respondents in the performance or execution of the contract as accessory to 'work and labour' the contract must be regarded as a works contract, and not a contract for sale, even if the property in the goods ultimately passes as a result of the contract."

51. The Court further observed at page 252 as follows:

"The contract being one for supplying for an inclusive price a specially designed fabricated unit to be assembled and installed by specially trained technicians in the premises of the customer, it was not a contract for sale of a unit or different parts of the unit as specific goods, but a works contract."

52. In the Govt. of Andhra Pradesh v. Guntur Tobaccos Ltd., 1965-16 STC 240 = (AIR 1965 SC 1396) this Court dealing with an identical issue observed as follows at page 255 (of 16 STC) = (at page 1403 of AIR) (SC):

"The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials."

Again at page 258 (of 16 STC) = (at page 1405 of AIR) (SC):

"Whether a contract for service or for execution of work, involves a taxable sale of goods must be decided on the facts and circumstances of the case. The burden in such a case lies upon the taxing authorities to show that there was a taxable sale, and that burden is not discharged by merely showing that property

in goods which belonged to the party performing service or executing the contract stands transferred to the other party."

53. This Court in Commr. of Sales Tax, M. P. v. Purshottam Premji, (1970) 26 STC 38 (SC) dealt with the difference between a contract of work or service and a contract for sale of goods in the following passage:

"The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the materials used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it, at some time before delivery, and the property therein passes only under the contract relating thereto to the other party for price. Mere transfer of property in goods used in the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contracted to be sold. Ultimately the true effect of an accretion made in pursuance to a contract has to be judged, not by an artificial rule that the accretion may be presumed to have become by virtue of affixing to a chattel, part of that chattel, but from the intention of the parties to the contract."

54. We are fortified by all the above decisions of this Court in our conclusion in favour of the assessee.

55. We are, therefore, clearly of opinion that the contract in the present case is one of works contract and the High Court is right in answering the question in favour of the assessee. The appeals, therefore, fail and are dismissed with costs. One hearing fee for counsel.

Appeals dismissed.

AIR 1976 SUPREME COURT 2118

(From: Orissa)*

**Y. V. CHANDRACHUD, V. R.
KRISHNA IYER AND N. L.
UNTWALIA, JJ.**

Achutananda Purohit and others,
Appellants v. The State of Orissa,
Respondent.

Civil Appeals Nos. 312 to 314 of
1972, D/- 26-3-1976.

**(A) Orissa Estates Abolition Act
(1 of 1952), Section 37 (3) — Quan-
tum of interest permissible — Vali-
dity — Small quantum is justified.**

Validity of S. 37 (3) of the Orissa Estates Abolition Act fixing a small rate of interest on the compensation amount has been upheld. The policy of law of agrarian reform postulates the extinguishment of ancient privileges and cornering of land resources, and the socio-economic yardstick is different from what applies to ordinary purchases of real estate and this is manifest in the special provisions contained in Art. 31A and Art. 31B of the Constitution. A similar principle applies to the award of interest which may sometimes be notional when feudal interests are puffed out. The notion of prevailing bank rates in such a situations cannot be imported. The dynamic rule of law, with a social mission, makes a meaningful distinction between rights steeped in the old system and compensation for deprivation of those interests, on the one hand, and the ordinary commercial transactions or regulation of rights untinged by social transformation urges, on the other. This gives rationality to the seeming disparity. In the case of compensation awarded under the Act there is good reason to depart from the old rule of full compensation and it perhaps legitimates the reduced rate of recompense. AIR 1953 SC 375, Ref.

(Para 6)

**(B) Orissa Estates Abolition Act
(1 of 1952), Section 28 — Compensa-
tion payable, calculation of — Slab
system is not unconstitutional. (Con-
stitution of India, Arts. 31A, 31 (2)
and 31 (3)).**

*(C. W. Nos. 325 to 327 of 1970, D/-
19-3-1971—(Orissa)).

HT/HT/B345/76/GGM

The slab system of calculating the compensation which awards smaller multiples for estates yielding larger income payable under the Act cannot be challenged as unconstitutional and as violating fundamental rights. Art. 31 (2) read with Article 31(3) bars any challenge to the amount of compensation on acquisition by the State subject to compliance with the prescriptions in the said sub-articles, on the ground that the amount so fixed or determined is not adequate. Presidential assent has been accorded to this State Act and so the ban operates. Moreover, Art. 31A repels the applicability of Arts. 14, 19 and 31 to the acquisition by the State of any estate or of any rights therein etc. (Para 8)

**(C) Orissa Estates Abolition Act
(1952), Section 27 — Calculation of
net income — Provision in section for
inclusion of assumed income in case
of forests is proper. (Para 9)**

**(D) Orissa Estates Abolition Act
(1952), Section 26 (2) (b) (v) — Cal-
culation of gross income by forest
officers — Approval by Chief Con-
servator of forests — Power to ap-
prove implies power to modify or
disapprove but not to report or ar-
rive at an income de hors the Forest
Officer's Report altogether — Chief
Conservator of Forests not either
approving wholly or in a modified
form the report of Forest Officer but
making his appraisal independently
and without reference to report of
Forest Officer — Procedure is con-
trary to Section 26. (Para 15)**

**Cases Referred: Chronological Paras
AIR 1953 SC 375 = 1954 SCR 1 6**

Appellant No. 1 in person and
(Mr. D. N. Misra, Advocate), for Ap-
pellants; Mr. Gobind Das, Sr. Advo-
cate, (Mr. G. S. Chatterjee, Advo-
cate, with him), for Respondent.

The Judgment of the Court was
delivered by

KRISHNA IYER, J.:— Three
civil appeals, stemming from three
revision petitions to the High Court
of Orissa under the Orissa Estates
Abolition Act, 1951 (Orissa Act I of
1952) (for short, the Act) have reach-
ed this Court, thanks to special leave
granted to the appellant, who is
common in all the cases. The High
Court, after deciding various issues,
remanded the cases to the Compen-

sation Officer under the Act, after overruling most of the contentions pressed before it by the appellant.

2. Shri Achutananda Purohit, appellant, was the intermediary in respect of vast forests and other lands comprised in the estate of Jujumura in the district of Sambalpur. This estate vested in the State on April 1, 1960 by force of the Act and the crucial question agitated before us, consequentially, turns on the quantum of compensation awardable under Chapter V of the Act. The appellant has received around Rupees 3,00,000/- but much more, according to him, is due and this controversy can be settled by examining his specific points.

3. Shri Purohit, appellant, is an Advocate by profession and is 83 years old. He has argued in person and with passion. We have listened with patience to all his submissions, good, bad and indifferent. If we may anticipate ourselves, none of the nine submissions has appealed to us, save to the extent the High Court has upheld. Even so, a minimal narration of the facts and a brief consideration of each argument is necessary and we proceed to do so. While his arguments did not impress us, we were touched by his concluding words that he had been born and had grown in an adivasi village, in the only brahmin family and, in his evening years of life, proposed to give a substantial part of the compensation the State would give him for adivasi welfare. Although he waxed sentimentally on this note, he did not convince us on his contentions. With these prefatory observations, we proceed to formulate the many points urged and give our findings and reasons, one after the other.

4. We are directly concerned with the issue of compensation which is dealt with, as earlier stated, in Chapter V of the Act. The Compensation Officer is charged with fixing the quantum in the prescribed manner. A compensation assessment roll containing the gross asset and net income of each estate, together with the compensation payable in respect of such estate, has to be prepared by him. Of course, when there is joint ownership, Section 24

stipulates that the compensation shall be determined for the estate as a whole and not separately for each of the shares therein. Section 26 has great relevance as it lays down the method of arriving at the gross asset and Section 27 has like significance as it focuses on the manner in which the net income from an estate shall be computed by deducting certain items from the gross asset of the estate. Section 28 states how the amount of compensation is to be determined and the methodology of payment. There are a few other sections in Chapter VI which deal with payment of compensation. The Act also provides for appeal, second appeal and revision, the last being to the High Court and the earlier ones being to the Collector and a Board constituted under S. 22. The rule-making power is vested in the Government under Section 47 and there is a routine 'removal of difficulties' clause contained in Sec. 50. These furnish in bare outline the provisions with which we are directly concerned.

5. Against the background of law just projected, we may set out Shri Purohit's points which, if we may say so, are substantially the same as have been argued by him in revision before the High Court with partial success. For convenience of reference, we may extract the statement by the High Court of the contentions urged before it (and repeated before us) by the appellant:

"(1) The provisions of Sec. 37 (3) read with Section 26 (2) (b) (v) of the Act make it clear that the date of vesting is the last date by which the calculation of compensation should have been made. As admittedly compensation had not been calculated by the date of vesting, the Compensation Officer lost his statutory jurisdiction to do so. It is this Court which, by its order dated 10-4-1969 in Civil Revisions 201, 202 and 203 of 1968 conferred new jurisdiction on the Compensation Officer to deal freshly with the case and therefore notwithstanding anything contained in the Act, the compensation has to be calculated according to the directions given by the Court;

(2) The Court was fully aware of the statutory provision in Section

26 (2) (b) (v) of the Act, but in spite of it, the direction was that the Divisional Forest Officer should make the appraisement. There was no direction that this report of the D.F.O. should be further subject to the approval of the Chief Conservator of Forests. The calculation made by the Chief Conservator of Forests therefore has no statutory force but could be just a piece of evidence. But as the Court directed that no further evidence on behalf of the State should be received, Ext. A/1 is inadmissible in evidence.

(3) Assuming that in spite of the directions of the court the Compensation Officer is entitled to follow the procedure laid down in Section 26 (2) (b) (v), the expression 'subject to the approval of the Chief Conservator of Forests' does not refer to the appraisement made by the D.F.O. but refers to his appointment.

(4) Assuming that Sec. 26 (2) (b) (v) would have full force, what it contemplates is that the appraisement must be made by the D.F.O., and it is subject to the approval by the Chief Conservator of Forests. But what has happened here is that the Chief Conservator himself made the appraisement without referring to the appraisement made by the D.F.O. and as such the appraisement made by the Chief Conservator is invalid.

(5) The report of the Chief Conservator of Forests is also invalid because of the fact that the appraisement is made only with reference to the area of the disputed forests without taking into consideration the density of growth therein;

(6) Unlike in case of fisheries etc., where the actual income is to be included in the gross assets, in the case of forests, the assumed income and not the actual income is to be included. During the agricultural year immediately preceding the abolition, the petitioners had not actually derived any income from the forests and as such they were under no obligation to pay any income-tax on such income. Therefore, deduction of income-tax from the gross assets is illegal and unwarranted.

(7) The slab-system of calculation of compensation in the Act

providing smaller multiples for estates yielding larger income is unconstitutional.

(8) Compensation money should be so calculated that the purchasing power of the amount of compensation to be paid on the date of actual payment will not be less than its purchasing power on the date of vesting; and

(9) Interest should be calculated at not less than 12% per annum from the date of vesting till payment."

The meat of the matter, the primary question agitated in the appeal, lopping off the fringe issues of lesser import, consists in the statutory methodology and functionalities prescribed by the Act for quantifying the compensation and the compliance therewith by the statutory machinery in the case of the appellant. But before examining this essential issue we may dispose of the minor points pressed, so that the deck may be cleared for dealing with what deserves to be dealt with.

6. Point No. 9, in the catalogue already given, relates to the claim for 12% interest on the amount of compensation as against the statutory rate of 2½%. The policy of the law of agrarian reform postulates the extinguishment of ancient privileges and cornering of land resources, and the socio-economic yardstick is different from what applies to ordinary purchases of real estate and this is manifest in the special provisions contained in Article 31A and Art. 31B of the Constitution. A similar principle applies to the award of interest which may sometimes be notional when feudal interests are puffed out. We cannot import the notion of prevailing bank rates in such situations. The dynamic rule of law, with a social mission, makes a meaningful distinction between rights steeped in the old system and compensation for deprivation of those interests, on the one hand, and the ordinary commercial transactions or regulation of rights untinged by social transformation urges, on the other. This gives rationality to the seeming disparity. Holmes once commented: 'It is revolting to have no better reason for

a rule of law than that so it was laid down in the time of Henry IV'. Here there is good reason to depart from the old rule of full compensation and it perhaps legitimates the reduced rate of recompense. Moreover, the High Court has rightly pointed out that the validity of Section 37 (3) of the Act which fixes a small rate of interest on the compensation amount has been upheld by the Supreme Court in Gajapati Narayan's case, AIR 1953 SC 375.

7. Point No. 8 has only to be stated to be rejected. The contention is that on the date of vesting, which was well over two decades ago, the purchasing power of the rupee was much higher than its present value. It is more or less a world phenomenon that the erosion in value of the unit of currency has been taking place, but this invisible devaluation owing to the inflationary spiral does not affect the quantum of monetary compensation prescribed by statute. For the purposes of the law, the rupee of long ago is the same as the rupee of today, although for the purposes of the market place and cost-of-living, the housewife's answer may be different. Law is sometimes blind.

8. The next point in the reverse order is equally unsubstantial and may be disposed of right away. The appellant challenges the slab system of compensation provided in the Act which awards smaller multiples for estates yielding larger incomes, on the score of violation of the fundamental rights under the Constitution. The short answer is that Art. 31 (3) read with Article 31 (2) bars any challenge to the amount of compensation on acquisition by the State subject to compliance with the prescriptions in the said sub-articles, on the ground that the amount so fixed or determined is not adequate. Presidential assent has been accorded to this State Act and so the ban operates. Moreover, Article 31A repels the applicability of Articles 14, 19 and 31 to the acquisition by the State of any estate or of any rights therein etc. This provision directly demolishes the contention of the appellant.

9. Point No. 6 in the list of contentions earlier reproduced is also bereft of force and we may make short shrift of it. The argument is that for certain reasons the appellant could not derive any actual income from the forests taken over by the State from him and therefore there was no income-tax payable on any agricultural income from these forests. The contention is that therefore in arriving at the net income the deduction of income-tax is not permissible. Here again, the flaw in the submission consists in mis-reading Section 27 of the Act which expressly states that the net income from an estate shall be computed by deducting from the gross assets of such estate any sum 'which was payable by the intermediary as income-tax in respect of any income... derived from such estate for the previous agricultural year.' No income, therefore no income-tax, and therefore no deduction, is the syllogism of Shri Purohit. He forgets that in the case of forests it is the assumed income and not the actual income that forms the basis of calculation of compensation. Indeed, if the actual income were to be the foundation for computation of compensation on the premise that no actual income has accrued, the compensation might be zero. On the other hand, statutory compensation is provided for on the formula of assumed income in the previous year. Similarly, an assumed income-tax also has to be worked out and deducted. If a notional income on the assumed basis can be used for fixing compensation, a notional income-tax can be calculated and deducted. The confusion that vitiates the argument is prompted by a circular letter of government regarding non-deductibility of income-tax due to the State from the amount of compensation lying to the credit of estate-holders. We have examined the circular letter and are satisfied that it has no relevance to a situation like the present and it deals with a totally different matter. In short, Section 27 properly construed, cannot lend itself to the meaning imputed to it by the appellant.

10. The serious question that survives for consideration is covered

by the remaining points which more or less overlap. The statutory scheme of compensation for forest lands consists of a machinery for assessment of the net income which is multiplied on a sliding scale and the method of challenge to the determination by the aggrieved owner or State. Section 26 (2) (b) (v) is relevant here and may be set out:

"26 (2) 'gross asset' when used with reference to an estate means the aggregate of the rents, including all cesses, which were payable in respect of the estate for the previous agricultural year.....

(b) by the raiyats or any other persons cultivating the land other than the land settled with the intermediary or intermediaries under sub-section (1) of Section 7 and includes.....

(v) gross income from forests calculated on the basis of the appraisal made of annual yield of the forests on the date of vesting by a Forest Officer subject to the approval of the Chief Conservator of Forests, such Forest Officer being not below the rank of a Divisional Forest Officer to be appointed in this behalf by the State Government."

11. The expression 'Forest Officer', used here, has been explained in S. 26. So the first step is for the Government to appoint Forest Officers from out of D.F.Os in the Forest Department, for the purposes of the Act. Those Officers ascertain the income from the forest concerned and the figure so fixed is subject to the approval of the C.C.F. (Chief Conservator of Forests), presumably the top expert in the department. The power to approve implies the power to disapprove or modify but not to report or arrive at an income de hors the Forest Officer's Report altogether.

12. The section is clear that the gross income from forests must be calculated on the basis of appraisal of the annual yield on the date of vesting, firstly, by a Forest Officer and, secondly, by the Chief Conservator of Forests screening it and approving it. Indeed, preliminary to the appraisal operation, the intermediary receives a notice in Form 'D' (Rule 13) and he is expected to furnish a return of the relevant parti-

culars and supporting information to enable correct appraisal. In the present case, the appellant did submit the 'D' return to the Compensation Officer and adduced some evidence to substantiate it. The Compensation Officer passed an order adverse to the appellant, whereupon he filed an appeal to the Collector which was rejected. A Second Appeal followed before the Board of Revenue which was dismissed. Later, revision petitions were filed before the High Court and G. K. Misra J., set aside the order disallowing the inclusion of the income from forests for ascertainment of compensation and directed a remand to the Compensation Officer. The said order (the relevant portion of which we are concerned) runs thus:

"He would immediately call upon the Divisional Forest Officer to make appraisal within three months from the receipt of the record. The appraisal can be scientifically done by looking to the age of the trees as they stand now. It is open to the petitioners to give evidence that after the date of vesting many of the trees and forest produce have been removed. Besides, the evidence already on record would be taken into consideration. The Divisional Forest Officer who would make the appraisal will be examined as a witness for the Compensation Officer and would be subjected to cross-examination. No other evidence would be permissible as the State has not chosen to give any other evidence. Under Rule 13 (1-C) of the Orissa Estates Abolition Rules, 1952 the compensation officer may rely upon such other materials as may otherwise be ascertained by him. But in such a case the materials must be brought to the notice of the petitioners who would be entitled to cross-examine the witnesses connected therewith and may give rebutting evidence. The compensation case is to be disposed of by the compensation officer within six months from today (10-4-1969) with intimation to this Court."

13. Strictly speaking, the statutory requirement is for initial appraisal of the annual income by the Forest Officer. The use of the expression 'Divisional Forest Officer' is

erroneous although Forest Officers are appointed from among Divisional Forest Officers. Equally clearly, a slight error has crept into the Judge's order because he does not make any reference specifically to the statutory requirement of approval of the Chief Conservator of Forests of the appraisal made by the Forest Officer.

14. However, what followed is interesting though erroneous. The District Forest Officer (who, incidentally, happens to be a Forest Officer under the Act, having been appointed as required thereunder) made his appraisal of the annual income and submitted to the Chief Conservator who altered the annual yield and reduced it substantially. But he pointed out that the Forest Officer had omitted to include the income from kendu leaves and added that sum to the income from forests. Even so, the total figure was less than what the Divisional Forest Officer had recommended. The Compensation Officer accepted the report of the Chief Conservator and made the statutory calculation on that date. Both the State and the appellant filed appeals to the Collector which were dismissed. A second appeal was filed by the appellant before the Board of Revenue without success. Then followed three revision petitions to the High Court which led to the order of remand now attacked before us in the present appeals.

15. From this narrative, what follows is that the Chief Conservator had substituted his appraisal which was accepted by the statutory tribunal. Indeed, there was a fundamental difference in the basis adopted by the Forest Officer and the Chief Conservator in the matter of assessing the income of the forests in question. We need not go into this detail except for the purpose of noticing that what the Chief Conservator did, was not to approve wholly or in a modified form what the Forest Officer did but to make his own appraisal independently and without reference to the report of the statutory functionary, viz., the Forest Officer. This was wrong and contrary to Section 26, as was contended by the appellant and in a way accepted by the High Court.

16. We are in agreement with the course adopted by the High Court and the reasoning which has prevailed with it. The direction given by the learned Judge in the remand order is correct although it may require a little clarification. Having heard the appellant at some length, we see no flaw in the High Court's order on this aspect of the matter. It is astonishing that anyone should urge, as the appellant did, that the date of vesting is the last date by which the calculation of compensation should have been made and since that had not been done, the Compensation Officer had become *functus officio* in awarding compensation. Before the date of vesting the State never can, nor does, fix the compensation through the Compensation Officer in any of the agrarian reform laws, and these compensation operations are post-statutory exercises. Therefore there is no substance in the *functus officio* argument. If the officer had no jurisdiction, the land would be gone because of the vesting provision and no compensation would be forthcoming for want of jurisdiction — a consequence the appellant never wants. Technicality can be frightened away by technicality. Nor is it right to contend, as the appellant did, that the Compensation Officer's jurisdiction was created by the order of remand by the High Court. No, it was created by the statute and canalised by the order of remand.

17. It follows that, after the present second remand, the reappraisal of the annual net income cannot be done solely by the Forest Officer without securing the approval of the Chief Conservator. Nor can the Compensation Officer bypass the Chief Conservator on the misunderstood strength of the High Court's first order of remand. The true legal drill is — and this holds good after the second remand order — that the Forest Officer will do the appraisal of the annual income, forward his report to the Chief Conservator of Forests who will take the said report into consideration and, if necessary, make modifications therein or approve it with such changes as he deems fit. Certainly the Chief Conservator cannot be ig-

nored by the Compensation Officer nor can the Chief Conservator ignore the assessment made by the Forest Officer and go through an independent exercise. The integrated process has already been explained by us and will be followed in the proceedings to ensue on remand. We may make it clear that now that a Forest Officer has made an appraisal, the Chief Conservator of Forests will apply his mind to it and approve it as a whole or with such modifications as he thinks necessary and forward it to the Compensation Officer. This will, among other things, save time. Thereafter, the appropriate statutory course will follow. Substantially, this is what has been done by the learned Judge when allowing the revisions and remitting the case back to the Compensation Officer.

18. The take-over of the forests of the appellant was effected as early as 1960 and 16 years have passed without the intermediary being out of the litigative woods. The High Court has stated that a large part of the delay has been 'due to laches committed from time to time by the Officers who have been charged with the duty to calculate the compensation. It is again due to mistakes committed by the authorities concerned that the matter is being remitted back to the Compensation Officer for disposal.' The force of these observations constrains us to direct that the proceedings before the Compensation Officer shall be completed within six months from today. In this context, it is perhaps not irrelevant to remember that the appellant, a freedom-fighter, is an 83-year-old man and, at this stage of his life, the State should show commiseration not merely in quickly disposing of the proceedings but also in not being cantankerous in awarding and disbursing the balance compensation. With these directions and observations we affirm the orders under appeal but, while dismissing the appeals, direct the parties to bear their costs in this Court.

Appeals dismissed.

AIR 1976 SUPREME COURT 2124

(From: 1974 Cri LJ 871 (All))

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

The State of Uttar Pradesh, Appellant v. Het Ram and others, Respondents.

Criminal Appeal No. 79 of 1975, D/- 3-2-1976.

(A) Criminal P. C. (1898), Section 539-B — Local Inspection by Judges — What is local inspection within meaning of Section. 1974 Cri LJ 871 (All), Reversed.

What Section 539-B contemplates is the local inspection of the topography of the place in which the offence was alleged to have been committed or its local peculiarities for the purpose of properly appreciating the evidence which was already on record. (Para 7)

Where the incident was alleged to have taken place at about 3.30 a.m. on 24-12-1971 and the Judges of the High Court (Appellate Court) chose to go and visit 'a place where there was no artificial light' on 11-1-1974 at about 7.30 p.m. for the purpose of ascertaining whether persons could be identified at that hour from a short distance, there was nothing in the judgment of the High Court to show the nature of the place or whether it was some such place as the one where the alleged incident took place and there was also nothing in the judgment as to whether the darkness found by the judges was so intense that even those clinging to the victims could not be identified by them in the darkness which the Judges found at the time of inspection or as to the impossibility of recognising the faces of those persons who were relations and were well known to the witness over long period of time, the evidence of the eye-witnesses was that the accused gave the beating while clinging to the victims at close quarters and some of the injuries were on the front part of the bodies of the victims, and a memorandum of the facts observed by the Judges at the inspection was not on record.

Held that: (i) Even if it be assumed that the omission of the

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Judges to record a memorandum of any relevant fact observed by them at the time of their inspection did not prejudice any one and was a mere irregularity, they did not correlate the result of their inspection to the evidence on record, and

(ii) the procedure adopted by the Judges in visiting quite a different place, on a date and time unconnected with the time of the alleged incident, for the purposes of deciding whether the witnesses could identify the assailants in the darkness, was quite illegal and it was not permissible for them to dispose of the case on the basis of their own findings without regard to the evidence which was already on the record, 1974 Cri LJ 871 (All), Reversed. (Paras 8, 9, 10)

Mr. O. P. Rana, Advocate, for Appellant; Mr. Yogeshwar Prasad, Advocate and Miss Rani Arora, Advocate, for Respondents.

The Judgment of the Court was delivered by

SHINGHAL, J.:— The Sessions Judge of Farukhabad convicted respondents Het Ram, Sobran and Ram Pal of an offence under Sec. 302/34, I. P. C. for committing the murder of Rati Ram, and sentenced them to rigorous imprisonment for life. He also convicted them of an offence under Section 307/34, I. P. C. for causing grievous injury to Raja Ram (P. W. 2) with intent to commit his murder, and sentenced them to rigorous imprisonment for ten years. The respondents were given benefit of doubt in regard to the murder of one Nain Sukh, brother-in-law of Rati Ram, and were acquitted. While no appeal was preferred against the acquittal, the accused went up in appeal to the High Court of Judicature at Allahabad, which took the view that the prosecution had failed to establish the guilt beyond reasonable doubt. The High Court allowed the appeal by its judgment dated January 15, 1974, and set aside the conviction and the sentences of the accused. The State of Uttar Pradesh has therefore filed the present appeal by special leave.

2. The controversy in this Court centres round a short point but, in order to appreciate it, it will

be necessary to make a brief mention of some of the facts.

3. It was alleged by the prosecution that there was a dispute between Rati Ram and respondent Het Ram over a potato field. Rati Ram initiated proceedings under Sec. 144, Cr. P. C. and secured an order of attachment. A panchayat was held thereafter, and it decided that while the potato crop may be given to respondent Het Ram, the field may be given to Rati Ram. It was alleged that the terms of the decision of the panchayat were reduced to writing and that document was handed over to Nain Sukh, brother-in-law of Rati Ram. It was alleged further that on December 24, 1971, Rati Ram and his son Raja Ram (P. W. 2) left for Farukhabad at about 2.45 a.m. in a bullock cart loaded with potatoes for selling them there. Rati Ram's nephew Dwarika (P. W. 3) accompanied them in another bullock cart loaded with potatoes for the same purpose. At about 3.30 a.m., when they were travelling between Jhausa and Rampura villages, they were surrounded by respondents Het Ram, Sobran and Ram Lal who were armed with "Karolis." It is alleged that Het Ram was also armed with a pistol, and Sobran with a lathi. All the three respondents caused injuries to Rati Ram and Raja Ram, who raised an alarm. Dwarika, who was trailing behind in his cart, also raised an alarm and ran towards Jhausa village, but the respondents ran away towards the west before the villagers could arrive saying they would go and kill Nain Sukh. It is said that Nain Sukh was murdered soon after, while he was sleeping in Rati Ram's "chaupal." A report of the incident was lodged at police station Shamshabad shortly afterwards, at about 9.50 a.m.

4. The injuries of Raja Ram and Rati Ram were examined by the Medical Officer, District Hospital, Fatehgarh, the same day. Raja Ram had 26 incised wounds. The injuries of Rati Ram were also examined the same day. He had 7 incised wounds. His dying declaration was recorded by the Sub-Divisional Magistrate on December 24, 1971, and he succumbed to his injuries on December 30, 1971. Nain Sukh succumbed to his

injuries soon after the incident, but we are not concerned with his case as it is not the subject-matter of the appeal before us.

5. The High Court took note of the fact that Raja Ram (P. W. 2) and Dwarika (P. W. 3) were the two eye-witnesses of the prosecution in regard to the incident relating to the injuries inflicted on Rati Ram and Raja Ram. It held that the presence of Raja Ram had been established by the injuries which were received by him, and it also reached the conclusion that Dwarika (P. W. 3) was also present at the time of the incident. After recording that finding, the Judges raised the question whether those witnesses could identify the assailants in the dark night, and answered it in the following manner,—

"As we were not certain whether persons could be identified in a dark night even from a short distance we went to a place where there was no artificial light on 11-1-74, which was the third day of dark fortnight, at about 7.30 p.m. before moonrise along with the learned Government Advocate and Sri Kundan Singh counsel for the appellants. We found that it was extremely difficult to recognise faces even of persons standing within a foot. Although the general outline of the face was visible the features could not be seen clearly. Beyond a distance of two or three feet even the outline of the face was not clear. It is noteworthy that according to the evidence on record the assailants did not speak at all at the time of the occurrence. There was therefore no question of recognition by voice. We are therefore of the opinion that even Raja Ram and Rati Ram who had received injuries in the incident were not in a position to recognise the assailants clearly beyond the possibility of any mistake. According to the evidence on record, Dwarika is alleged to have recognised the assailants from a distance of about five or six paces. From that distance it was not at all possible to do so. The result therefore is that we are not prepared to accept either the dying declaration of Rati Ram or the statements of Raja Ram and Dwarika regarding the complicity of the ap-

pellants in the crime. The implication of the appellants on the basis of suspicion cannot be ruled out as admittedly there was a dispute between Rati Ram and Het Ram in respect of a field which, according to the prosecution, constituted the motive for the crime."

6. The legality and the propriety of the visit of the Judges "to a place where there was no artificial light", at 7.30 p.m. on January 11, 1974, and the inference drawn from that visit, is the only point which has been urged for our consideration, for, as has been stated in the judgment under appeal, that was the basis of the order of acquittal. While Mr. Rana has challenged that action, Mr. Yogeshwar Prasad has argued that the visit was by way of a local inspection within the meaning of Section 539B of the Code of Criminal Procedure and was quite in order. It is admitted that a memorandum of the facts observed by the Judges was not recorded, and Mr. Yogeshwar Prasad has invited our attention to several decisions of High Courts in which it has been held that such an omission was a mere irregularity so long as it could be shown that it had not caused failure of justice or prejudiced the defence.

7. It is not in controversy before us that it is permissible for an appellate court to make a local inspection of the nature contemplated by Section 539B, Sub-section (1) of that section, which bears on the controversy before us, reads as follows,—

"539B (1) Any Judge or Magistrate may at any stage of the inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection."

What is therefore permissible is that a Judge may inspect any "place in,

which an offence is alleged to have been committed," or "any other place" which it is in his opinion necessary to view for the purpose of "properly appreciating the evidence" given at an inquiry, trial or other proceeding. The Judges of the High Court did not, however, inspect any such place in which an offence was alleged to have been committed and, as is obvious, it cannot be said that they inspected any other place which could be said to be necessary to view for the purpose of properly appreciating the evidence in the case. The learned Judges in fact did not go to visit any particular "place" as such, for they went to a place "at a short distance" where there was no artificial light merely for the purpose of ascertaining whether "persons could be identified in a dark night even from a short distance." Theirs was therefore not a local inspection within the meaning of S. 539B, Cr. P. C., for what that section contemplates is the local inspection of the topography of the place in which the offence was alleged to have been committed or its local peculiarities for the purpose of properly appreciating the evidence which was already on the record.

8. It will be recalled that the incident in this case was alleged to have taken place at about 3.30 a.m. on December 24, 1971. The Judges however chose to go and visit a place unconnected with the incident on January 11, 1974, at about 7.30 p.m. for the purpose of ascertaining whether persons could be identified at that hour from a short distance. They thus chose the time and the place of their visit according to their whim and fancy, quite unconnected with the time and place of the incident. Mr. Yogeshwar Prasad has not been able to refer us to any provision of law under which such a course could be said to be permissible. It will be recalled that the Judges did not record a memorandum of any relevant fact observed by them at the time of their inspection. But even if it is assumed, for the sake of argument, that the omission did not prejudice any one and was a mere irregularity, the fact remains

that, as we shall show presently, they did not correlate the result of their inspection to the evidence on record and there is justification for the argument of Mr. Rana that the local inspection cannot be said to have been undertaken for the purpose of properly appreciating the evidence on record.

9. We have extracted that portion of the impugned judgment of the High Court which bears on the controversy before us. There is nothing in the judgment to show the nature of the place which was selected by the Judges for their visit on January 11, 1974 at about 7.30 P. M. It is thus not known whether it was an open place, or it was some such place as the one where the alleged incident took place. The time of the visit had also nothing to do with the alleged incident. It has been stated by the Judges that they found that it was "extremely difficult to recognise faces even of persons standing within a foot, "but they have not stated whether it was impossible to recognise the faces of even those persons who were relations and were well known to the witnesses over a long period of time. The statement of Raja Ram (P. W. 2) in the trial Court was read out to us. He has stated that the accused gave the beating while clinging to the victims at close quarters. There is however nothing in the judgment of the High Court to show whether the darkness found by the Judges was so intense that even those clinging to the victims could not be identified by them in the darkness which the Judges found at the time of their inspection. The statement that it was extremely difficult to recognise faces of persons standing within a foot, was thus quite immaterial because the evidence in the present case was not that the accused were standing at that distance but that they were clinging to the victims. It has further been stated in the impugned judgment that "although the general outline of the face was visible the features could not be seen clearly." It has not however been stated whether the features of well familiar faces could also not be recognised. The same criticism ap-

plies to the observation that beyond a distance of two or three feet, even the outline of the face was not clear. It would thus appear that it is not possible to contend that the local inspection on which considerable reliance was placed by the learned Judges was undertaken for the purpose of "properly appreciating the evidence" on the record. If we may say so, the inspection was not utilised for any such purpose. It had the effect of substituting the personal observations of the Judges for the evidence on the record. It is a matter of regret that those views should have formed the basis for rejecting the prosecution evidence altogether. It has to be remembered that Raja Ram (P. W. 2) received as many as 26 incised wounds, some of which were on the front part of his body. He has stated at the trial that the accused were clinging to him so that, according to him, he was facing them at very close quarters. Rati Ram received 7 injuries including those on the chest. He also thus had the opportunity of identifying them at very close quarters. The statement of Raja Ram and the dying declaration of Rati Ram should therefore have been examined by the High Court, as the Court of first appeal, on their merits and not on the fanciful ground that the Judges who went for local inspection found, on their own examination, that it was extremely difficult to recognise the faces of the assailants.

10. For the reasons mentioned above, we have no doubt that the procedure adopted by the Judges in visiting quite a different place, on a date and time unconnected with the time of the alleged incident, for the purpose of deciding whether the witnesses could identify the assailants in the darkness, was quite illegal and it was not permissible for them to dispose of the case on the basis of their own findings without regard to the evidence which was already on the record. We are therefore constrained to set aside the impugned judgment dated January 15, 1974 and to direct that the High Court shall rehear the appeal according to the law and dispose of it within a period of three weeks. The record

of the case may be sent to the High Court by a special messenger to avoid any delay in transit.

Acquittal set aside;
appeal remanded.

AIR 1976 SUPREME COURT 2128

(From: Punjab and Haryana)*

H. R. KHANNA, P. N. BHAGWATI
AND S. MURTAZA FAZL ALI, JJ.

Bhagat Ram Batra, Appellant v.
Union of India and others, Respondents.

Civil Appeal No. 1875 of 1970,
D/- 27-11-1975.

(A) Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 20 — Auction sale of evacuee property — Auction purchaser, a displaced person — He repudiating his liability on the ground that the area of the property auctioned was less than the area represented at the time of sale — Sale in his favour cancelled and re-sale ordered — Re-sale of property at an appreciated price — Held that he could not contend that the sale in his favour should not have been cancelled — Further the authorities were not bound to accept his conditional offer that he was prepared to accept property if proportionate reduction in the price offered by him was allowed as the area had been found less than what was represented. (Contract Act (1872), Sections 6, 7). (Para 4)

Mr. Naunit Lal, Advocate, for Appellant; Mr. S. K. Bagga, S. Bagga and Miss Yash Bagga, Advocates, for Respondent No. 4.

Judgment of the Court was delivered by

KHANNA, J.:— This is an appeal on certificate by Bhagat Ram Batra against the order of the Punjab and Haryana High Court whereby a petition under Article 226 of the Constitution of India filed by the appellant against the Union of India and three others was dismissed in limine.

2. The appellant is a displaced person. On October 15, 1959

*(C. W. No. 1437 of 1969, D/- 18-8-1969—(Punj. and Har.)).

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evacuee property 2 N. A. C. Ambala City was sold by public auction. The appellant gave the highest bid of Rs. 72,700/- and his bid was accepted. The appellant wanted Rupees 45,620/05 paise, on account of compensation for the claim in respect of his property left in Pakistan, to be adjusted towards the sale price. Before the appellant could pay the balance of the price, he made a representation to the rehabilitation authorities that there had been an encroachment upon the property for which he had given the bid by the owner of the adjoining property and that the area of the property auctioned in his (the appellant's) favour was less than the area mentioned at the time of the auction sale. The rehabilitation authorities inspected the spot and found that the area of the property in fact was less than that assessed by the valuation unit.

3. In his letter dated March 12, 1963, the appellant wrote to the Regional Settlement Commissioner that as the area of the property sold in his favour was less than what had been represented at the time of the auction sale, he was "not liable in purchase of the property, i.e., bungalow 2 N. A. C. Ambala City and am free from all liabilities." The Managing Officer (Sales) as per order dated July 21, 1966 cancelled the sale in favour of the appellant and directed that the property in question be re-sold by public auction. The property was thereafter re-sold by public auction on September 24, 1966 for rupees one lakh one thousand in favour of respondent 4. As the price of the property had appreciated, the appellant went up in appeal against the order of the Managing Officer and prayed that the auction sale in his favour should not have been cancelled. The appeal of the appellant was dismissed by the Assistant Settlement Commissioner as per order dated October 31, 1966. Revision filed by the appellant to the Chief Settlement Commissioner also met the same fate as per order dated May 17, 1969. The appellant then filed a writ petition before the Punjab and Haryana High Court to challenge the orders dated July 21,

1966, October 31, 1966 and May 17, 1969, but the said petition, as already stated above, was dismissed in limine.

4. We have heard Mr. Naunit Lal on behalf of the appellant and are of the opinion that there is no merit in this appeal. As would appear from the resume of the facts given above, the appellant did not stick to the auction sale in his favour, because he found that the area of the property sold in his favour was less than what had been represented at the time of the auction sale. It was at the instance of the appellant that the Managing Officer cancelled the auction sale in favour of the appellant. The appellant, it seems, subsequently realised that as the value of the property had appreciated, he should not have asked for cancellation of the auction sale in his favour. This was, however, too late, because an order had already been made by the Managing Officer for the re-sale of the property. As it is, we find that as a result of the re-sale, the property fetched a price of rupees one lakh one thousand as against the price of Rs. 72,700 offered by the appellant. An offer was also made by the appellant that he was prepared to accept the property in dispute if the rehabilitation authorities allowed proportionate reduction in the price offered by him on account of the fact that the area of the property had been found to be less than what had been represented at the time of the auction sale. This was a conditional offer and the rehabilitation authorities were not bound to accept that offer. We find no cogent ground to interfere with the order of the High Court. The appeal fails and is dismissed but with no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2130

(From: AIR 1976 Orissa 85)

H. R. KHANNA, V. R. KRISHNA
IYER AND N. L. UNTWALIA,
JJ.Jugal Kishore Patnaik, Appel-
lant v. Ratnakar Mohanty, Respon-
dent.Civil Appeal No. 910 of 1975,
D/- 26-7-1976.

(A) Representation of the People Act (1951), Section 100 (1) (c) — Improper rejection of nomination papers — Effect — Election has to be declared as void — Objections by a contesting candidate to the validity of nomination papers of another candidate — Objections upheld and nomination rejected — Election petition against elected candidate by such person whose nomination was rejected — Allegations that objections were raised in collusion with the election petitioner and the elected candidate ought not to suffer — Held, on facts that the elected candidate has admitted about objections being genuine in his written statement and he could not be allowed to take inconsistent stand — Further held that in view of imperative nature of Section 100 (1) (c) election had to be declared void. (Para 11)

(B) Representation of the People Act (1951), Section 82 — Election Petition — Necessary parties — Absence of prayer in election petition that the petitioner or any other person should be declared elected — Absence of allegation of corrupt practice — Only elected candidate impleaded — Requirement of law, held, was fully satisfied — Fact that a person who had raised objection to the nomination paper of the election petitioner, was not impleaded, held, was, not fatal. (Para 10)

(C) Representation of the People Act (1951), Section 9A — Subsisting contract with the State Government — Contract of execution of work undertaken by Government — Work to be executed by Gram Panchayat — Contract signed by the candidate not in his personal capacity but as a President of Gram Panchayat — Held, no disqualification was

incurred — Further, held on appreciation of evidence that the contract was not subsisting on the date of filing of nomination paper.

(Paras 12, 13 and 14)

Deficiencies in section pointed out. (Paras 18 and 19)

(D) Representation of the People Act (1951), Section 81 (3) — Compliance with — Proof — Attested copy of petition under respondent's signature alleged to have been sent with summons — Copy affixed on the residence of appellant as the latter refused to receive — Endorsement by officer of High Court that copy was filed — Further endorsement about there being no defect in petition made by officer of the High Court — Held, that petition did not suffer from lack of compliance with procedural requirement. (Para 8)

Mr. D. P. Singh, Sr Advocate, (M/s. R. P. Singh and Rajiv Dutta, Mrs. Nilma and M/s. L. R. Singh and R. K. Jain, Advocates with him), for Appellant; M/s. Santosh Chatterjee, G. S. Chatterjee and D. P. Mukherjee, Advocates, for Respondent.

The following Judgments of the Court were delivered by

KHANNA, J.:— (on behalf of himself and N. L. Untwalia J.) On an election petition filed by Ratnakar Mohanty respondent, the election of Jugal Kishore Patnaik appellant to the Orissa Legislative Assembly from Bhadrak constituency was declared to be void by the Orissa High Court and as such set aside. The appellant has filed the present appeal against the judgment of the High Court.

2. Bhadrak assembly constituency is a single-member general constituency. During the general elections to the Orissa Legislative Assembly held in February 1974, the respondent filed four nomination papers for being elected from this constituency. At the time of scrutiny on January 30, 1974, objection was raised at the instance of Balaram Sahu, one of the contesting candidates, before the Returning Officer that the respondent was disqualified for being chosen as a member of the Assembly as there subsisted contracts between him and the Govern-

ment of Orissa for execution of certain works. The respondent, it was accordingly asserted, was disqualified under Section 9A of the Representation of the People Act, 1951 (hereinafter referred to as the Act) from seeking election. Some documents were also produced before the Returning Officer to show that proceedings had been initiated by the Block Development Officer for realisation of certain amounts alleged to be due under those contracts from the respondent. The Returning Officer upheld the objection and rejected the nomination papers of the respondent.

3. Four candidates contested the election, but the main contest was between the appellant, a Congress nominee, who secured 25,522 votes, and Balaram Sahu, an Utkal Congress nominee, who secured 18,723 votes. The result of the election was declared on February 28, 1974. Petition to challenge the election of the appellant was filed by the respondent on April 12, 1974.

4. The case of the respondent, as set up in the election petition was that his nomination papers had been improperly rejected by the Returning Officer. According to the respondent, the works on account of which he had been held to be disqualified by the Returning Officer had been undertaken by him not in his personal capacity but as the Sarpanch of Rahanj Gram Panchayat under the Bhadrak Panchayat Samiti. The respondent, therefore, prayed that the election of the appellant be declared to be void.

5. The petition was resisted by the appellant. Objections were raised on his behalf that the petition was liable to be dismissed for non-compliance with Sections 81, 82 and 83 of the Act. It was also averred that the nomination papers filed by the respondent were not in conformity with Sections 33 and 34 of the Act. On merits, the appellant stated that the respondent was disqualified under Section 9A of the Act from seeking election to the Legislative Assembly of Orissa because he had on the date of filing of the nomination papers subsisting contracts with the Government of Orissa in course of his trade and business for execu-

tion of work undertaken by the Government. Following issues were framed by the High Court:

ISSUES

1. Is the election petition liable to be dismissed for non-compliance of Sections 81, 82 and 83 of the Representation of the People Act, 1951?

2. Whether the nomination paper filed by the petitioner was in substantial compliance of Sections 33 and 34 of the Representation of the People Act, 1951?

3. Was the petitioner disqualified under Section 9A of the Representation of the People Act, 1951 having subsisting contract with the Government of Orissa in course of his trade and business for execution of work undertaken by the Government on the date of the filing of the nomination?

4. To what relief, if any, the petitioner is entitled to in the facts and circumstances of the case?"

Issues (1) to (3) were decided by the High Court in favour of the respondent and against the appellant. In the result, the election of the appellant was declared to be void.

6. In appeal before us Mr. D. P. Singh has at the outset assailed on behalf of the appellant the finding of the High Court on issue No. (1). The challenge to the finding on issue No. (1) is, however, confined only to alleged infraction of sub-section (3) of Section 81 of the Act. According to that sub-section, every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. Mr. Singh contends that no attested copy of the election petition signed by the petitioner was filed along with the petition. This contention has been controverted by Mr. Chatterjee on behalf of the respondent, who submits that a copy of the petition attested by the respondent under his own signature was filed along with the petition. It is further pointed out that the said attested copy of the petition was sent along with the summons to the appellant, but as he declined to accept the summons, the attested copy along

with the summons was affixed at his residence. The above stand of the respondent is borne out by the report of the process-server.

7. Mr. Singh has assailed the correctness of the above report of the process-server, and has contended that in the index attached to the petition there was no reference to the copy. As against that, it is submitted on behalf of the respondent that it is not the usual practice in the High Court to refer to the copy of the petition in the index.

8. There are, in our opinion, some broad facts of the case which lend support to the finding of the High Court on issue No. (1) that the election petition was accompanied by an attested copy signed by the respondent. Endorsement dated April 15, 1974 made by an officer of the High Court shows that a copy of the election petition had been filed. We find no cogent reason as to why an officer of the High Court should make a false endorsement on the petition if, in fact, no such copy had been filed. As regards the factum of the attestation of the copy by the respondent under his own signature, we find that the appellant cannot in the very nature of things assert positively that the copy had not been attested by the respondent as, according to him, he did not see that copy. The copy was also not available on the record as the same had been affixed at the residence of the appellant when he, according to the report of the process-server, declined to accept the summons. Before summons was issued to the appellant, the following endorsement was made by an officer of the High Court in respect of the election petition filed by the respondent:

"Defect: Nil."

We see no cogent ground to question the correctness of this endorsement which clearly lends support to the inference that the copy filed with the petition had been attested by the respondent and that the petition did not suffer from lack of compliance with the procedural requirement.

9. Mr. Singh has next assailed the correctness of the finding of the High Court on issue No. (2). It is urged that the respondent obtained signatures of his proposers on blank

nomination papers, subsequently filled in the columns and then filed the nomination papers. It is, in our opinion, not necessary to express opinion about three of the nomination papers as we find that one of the nomination papers in any case did not suffer from any such alleged infirmity. This nomination paper of the respondent was signed by Lakshmikant Mahapatra (P. W. 3) as proposer. Evidence of this witness clearly shows that he signed the nomination paper as proposer of the respondent after the various columns in that paper had been filled in. Nothing has been brought to our notice as to why the statement of the witness in this respect be not accepted. As at least one of the nomination papers filed by the respondent was in compliance with the legal requirement, the High Court, in our opinion, correctly decided issue No. (2). In view of the above finding, it is not necessary to express opinion on the point as to whether a nomination paper should be held to be invalid in case the signature of the proposer is obtained before filling in the columns of the nomination paper.

10. It has been faintly argued that Balaram Sahu, who raised objection to the validity of the nomination papers of the respondent, was not impleaded as a party in the election petition and as such the petition was liable to be dismissed for non-joinder of parties. This submission too is bereft of force. According to Sec. 82 of the Act, a petitioner shall join as respondent to his petition where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates. It is further provided that if allegations of any corrupt practice are made in the petition against any other candidate, he too shall be joined as a respondent. In the present case, there was no prayer made by the respondent in the election petition that he or any other person should be declared to have been duly elected.

There was also no allegation of corrupt practice against any candidate. In the circumstances, the requirements of law should be held to be fully satisfied when the respondent impleaded the successful candidate, namely, the appellant, as a respondent in the petition.

11. Contention has also been advanced on behalf of the appellant that the objections of Balamram Sahu before the Returning Officer about the validity of the nomination papers of the respondent were raised in collusion with the respondent. The appellant, who has been duly elected, should not, according to the contention, suffer because of any order made on such collusive objections. In this respect we find that there is no factual basis for the assertion that the objections which were raised by Balamram Sahu about the validity of the nomination papers of the respondent were of collusive character. On the contrary, the appellant in the course of his written statement stated in respect of the objections as under:

"At the time of the scrutiny valid and genuine objections were filed against the petitioner on the ground that there was subsisting contract between the petitioner and the Government of Orissa and as such he was disqualified to be a candidate." In view of the unequivocal assertion of the appellant in the written statement that the objections were valid and genuine, it would not be permissible for the appellant to take an inconsistent stand in appeal and urge that those objections had been filed in collusion with the respondent. Apart from that, we find that according to Section 100 (1) (c) of the Act, if the High Court is of the opinion that any nomination has been improperly rejected, it shall declare the election of the returned candidate to be void. In view of the imperative nature of the provision, it is open to question as to whether the courts can, in the event of an improper rejection of nomination, afford relief to the successful candidate on the score that the objections resulting in the improper rejection of the nomination, were collusive. Whether the legislature would do some-

thing in the matter is essentially for the legislature to decide.

We need not, however, dilate upon this aspect of this case in the face of our finding that the appellant has clearly admitted in the written statement that the objections which were filed about the validity of the nomination papers of the respondent were not collusive but were genuine.

12. Lastly, Mr. Singh has assailed the finding of the High Court on issue No. (3). Although during the course of the trial of the election petition the appellant relied upon 15 items to show that the respondent had entered into works contracts with the State Government, in this Court Mr. Singh has confined his argument to only two items, namely, item No. (1) and item No. (8). Item No. (1) relates to an advance of Rs. 100 for repair of Erein School. The case of the respondent is that the above amount was received by him as Sarpanch of Gram Panchayat Rahanj, and that the said work had to be executed by that Gram Panchayat and not by the respondent personally. The High Court accepted the stand of the respondent, and we found no cogent ground to take a different view. Ex. 43 is letter dated December 3, 1968 signed by the Sub-Divisional Officer Bhadrak to the Certificate Officer for recovery of Rs. 7,017/-. This letter shows that the aggregate sum of Rs. 7,017, of which Rs. 100 was a part, constituted the fund of the Gram Panchayat. Order dated May 25, 1965 of the Block Development Officer also shows that the work on account of which Rs. 100 were paid had to be executed through the agency of Rahanj Gram Panchayat. To similar effect is the statement of PW 9 Khageswar Roy, Block Development Officer. The evidence of this witness shows that the amount in question was given to the Gram Panchayat for repair work. The above material, in our opinion, clearly shows that the contract for the execution of the repair work, which is the subject-matter of item No. (1), was not entered into with the respondent in his personal capacity and that the said work had to be executed by the Gram Panchayat.

13. So far as item No. (8) is concerned, the same relates to work of wooden culvert No. 9 on Jamuhari Khirkona road. Ex. 55 is the written agreement relating to this contract. Perusal of the agreement makes it clear that the tender in respect of this work was accepted on behalf of the Modern Labour Co-operative Contract Society, of which the respondent was the President. The document thus shows that it was not the respondent but the Society which entered into contract for the execution of the above work, and the respondent signed the document in his capacity as the President of that Society.

14. Apart from the above, we agree with the High Court that the above contract was not subsisting on the date of the filing of the nomination paper. The agreement for the execution of the above work was dated May 8, 1964. On November 24, 1966 an order was made by the Block Development Officer that the construction work of the culvert had been completed since long and final measurements too had already been made. The total work was found to be worth Rs. 4,253.70. It was further observed in the order that Rs. 722 should be paid on account of the above work after deducting the previous advances and cost of the material. The contractor was directed to return the material used in the tubewell. The above order of the Block Development Officer shows that the cost of the material and the amounts advanced to the respondent were deducted before direction was given for payment of Rs. 722 to the contractor. Mr. Singh has laid particular stress upon the direction in the order of the Block Development Officer that the contractor should return the material used in the tubewell. In respect of the material used in the tubewell, it appears to us that the said material was also returned by the contractor the same day the order was made. According to the testimony of RW 11 J. K. Satpathy Block Development Officer, if the material required to be returned as per that last order was not returned, the final bill amount in respect of that work could not have been paid. Rs. 722 were, how-

ever, admittedly paid on November 24, 1966. The factum of that payment clearly points to the conclusion that the contractor returned the material used in the tubewell before the payment of Rs. 722 was made to him. There is also nothing to show that any demand was made to the contractor subsequent to 1966 for return of the material used in the tubewell. The absence of any such demand, even though a long period had elapsed since 1966, clearly goes to show that no material used in the tubewell remained with the contractor. It cannot, therefore, be said that the said contract was subsisting on the date the respondent filed his nomination paper. We consequently uphold the finding of the High Court on items (1) and (8) under issue No. (3).

15. As a result of the above, we dismiss the appeal, but in the circumstances without costs.

KRISHNA IYER, J.:— 16.

Whole-hearted is my agreement with the judgment of my learned brother Khanna J., both in the conclusions and in the reasonings. This does not obviate an extra opinion on certain deeper, though peripheral, aspects of the law thrown up by the facts, disturbing in their implications and laying bare certain gaping gaps in the election law. In a democracy, the electoral process has a strategic role and in India it has constitutional status although canalised by the Representation of the People Act, 1951 (hereinafter called the Act). Lord Holt long ago observed*:

"A right that a man has to give his vote at an election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes. The right of voting at the election of burgesses is a thing of highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it."

*Quoted in University of Pennsylvania Law Review 1968 p. 24 (Vol. 117).

And, if I may add, this widespread right belongs to every common citizen.

17. In such circumstances, no one can gainsay the need for the provisions regulating disqualifications affecting the adult franchise to run for elective office to be fool-proof to that degree that the little man of India may confidently participate in the political process without being exposed to booby traps of the law.

18. In this case an election was honestly fought and won by the appellant but the verdict has been reduced to a Dead Sea fruit by a surprise blow of the law because the respondent's nomination on the capitious objection of the defeated candidate (the appellant being innocent, at that stage, of raising any obstructive tactic), was illegally rejected. The facts, already set out by my learned brother, disclose that the wrong rejection by the Returning Officer was on the score that he had subsisting contracts with the State Government. This ground was plausibly urged before the Returning Officer by a candidate who polled poorly. The Officer was taken in by the specious plea and rejected the respondent's nomination. Its aftermath, long after the election was fought and won, is that the people's verdict has been stultified and its victim is the then innocent appellant. Had there been any procedure for double-quick determination of objections to nominations with early appellate finality attached to it, the lurking danger of the whole process being ultimately balked on account of antecedent official error would not have arisen — a consummation devoutly to be wished. Nor does it require great imagination to make provision in this behalf, but its omission has led to the martyrdom of the appellant and the orphanage of the electorate.

19. Yet another legislative insufficiency surrounding Section 9A of the Act needs to be highlighted. This provision, as has been explained earlier by my learned brother, disqualifies a person from being a candidate if there subsists a contract entered into by him in the course of his trade or business with the appropriate government for the supply of goods

to, or for the execution of any works undertaken by that government. It is followed by an Explanation which is more or less a legal fiction. The rugged edges of ambiguity of Section 9A especially as to how long and in what sense can a contract be said to be subsisting envelop the disbarment provision with subtle legal questions. The common man of India is the potential candidate and is he to risk his candidature on the niceties of the law of contracts? In this context we must remember that the vast and various developmental works undertaken by the State and its subsidiaries and executed by a large number of little construction contractors make it very desirable that the disqualificatory net should not be cast too wide to disfranchise innumerable persons and must be easy of ascertainment if uncertainty is not to overhang elections in our political system. In this very case several problems were mooted, somewhat difficult to answer. How long does a contract subsist? Is every liability arising on a breach of contract, a claim under the contract attracting the lethal coils of Sec. 9A? If government money is involved in the execution of the work, does the contract necessarily become one with government? A host of other questions may mystify the legal import of the taboo Section 9A sets out and yet every lay man is imperilled by this vague provision in the exercise of his electoral right. Such a brooding fear and haunting provision is counter-productive and may perhaps have to be re-drafted in the light of experience in court. These are problems not of high-sounding law but affecting the common man in the exercise of his most democratic right. Nietzsche once said: 'The great problems are in the streets'. The inaugural error in the drawing up of our election law, as is illustrated by this case, is that sophisticated provisions amenable to logico-linguistic feats or subtle interpretation of civil law ill suit a regulatory area of the political process where the small individual offers himself for electoral contest. I choose to make these observations and draw the attention of the concerned instrumentalities only because in my humble

view the court has an activist role to tell the nation, through its judgment or other designated channels where the law misfires, or how the law stands in need of reform. This case therefore induces me to make what may be regarded as obiter:

"The little case, the ordinary case, is a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our law."*

More than a hundred years ago Lord Chancellor Westbury made certain seminal observations:**

"The first thing, then, that strikes every member of our profession who directs his mind beyond the daily practical necessity of the cases which come before him is, that we have no machinery for noting, arranging, generalising and deducing conclusions from the observations which every, scientific mind could naturally make on the way in which the law is worked in the country..... Take any particular department of the common law — take, if you please, any particular statute. Why is there not a body of men in this country whose duty it is to collect a body of judicial statistics, or, in the more common phrase, make the necessary experiments to see how far the law is fitted to the exigencies of society, the necessities of the times, the growth of wealth, and the progress of mankind?"

Way back in 1921, Benjamin N. Cardozo, then a Judge of New York's highest court, said:†

"The Courts are not helped as they could and ought to be in the adaptation of law to justice. The reason they are not helped is because there is no one whose business it is to give warning that help is needed..... We must have a courier who will carry the tidings of distress. Today courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in

*Quoted in (1961-62) 71 Yale LJ p. 259.

**Quoted in Vol. 28, Mod. L.R. p. 1;

†Address to the Association of the Bar of the City of New York, quoted in** supra.

the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agent must be found to mediate between them."

Maybe, as has been done in the State of New York, the establishment of a Law Revision Commission charged with comprehensive law reform duties with direct link with the law court may go a long way to meet the felt need.

Appeal dismissed.

AIR 1976 SUPREME COURT 2136 =
1976 TAX. L. R. 1716

(From Madras: (1974) 34 STC 364)

A. N. RAY, C. J., M. H. BEG AND
JASWANT SINGH, JJ.

Thvl. Bombay Ammonia Pvt. Ltd., Appellant v. The State of Tamil Nadu, Respondent.

Civil Appeal No. 1699 of 1973,
D/- 24-3-1976.

(A). T. N. General Sales Tax Act (1 of 1959), Section 32 — Suo motu power of revision — It can be exercised in favour of revenue as well as tax payer.

The suo motu power of revision of the Deputy Commissioner is of wide amplitude and can be exercised in favour of the Revenue as well as the tax payer in order to correct any error or illegality committed by the assessing authority in his order of assessment. (Para 15)

The language of S. 32 makes it clear that the suo motu power con-

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ferred on the Deputy Commissioner in regard to the order or proceeding specified therein is quite wide and he can subject to the conditions laid down in sub-sections (2) and (3) exercise the same even at the instance of an assessee who has not filed an appeal against the order for the purpose of rectifying any illegality or impropriety therein. (Case law discussed). (Para 11)

(B) T. N. General Sales Tax Act (1 of 1959), S. 32 — Suo motu power of revision — Refusal to exercise in favour of assessee — Refusal in the circumstances, held was justified.

The assessing authority under the Sales Tax Act determined the taxable turnover by making an addition to the reported turnover. No appeal was filed against the assessment. Thereafter, the revisional authority in exercise of suo motu powers under Section 32, issued notice purporting to levy penalty on the undisclosed turnover viz. the amount added to the turnover by the authority. The assessee claimed that a portion of the turnover subjected to assessment was exempt from tax as it related to works contract. The Dy. Commissioner rejected this claim on the ground that the assessee had not questioned the assessment at any stage before. The Tribunal however considered the case and granted some relief.

Held, that the assessee not having raised the question by claiming the exemption, the Assessing Authority had no occasion to consider it. It could not therefore, be said that the order of assessment suffered from any illegality. It is also significant that the assessee acquiesced in the order of assessment passed by the assessing authority and did not prefer any appeal against it nor did he take any other step to have it modified. Even in the objections filed by him to the show cause notice issued by the Deputy Commissioner in regard to the levy of penalty, he made a half-hearted attempt to claim exemption. Therefore, the Deputy Commissioner rightly refused to exercise his revisional jurisdiction in favour of the assessee and the High Court was right in reversing the order of the Appellate Tribunal in so

far as it related to the assessee's claim to the exemption. (1974) 34 STC 364 (Mad), Affirmed.

(Paras 16, 17)

Cases Referred: Chronological Paras
 AIR 1968 SC 843 = (1968) 21 STC 383 12, 14
 AIR 1965 SC 1585 = (1965) 16 STC 875 12, 14
 (1965) 16 STC 689 = (1965) 2 SCWR 109 16
 AIR 1958 SC 560 = 1959 SCR 379 17
 AIR 1954 SC 1130 = (1954) 5 STC 216 17

Mr. K. S. Ramamurthi, Sr. Advocate, (Mrs. S. Gopalakrishnan, Advocate with him), for Appellant; Mr. P. Ram Reddy Sr. Advocate, (Mr. A. V. Rangam and Miss A. Subhashini, Advocates with him), for Respondent.

Judgment of the Court was delivered by

JASWANT SINGH, J.:— This is an appeal by Special Leave against the judgment and order dated May 4, 1973 passed by the High Court of Madras in T. C. No. 223 of 1969.

2. It appears that the appellants who are dealers in refrigerators spare parts etc. submitted a return for the year 1964-65 to the Joint Commercial Tax Officer, Madras (hereinafter called the 'Assessing Authority') under the Madras General Sales Tax Act, 1959 (hereinafter referred to as 'the Act') showing a total taxable turnover of Rupees 6,41,031.77. On checking the accounts of the appellants, the Assessing Authority by its order dated January 31, 1966 made an addition of Rs. 33,710.88 to the turnover reported by the appellants and assessed the sales Tax on the turnover of Rupees 6,74,742.65. The appellants did not choose to prefer an appeal against this assessment.

3. On January 7, 1967, the Deputy Commissioner, Commercial Taxes, Madras Division, in exercise of his suo motu power of revision under Section 32 of the Act issued a notice to the appellants calling upon them to show cause why a penalty of Rs. 5,056/- on the aforesaid undisclosed turnover of Rs. 33,710.88 be not levied against them.

4. In response to the notice, the appellants submitted their objec-

tions challenging the jurisdiction of the Deputy Commissioner to levy the proposed penalty and requested him to drop the proceedings. In the alternative, they prayed that they should be granted exemption in respect of Rs. 6,32,142/- which represented works contracts for complete fabrication, erection and installation of air-conditioning plants with their employers which did not amount to sale of goods.

5. The Deputy Commissioner negatived the contention of the appellants regarding his jurisdiction to levy the penalty, and revising the assessment levied a penalty of Rupees 3,371/- under Section 12 (3) of the Act. The Deputy Commissioner also declined to allow the aforesaid exemption claimed by the appellants on the ground that they 'did not file appeals in the regular course as contemplated by the provisions of the Act'.

6. The appellants went up in appeal from this order to the Sales Tax Appellate Tribunal, Madras, who substantially allowed the appeal, cancelled the penalty and acting on the statements of transactions filed before him by the appellants allowed an exemption from tax on a turnover of Rs. 5,99,468/- as representing the works contracts holding that as suo motu power of revision could be exercised by the Deputy Commissioner both for the benefit of the State and the tax-payer, he should have gone into the question of exemption and set right the assessment by allowing the exemption on the turnover relating to works contracts.

7. Aggrieved by this order of the Sales Tax Appellate Tribunal, the respondent filed a petition under Section 38 of the Act to the High Court of Judicature at Madras for revision of the order of the Sales Tax Appellate Tribunal. The High Court allowed the revision petition in part and set aside the order of the Tribunal in so far as it related to the deletion of the turnover of Rupees 5,99,468/-.

8. Counsel for the appellants has urged before us that as the suo motu power of revision under Section 32 of the Act is wide enough

and can be exercised both in favour of the revenue as well as the assessee regardless of the fact whether the latter has filed an appeal against the order of assessment or not, the High Court ought not to have reversed the order of the Sales Tax Appellate Tribunal in respect of the turnover of Rs. 5,99,468/- which related to works contracts.

9. Two questions arise for determination in this appeal. Firstly is the scope of the suo motu power under Section 32 of the Act. Secondly, whether the Deputy Commissioner rightly refused to exercise discretion under Sec. 32 of the Act in favour of the appellants.

10. For the determination of the first question, it is necessary to refer to Section 32 of the Act which runs as follows:—

"32 Special powers of the Deputy Commissioners.—

(1) The Deputy Commissioner may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority under Section 4-A, Section 12, Section 14, Section 15, or sub-sections (1) and (2) of Section 16, and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under sub-section (1), if—

(a) the time for appeal against the order has not expired;

(b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal, or of a revision in the High Court; or

(c) more than five years have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

(4) In computing the period referred to in clause (c) of sub-section (2), the time during which the proceedings before the Deputy Commissioner remained stayed under the

order of a Civil Court or other competent authority shall be excluded."

11. The language of this section makes it clear that the suo motu power conferred on the Deputy Commissioner in regard to the order or proceeding specified therein is quite wide and he can, subject to the conditions laid down in sub-sections (2) and (3), exercise the same even at the instance of an assessee who has not filed an appeal against the order for the purpose of rectifying any illegality or impropriety therein.

12. This section has also been subject-matter of interpretation in two decisions of this Court viz. *State of Kerala v. K. M. Cheria Abdulla and Co.*, (1965) 16 STC 875 = (1965) 1 SCR 601 = (AIR 1965 SC 1585) and *Swastik Oil Mills Ltd. v. H. B. Munshi*, (1968) 21 STC 383 = (AIR 1968 SC 843). In the case of *K. M. Cheria Abdulla and Co.* (supra) the majority held as follows in regard to the scope of the revisional power:—

"The Deputy Commissioner is thereby invested with power to satisfy himself about the legality or propriety of any order passed or proceeding recorded by any officer subordinate to him; or the regularity of any proceeding of such officer, and to pass such orders with respect thereto as he thinks fit. For exercising this power, he may suo motu or on application call for and examine the record of any proceeding or order. There is no doubt that the revising authority may only call for the record of the order or the proceeding and the record alone may be scrutinised for ascertaining the legality or propriety of an order or regularity of the proceeding. But there is nothing in the Act that for passing an order in exercise of his revisional jurisdiction, if the revising authority is satisfied that the subordinate officer has committed an illegality or impropriety in the order or irregularity in the proceedings, he cannot make or direct any further enquiry It is, therefore, not right baldly to propound that in passing an order in the exercise of his revisional jurisdiction the Deputy Commissioner must in all cases be

restricted to the record maintained by the Officer subordinate to him and can never make enquiry outside that record..... Jurisdiction to revise the order or proceeding of a subordinate officer has to be exercised for the purpose of rectifying any illegality or impropriety of the order or irregularity in the proceeding."

13. The limitations to which the revisional power is subject were indicated by the majority thus:—

"It would not invest the revising authority with power to launch upon enquiries at large so as to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the limitations inherent in the exercise of those powers. For instance, the power to reassess escaped turnover is primarily vested by Rule 17 in the assessing officer and is to be exercised subject to certain limitations, and the revising authority will not be competent to make an enquiry for reassessing a tax-payer. Similarly, the power to make a best judgment assessment is vested by Section 9 (2) (b) in the assessing authority and has to be exercised in the manner provided. It would not be open to the revising authority to assume that power."

14. The above view was affirmed by this Court in the case of *Swastik Oil Mills Ltd.*, (AIR 1968 SC 843) (supra). In regard to the limitations to which the revisional power is subject, this Court went on in that case to observe:—

"In fact, when a revisional power is to be exercised, we think that the only limitations, to which that power is subject, are those indicated by this Court in *K. M. Cheria Abdulla & Co.*'s case, (1965) 16 STC 875 = (AIR 1965 SC 1585). These limitations are that the revising authority should not trench upon the powers which are expressly reserved by the Acts or by the Rules to other authorities and should not ignore the limitations inherent in the exercise of those powers."

15. In view of the above, we are of opinion that the suo motu power of revision of the Deputy Commissioner is of wide amplitude.

and can be exercised in favour of the Revenue as well as the taxpayer in order to correct any error or illegality committed by the assessing authority in his order of assessment.

16. With regard to the second question relating to the refusal by the Deputy Commissioner to exercise his revisional power in favour of the appellants, we are of the view that the order does not suffer from any infirmity. It is true that money paid under a mistake of law common both to the assessee and the taxing authority can be got refunded (see the decision of this Court in *State of Kerala v. Aluminium Industries Ltd.*, (1965) 16 STC 689 (SC)). But in the instant case, the appellants themselves submitted a return showing taxable turnover of Rs. 6,41,031.77. At no stage of the assessment proceedings before the assessing authority did they bring it to his notice that a substantial portion of the turnover related to works contracts and was as such exempt from liability to tax. The appellants not having raised the question by claiming the exemption, the Assessing Authority had no occasion to consider it. It cannot, therefore, be said that the order of assessment suffered from any illegality. It is also significant that the appellants acquiesced in the order of assessment passed by the assessing authority and did not prefer any appeal against it nor did they take any other step to have it modified. Even in the objections filed by them to the show cause notice issued by the Deputy Commissioner in regard to the levy of penalty, they made a half-hearted attempt to claim exemption. It will be relevant in this connection to advert to the prayer made by them which is couched in the following terms:—

"In the circumstances we request you that the Deputy Commissioner may either totally drop the proposal to levy penalty or in the alternative totally cure the illegality of the assessment and render justice."

17. The plea put forth by the appellants that they did not claim exemption under the mistaken impression that the transactions amounted to sale of goods cannot

also be countenanced in view of the fact that so far back as in 1954 it was held by the Madras High Court in *Gannon Dunkerley and Co. Ltd. v. State of Madras*, (1954) 5 STC 216 = (AIR 1954 SC 1130) that works contracts did not involve any element of sale of materials and the levy of sales tax thereon was unlawful. This ruling was affirmed by this Court in *State of Madras v. Gannon Dunkerley and Co. Ltd.*, (1959) SCR 379 = (AIR 1958 SC 560). We are, therefore, of the view that the Deputy Commissioner rightly refused to exercise his revisional jurisdiction in favour of the appellants and the High Court was right in reversing the order of the Appellate Tribunal in so far as it related to the appellants' claim to the aforesaid exemption.

18. For the foregoing reasons, we do not find any merit in this appeal which is dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2140 =
1976 CRI. L. J. 913

(From: Delhi)*

R. S. SARKARIA AND P. N. SHINGHAL, JJ.

S. Harnam Singh, Appellant v. The State (Delhi Admn.), Respondent.

Criminal Appeal No. 245 of 1971,
D/- 23-3-1976.

(A) Penal Code (1860), S. 477-A — Scope — "Wilfully" and "intent to defraud" — Meaning — (Words and Phrases — "Wilfully" and "intent to defraud").

"Wilfully" as used in S. 477-A means "intentionally" or "deliberately." But from the mere fact that certain entries were made "wilfully" by an accused, does not necessarily follow that he did so "with intent to defraud" within the meaning of Section 477-A, Penal Code. The Code does not contain any precise and specific definition of the words "in-

*(Criminal Appeal No. 72 of 1970,
D/- 15-2-1971—Delhi.)

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tent to defraud." However, the expression "intent to defraud" contains two elements viz., deceit and injury. A person is said to deceive another when by practising "suggestio falsi" or "suppressio veri" or both he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. 'Injury' has been defined in Section 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property." Ingredients of Section 477-A pointed.

(Paras 18, 13)

(B) Criminal P. C. (1898), Ss. 342, 537 — Duty of Court under Section 342 — Material circumstance appearing against accused not put to him — Serious irregularity — Non-production of material witnesses — Prejudice to accused — Trial held vitiated. Criminal Appeal No. 72 of 1970, D/- 15-2-1971 (Delhi), Reversed.

Section 342, Cr. P. C. casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Therefore each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537 of the Code. (Para 22)

A Goods Loading Clerk of certain Railways was prosecuted and convicted for offence under Section 477-A, I. P. C. for falsifying certain entries in the Marking-cum-loading Register by showing the receipt of certain bales of cloth from a cotton Mills on 10-1-1967 by antedating that entry, although in fact the goods were received in the Goods Shed on 11-1-1967 in order to circumvent certain order of Divisional Superintendent restricting booking of goods from 11-1-1967. The time of the actual exit of the goods in question from the Mills was a vital circumstance against the accused appearing

in the prosecution evidence. In view of Section 342, therefore, it was incumbent on the trial Court to put this circumstance clearly and distinctly to the accused during his examination. The failure to do so, amounted to a grave irregularity. The gravity of this irregularity was accentuated by another lapse on the part of the prosecution. That lapse was the failure to produce three crucial witnesses, namely, the truck driver, the Marker, and the Railway Gate Clerk with his record.

Held that on the facts of this case, the aforesaid non-compliance with Section 342, Cr. P. C. coupled with the non-production of the three material witnesses had caused miscarriage of justice. These irregularities vitiated the trial. Criminal Appeal No. 72 of 1970, D/- 15-2-1971 (Delhi), Reversed. [Paras 23, 25]

Cases Referred: Chronological Paras
 AIR 1973 SC 618 = (1973) 1 SCC 490 = 1973 Cri LJ 618 11
 AIR 1963 SC 1572 = 1963 Supp (2) SCR 585 10
 AIR 1954 SC 51 = 1954 SCR 475 = 1954 Cri LJ 338 11

Mr. Frank Anthony, Sr. Advocate, (M/s. K. B. Rohatgi, Vijay K. Jain and Mahesh K. Rastogi, Advocates with him), for Appellant; Mr. H. R. Khanna, Advocate and Mr. R. N. Sachthey, Advocate, for Respondent.

Judgment of the Court was delivered by

R. S. SARKARIA, J.:— The appellant, a Goods Loading Clerk in the Outward Goods Shed, Northern Railway, New Delhi was tried along with one Naresh Chand, an agent of the Birla Cotton Spg. & Wvg. Mills Ltd., Delhi by the Special Judge, on charges under Sections 120B, 477-A Penal Code and under Section 5 (2) of the Prevention of Corruption Act. The trial Court acquitted the appellant of the charge of criminal conspiracy, but found him guilty of the other two charges and sentenced him on each of those counts to rigorous imprisonment for one year. A fine of Rs. 200/- was further imposed in addition to the substantive sentence of imprisonment under Section 5 (2) of the Prevention of Corruption Act.

The sentences were directed to run concurrently.

2. Naresh Chand, the co-accused, was acquitted of all the charges.

3. On appeal, the High Court of Delhi set aside the conviction of the appellant under Section 5 (2) of the Prevention of Corruption Act but maintained his conviction and sentence under Section 477-A, Penal Code.

4. Hence this appeal by special leave.

5. The charge under Section 477-A framed against the appellant by the trial Judge, runs as under:

"That you in furtherance of the aforesaid conspiracy on the same day and place, being a public servant employed in the Railway Department, wilfully and with intent to defraud on 11-1-67 falsified the entries in the Marking-Cum-Loading Register maintained by you as Goods Loading Clerk at GMRI scale in outward Goods Shed, New Delhi, by falsely showing therein that 32 bales of cloth belonging to M/s. Birla Cotton Spg. & Wvg. Mills Ltd., Delhi, had reached Outward Goods Shed, New Delhi on 10-1-1967, when in fact these had reached on 11-1-67 and by making corresponding endorsements on forwarding notes, prepared by Naresh Chand, accused. And thereby you facilitated the issue of invoices and R/Rs and the booking and loading of 32 bales of cloth and you thereby committed an offence punishable under Section 477-A of the Indian Penal Code and within my cognizance."

6. The prosecution case was that booking of goods by rail via Barabanki was closed and restricted by the Divisional Superintendent, Northern Railway, New Delhi by his order No. 398-T/9 S-1 No. 41 (TR) after January 10, 1967. The appellant entered into criminal conspiracy with Naresh Chand, agent of M/s. Birla Cotton Spg. & Wvg. Mills, Delhi, for booking 32 bales of cotton cloth belonging to the said Mills by circumventing this order of the Divisional Superintendent, on January 11, 1967. The plan was that the appellant would falsify the entries in the Marking-cum-loading Register by

showing the receipt of the said 32 bales of cloth on January 10, 1967 by antedating that entry, although, in fact, the goods were received in the Goods Shed on January 11, 1967 when the ban against booking imposed by the Divisional Superintendent had become operative. The appellant falsified these accounts by abusing his position as a public servant from corrupt motives.

7. The prosecution has tried to show by circumstantial evidence that these 32 bales of cloth could not have been received in the Outward Goods Shed of Northern Railway before January 11, 1967. This evidence primarily consists of the Gate Passes signed by the Excise Inspector showing the clearance of these goods from the Mills on the 11th January. The Mills had obtained an allotment order for the despatch of these goods to Jogbani. The valid period for this allotment had expired on January 10, 1967.

8. In his examination under Section 342, Cr. P. C., the appellant admitted that at the relevant time, he was working as Goods-Cum-Loading Clerk at the Goods Shed. He further admitted that traffic restrictions in respect of the booking of this class of goods via Barabanki, as alleged by the prosecution, had been imposed by the Divisional Superintendent of the Railway. He further conceded that the entries under the date 'January 10, 1967' in the Marking-cum-Loading Register, Ex. P. W. 10/J, evidencing the receipt of the consignments, were in his hand. He, however, expressed ignorance if these consignments in question were received in the Goods Shed only on January 11, 1967. He emphatically denied that he had fraudulently or dishonestly falsified the entries in the Marking-cum-Loading Register, Ex. P. W. 10/J, in order to obtain a pecuniary advantage for M/s. Birla Cotton Spg. & Wvg. Mills. In reply to the general question he stated that in the discharge of his heavy multifarious duties in connection with the loading of goods he was, as usual, helped by Mukand Lal Marker. The appellant could not complete the entries in his Marking-cum-Loading Register as he was preoccupied with loading. On January 11, 1967, when

at 10 A.M., as usual the appellant came to the goods shed to complete the entries, he was told by Mukand Lal that the bales in question and one other consignment had reached the goods shed on January 10, 1967 in the evening. The appellant had no reason to doubt that information. The appellant added:

"Because of this I made the entries of the forwarding notes in my register and noted the same serials on the forwarding notes which had already been marked on the bales. I am innocent. I will produce defence."

9. In short, the appellant's case is that he acted innocently and had no 'intent to defraud'.

10. Mr. Frank Anthony, learned Counsel for the appellant has canvassed two main contentions. The first is that in making the wrong entries in the Marking-cum-Loading Register and the endorsements on the forwarding notes, the appellant could not, in the circumstances of this case be said to have the mens rea requisite for an offence under Sec. 477-A Penal Code. It is maintained that his duty commenced from 10 a.m. and ended at 5.00 p.m. on working days. But the Gate Clerk known as Gate Keeper of the Goods-Shed commenced his duty at 9 a.m., that is, one hour earlier than the Loading Clerk. It is the Gate Keeper, who, according to the Counsel, admits the goods into the Goods-Shed. In this particular case, the goods were allowed to be brought into the Goods-Shed, in the absence of the appellant and he was told by the Marker Mukand Lal on the 11th that the 32 bales of cloth had been received on the 10th. Believing that representation to be true, the appellant made the entries in question showing the receipt of the goods on January 10, 1967. In these circumstances, it is urged that the entries in question, even if false, were not made by the appellant "wilfully and with intent to defraud" within the meaning of Section 477-A. The strongest circumstance, according to Counsel, which negatives any ulterior motive or intent to defraud on the part of the appellant is that at the time of making the entries, he put the date

'January 11, 1967' under his signatures. It is maintained that he did not conceal or suppress the material fact that the entries were being made on the 11th Jan. Our attention has been invited to the serial No. and the signatures with date, which are admittedly in the hand of the appellant, on the forwarding notes PW 10/A, PW 10/B, PW 10/C. It often happens, says Mr. Anthony, that if the Loading Clerk on a particular day receives hundreds of parcels for booking and consequently is unable to make the entries in respect thereof in the various records on that very day, he, as a matter of practice, makes the remaining entries on the following day. The appellant, it is argued, in keeping with that practice, made these entries only ritualistically without any criminal intent. It is stressed that his acquittal on the charge under Section 5 (1) of the Prevention of Corruption Act by the High Court, which includes a finding that he had no dishonest intention or motive to get a pecuniary advantage for himself or for anybody else, now precludes the prosecution from contending that nevertheless his intention in making these entries was fraudulent, wrongful gain or injury being an element of 'intent to defraud.' In support of this proposition he has referred to *Dr. Vimla v. Delhi Administration*, (1963) Supp 2 SCR 585 = (AIR 1963 SC 1572) and *Tara Chand v. State*, AIR 1960 Mad 370 (sic).

11. The second contention raised by the Counsel is that the prosecution has not led any evidence to substantiate the factum and the time of the receipt of these cloth bales at the Goods Shed. It is stressed that the best evidence with regard to this vital fact could be given by Chiranji Lal, the truck driver, who is said to have brought these goods from the Mills to the Goods-Shed, Mohan Lal, the Gate Clerk of the Goods Shed, and Mukand Lal, the Marker of the goods. According to the Counsel these material witnesses had been withheld by the prosecution for an oblique motive and consequently an adverse inference should be drawn that if produced, they would have demolished the prosecution case by revealing

that, in fact these goods were received in the Goods Shed sometime before the appellant came on duty on the 11th, notwithstanding the fictitious entries with regard to the exit of these goods from the Birla Mills, shown in the Excise Gate Passes. In this connection, reference has been made to this Court's decisions in Sahaj Ram's case (1973) 1 SCC 490 = (AIR 1973 SC 618 = 1973 Cri LJ 618); Habeeb Mohd. v. State of Hyderabad, 1954 SCR 475 = (AIR 1954 SC 51 = 1954 Cri LJ 338).

12. Section 477-A, Penal Code reads thus:

"Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation: It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed."

13. An analysis of this section would show that in order to bring home an offence under this provision, the prosecution has to establish (1) that at the relevant time, the accused was a clerk, officer or servant; and (2) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc. (3) that he did so wilfully and with intent to defraud.

14. In the instant case, the existence of the first ingredient is not disputed. With regard to the second, the position is that the entries Q1, Q2 and Q3 in the Marking-cum-Loading Register were admittedly made on the 11th January, 1967 showing that the goods to which they related, were, in fact, received on January 10, 1967. On the endorsements made on the Forwarding Notes relating to these goods, however, he put the date January 11, 1967. Question No. 14 put to him in his examination under Section 342, Cr. P. C. was:

"It is in evidence that although you received and accepted the aforesaid bales on January 11, 1967, yet you made entries in the Marking-cum-Loading Register of GMR-1 Scale of Outward Shed, New Delhi where you were then working, false showing their receipt as 10-1-1967 to facilitate the booking of these goods. What have you to say to this?"

15. The appellant replied: "No. I shall give detailed answer below."

16. This detailed answer was given by him in reply to Question No. 20. We have reproduced its substance earlier in this judgment. The defence taken therein is that when on the 11th January at 10 A.M., the appellant came on duty to the Goods Shed, he was told by the Marker (Mukand Lal) that the bales lying there had been received on the 10th January in the evening. Believing the information given by the Marker to be true, the appellant made these entries (Q1, Q2 and Q3) in the Register. Thus, if these goods were actually received on the 10th January, the entries Q1, Q2 and Q3 could not be said to be false. If they were actually received on the 11th, these entries would not be true, even if they were induced by some representation made by the Marker with regard to their receipt. Such representation, if any, made by the Marker would be relevant with regard to the third ingredient only.

17. The existence of the third ingredient has been the subject of serious controversy. The question is: Did the appellant make these

17. The existence of the third ingredient has been the subject of serious controversy. The question is: Did the appellant make these

entries "wilfully and with intent to defraud"?

18. "Wilfully" as used in Section 477-A means "intentionally" or "deliberately." There can be no difficulty in holding that these entries were made by the appellant 'wilfully.' The appellant must have been aware that the Divisional Superintendent had by an order prohibited the booking of this class of goods via Barabanki from and on January 11, 1967. But from the mere fact that these entries were made 'wilfully'. It does not necessarily follow that he did so "with intent to defraud" within the meaning of Section 477-A, Penal Code. The Code does not contain any precise and specific definition of the words "intent to defraud". However, it has been settled by a catena of authorities that "intent to defraud" contains two elements viz., deceit and injury. A person is said to deceive another when by practising "suggestio falsi" or "suppressio veri" or both he intentionally induces another to believe a thing to be true, which he knows to be false or does not believe to be true. 'Injury' has been defined in Section 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property."

19. The burden of Mr. Anthony's argument is that the prosecution had not established these elements beyond reasonable doubt. It is maintained that there was no 'deceit' because the appellant did not conceal the fact that he was making the entries meant for the 10th January on the 11th January. In this connection, reference has been made to the endorsements and the entries on the Forwarding Notes relating to these goods, which were manifestly made on the 11th. It is further submitted that there was no intent to cause wrongful gain or wrongful loss to any person either in particular or in general and consequently the second element necessary to constitute a fraudulent intention did not exist.

20. As against this, it is contended on behalf of the respondent that this defence plea set up by the appellant was utterly false because

these goods, in fact, had left the premises of the Birla Mills at 3.30 p.m. on January 11, 1967 and they could not have reached the goods shed in any case before 4 or 4.30 p.m. on that date. Reliance for this argument has been placed on the Gate Passes Exhs. P. W. 12/E 1 to E-34 which bear the signatures of the Central Excise Inspector, P. W. 12. Great emphasis has been laid on the fact that in these Gate Passes, the time of clearance of the goods from the Mills is noted as 15.30 (P.M.) on January 11, 1967.

21. In reply, Mr. Anthony maintains that everything appearing in these Gate Passes cannot be accepted as gospel Truth. Counsel takes strong exception to, what he says, the manner in which the entry as to time was smuggled into the case. In this connection, Mr. Anthony has emphasised that in his examination-in-chief, PW 12 did not say a word that these packages were in fact allowed to go out of the gate of the Mills at 3.30 p.m. on January 11, 1967, that he did not refer even obliquely, to the time noted on these Gate-Passes; that this fact on which a whole argument is now sought to be built up by the prosecution for the first time in this Court, was never put to the accused during his examination under Section 342, Cr. P. C., that even the Gate Passes Exhs. PW 12/E-1 to 34 were never specifically put to him and thus no opportunity whatever was given to him to explain this circumstance. This omission, says the Counsel, has greatly prejudiced the appellant in his defence, and coupled with the non-production of the material witnesses as to the receipt of the goods in the Goods Shed, vitiates the trial and is fatal to the prosecution case. It is further submitted that otherwise too, the entry as to time in the Gate Passes is of a suspicious character because such time has not been noted on the Gate Passes issued on other days for similar goods. It is contended that despite the requirement of Rules 9 and 52 of the Excise Manual, there is an instance on the record to show that the goods were allowed to be cleared at the gate of the Mills although excise duty in respect thereof

was actually paid on the following day. It was not improbable — proceeds the argument — that the goods in question might have been allowed to go out of the Mills in the evening of the 10th or on the morning of the 11th so as to reach the Goods Shed before 10 a.m., while, on paper, their clearance, in ostensible deference to the Rules, was shown as on the 11th January 1967. According to the Counsel, there is no rule or prescribed form requiring the time of the exit of the goods to be noted in the Gate passes and there being every reason to suspect a gap between the theoretical observance of the Rules and the actual practice, the Court should not, in the absence of the best direct evidence of the receipt of these packages in the Goods Shed, as a matter of caution, spell out everything with regard to the time and date of the exit of these packages from the Mills and of their receipt in the Goods Shed from them.

22. Section 342 of the Code of Criminal Procedure, 1898, casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under S. 537 of the Code.

23. In the instant case, as already observed, the time of the actual exit of the goods in question from the Mills was a vital circumstance appearing in the prosecution evidence. Indeed, Counsel for the respondent has primarily staked his arguments on it to show that the goods could not have reached the Goods Shed before 10 A.M. on the 11th. In view of Section 342, therefore, it was incumbent on the trial Court to put this circumstance clearly and distinctly to the accused during his examination. The failure to do so amounts to a grave irregularity.

The gravity of this irregularity was accentuated by another lapse on the part of the prosecution. That lapse was the failure to produce three crucial witnesses, namely, Chiranjilal, the truck driver, Mukand Lal, the Marker, and Om Parkash, the Railway Gate Clerk with his record. It may be noted that these witnesses were cited by the prosecution in the calendar of witnesses and were required to appear along with the records maintained by them. But subsequently, without good reason, they were given up. They were the persons who could give the best and direct evidence with regard to the receipt of these goods in the Goods Shed. The non-production of this evidence has certainly prejudiced the fair trial of the appellant.

24. Mr. H. R. Khanna points out that the question of the appellant being prejudiced owing to the failure of the prosecution to put this circumstance to him in examination under Section 342, was not raised in the courts below, and consequently, the appellant is debarred from raising it now.

25. The contention must be repelled. Firstly, there was no occasion for the appellant to urge it earlier, because the prosecution have tried to stake a vital part of their case on this circumstance, for the first time in the course of arguments in this Court. Secondly, an objection with regard to the prejudice resulting to the accused from the non-production of the material witnesses whose evidence had a direct bearing on the same fact which was sought to be inferentially established from the Gate-Passes, was urged even in the courts below. The conclusion is therefore, inescapable that on the facts of this case, the aforesaid non-compliance with Section 342, Cr. P.C. coupled with the non-production of the three material witnesses had caused miscarriage of justice. We therefore think that these irregularities have vitiated the trial and conviction of the appellant.

26. Further question to be considered is: Should the case be sent back for retrial? Again, answer to this question in the circumstances of the case, must be in the negative.

Firstly, the appellant on account of his acquittal on the graver charge under S. 5(1) of the Prevention of Corruption Act, stands exonerated of the allegation that he made these entries with any motive or intention to gain a pecuniary advantage. Secondly, his co-accused stands acquitted of all the charges. Thirdly, these proceedings against the accused commenced as far back as May 13, 1959 and the appellant has suffered enough privation, harassment and expense which is a necessary concomitant of protracted criminal proceedings.

27. For the foregoing reasons, we allow this appeal, set aside the conviction, accord the benefit of doubt to the appellant and acquit him.

Appeal allowed.

AIR 1976 SUPREME COURT 2147

(From: Patna)*

P. N. BHAGWATI, R. S. SARKARIA
AND S. MURTAZA FAZL ALI, JJ.

Ramasray Pandey and others,
Appellants v. State of Bihar, Respondent.

Criminal Appeal No. 292-A of
1971, D/- 6-9-1976.

(A) Penal Code (1860), Ss. 299-300 — Insufficiency of evidence for conviction — Prosecution evidence manifestly unbelievable and contradictory — Conviction set aside. Crl. A. No. 217 of 1968, D/- 30-4-1971 (Pat), Reversed.

Eye-witnesses not only lying about the genesis of the occurrence and the place of the incident but also irretrievably mutilating the truth with regard to the number of assailants and the author of the fatal blow — Alleged oral dying declaration of the deceased also hopelessly contradictory and unbelievable — Held (by the Supreme Court) that there was no credible evidence on record to bring home the charge of murder to the appellant accused — Eye-witnesses had unscrupulously spoken the untruth on all vital points which had polluted their testimony to the core

*(Criminal Appeal No. 217 of 1968, D/- 30-4-1971—(Pat.)).

IT/IT/D132/76/VBB

— Courts below were in error in convicting the appellant on the basis of such manifestly unbelievable evidence produced by the prosecution: Crl. A. No. 217 of 1968, D/- 30-4-1971 (Pat), Reversed. (Para 24)

Mr. B. R. G. K. Achar, Advocate, for Appellants; Mr. U. S. Prasad, Advocate, for Respondent.

Judgment of the Court was delivered by

SARKARIA, J.:— By our order, dated September 1, 1976, we had allowed this appeal and acquitted the appellant. We now proceed to give our reasons in support of that order.

2-3. The facts of the case may briefly be stated thus:

The deceased Methur Dass was a night watch-man in the orchard of Mohan Lal in the area of village Phulwaria, P. S. Pipra, District Champaran. The appellant and his two brothers, Rajeshwar Pandey and Raghunath Pandey trespassed into the orchard to steal plantains. Ram Asrey Pandey was armed with a bhalla (spear) while his brothers were armed with garases. The deceased protested and thereupon the appellant assaulted him with the bhalla, while his two companions inflicted injuries on him with their respective weapons. As a result, the deceased received 12 incised wounds. The occurrence took place at about 9 P.M. or sometime thereafter in the night between the 23rd and 24th of August, 1964. During the same night he succumbed to his injuries in the early hours of 24th August, 1964 in the Chakia Dispensary. The First Information Report was lodged on the basis of a statement (Ex. 1) made by Smt. Deojharia (P. W. 4), the widow of the deceased, to Matuk Narain Singh, Officer-in-charge of Police Station, Pipra at village Ghangti on August 24, 1964 when he was there to investigate a charge of theft on the basis of a First Information Report lodged by the appellant. That F. I. R. is Ex. 2/1. Therein the appellant had charged Sukhdeo Mahto (P. W. 1), Jagdish Raut (PW 2) and the deceased with the theft of his patua at about 8.30 p.m.

4. After investigation five persons namely, the appellant and his said two brothers and Goburdhan and

Yogendra were sent up under a charge-sheet before the Magistrate who committed them for trial to the Court of Session. The Sessions Judge acquitted Gobardhan and Yogendra, but convicted the other three. The appellant was convicted under Section 302, Penal Code and sentenced to rigorous imprisonment for life. Rajeshwar and Raghunath were convicted under Section 304, read with Section 34, Penal Code and sentenced to 10 years' rigorous imprisonment, each.

5. The convicts appealed to the High Court which dismissed Ram Asrey Pandey's appeal and maintained his conviction, but altered the conviction of Raghunath and Rajeshwar into one under Section 324, read with Section 34, Penal Code with a sentence of one year's rigorous imprisonment, each.

6. Special leave petition under Article 136 filed by Rajeshwar and Raghunath was rejected, but that of the appellant was granted by this Court. This is how Ram Asrey, appellant is now before us.

7. The conviction of the appellant rests on two types of testimony. Firstly, there is the evidence of the eye-witnesses, Sukhdeo, PW 1, and Jagdish, PW 2. Secondly, there is the evidence of an oral dying declaration alleged to have been made by the deceased before his family members.

8. We have examined the evidence on record and heard the Counsel on both sides. In our opinion, the evidence of both the types produced by the prosecution, was unreliable. The oral evidence rendered by the eye-witnesses was replete with material discrepancies and lies. Even the learned Judges of the High Court who have overlooked most of these faults, found that the prosecution story in regard to the genesis of the occurrence is not correct. It cannot be gainsaid that Sukhdeo (PW 1), Jagdish (PW 2) and Methur Dass deceased had gone together to the nearby field of the accused to steal patua (cut jute), bundles of which had been kept immersed in water, there. The deceased and his companions took out one bundle from the water and started disembarking the same. Thereupon, the assailants who

were lying in ambush assaulted them. On receiving the blows, the deceased fell to the ground while trying to run away from the scene of theft. PWs 1 and 2 were then marched away by the assailants and other villagers to the Darwaza of Raghunath and handed over to Krishna Deo Rai (PW 14) an Assistant Sub-Inspector of Police, there.

9. PWs. 1 and 2 were questioned with regard to the cause and origin of the occurrence. Their denials, equivocations and prevarications notwithstanding, sufficient tell-tale circumstances have been wrenched out from their unwilling lips to demonstrate that they are hiding the truth on material points. It is admitted by both the eye-witnesses that they were captured by the accused and other villagers and handed over to the Police who have sent them up for trial before a Magistrate on a charge of stealing patua of the appellant. Sukhdeo admitted that he had been convicted on that charge, and his appeal against his conviction was pending in Court at the time of his deposition. It was put to the witness that he and his companion had been captured by their assailants in the Kharor (bush land) at a distance of 20-25 laggis (210-260 ft. approximately) from the mango orchard of Mohan Lal. The witness denied this suggestion. However, his companion, Jagdish (PW 2) admitted in cross-examination, that he was assaulted in the Kharor, although he tried to wriggle out of it later.

10. Both the eye-witnesses radically changed the story that they had originally stated to the police during investigation. Before the police PW had denounced three persons, namely, Ram Asrey appellant, Rajeshwar and Raghunath as the assailants. At the trial, he has named two more, viz., Gobardhan and Yogendra, who have been acquitted by the trial Court.

11. The eye-witnesses sharply contradict each other with regard to the identity of the person who dealt the fatal blow on the abdomen of the deceased with a bhalla. According to PW 1, it was the appellant who had caused this injury. Directly contradicting PW 1, the other eye-witness PW 2, stated that this injury

was caused by Rajeshwar who was assaulting with a bhalla, while his brothers were causing injuries to the deceased with Farsas. This was a vital discrepancy which could not be ignored.

12. In his statement before the Police, Jagdish PW 2, had admitted that he and PW 1 had accompanied Methur Das deceased to steal Patua, that when they took out Patua from water and started disembarking the same, the villagers, who were lying in ambush assaulted. Confronted with this previous statement, witness brazenly disowned it altogether. On further questioning however, he admitted that the villagers assaulted him as well as Sukhdeo and Methur with lathi. He further admitted that many people armed with lathi and bhala had assembled. They were raising shouts: "Thief/Thief" and "they were the persons, who started committing assault."

13. From the above discussion, it is manifest, that these eye-witnesses have not only lied about the genesis of the occurrence and the place of the incident, but also irretrievably mutilated the truth with regard to the number of the assailants and the author of the fatal blow. In short, they have unscrupulously spoken the untruth on all vital points, which has polluted their testimony to the core.

14. Having seen that the ocular account of the eye-witnesses in this case was utterly unreliable, we pass on to examine the evidence with regard to the oral dying declaration alleged to have been made by the deceased.

15. The prosecution examined four witnesses to prove this statement. They are PW 4, the widow; PW 5, the mother, PW 6, the nephew, and PW 9, the son of the deceased.

16. Bigu Das (PW 9) stated in cross-examination that the Police Assistant Sub-Inspector had recorded the statement of the deceased and the latter had thumbmarked the same. Either the witness is telling a lie or the dying declaration of the deceased recorded by the police has been purposely withheld from an oblique motive. If the latter is the case, the in-

ference is that the recorded statement, if produced, would completely demolish the prosecution case. Further, these four witnesses speak with discordant voices with regard to the number of persons named as his assailants by the deceased. If the mother (PW 2), is to be believed, the deceased had named only three persons viz., Ram Asrey, Rajeshwar and Raghunath as his assailants. In variance with it, PWs. 4, 6 and 9 stated that the deceased had named all the five accused, including the appellant, as his assailants.

17. These four witnesses, also contradicted their statements which they had made to the police. In her statement, Ex. 1, which is supposed to be the First Information Report, PW 4 stated that on being asked, her husband said that "Ram Asrey Pandey assaulted him on the abdomen with a bhala, while Rajeshwar, Raghunath and two associates of theirs whom he could not recognize, assaulted him with girasas while raising the hulla; Thief! Thief!" The cause of occurrence as stated by the informant in this report is as under:

".....last year my son Bigu caught Raghunath Pandey cutting my Khaira tree on account of which there was dispute between my husband and Raghu Nath. During the night some thief stole patua of Raghunath Pandey as we heard and Pandeys (persons having titles of Pandey), suspected that Methur Das also participated in the theft of patua caught hold of him in the plantain orchard, dragged him to the orchard and assaulted (?) him."

18. It is noteworthy, that the FIR which was lodged after an inordinate, unexplained delay of about 20 hours on the basis of information purportedly derived from the deceased, PW 4 did not name Yogendra and Gobardhan as assailants of the deceased. At the trial, she added these two persons also to the list of assailants named by the deceased.

19. PW 3 Nathuni Sah testified that soon after hearing the hulla he saw people running to the other bank of the Lakhna. Thereafter witness also accompanied the Assistant Sub-Inspector of Police to the orchard where Methur lay injured. Wit-

ness found the son, the wife and mother of the deceased there. But he did not find the nephew (PW 6) there. The witness further stated that in his presence, Methur did not name any of his assailants. The witness did not hear anybody saying as to who had committed the assault.

20. PW 3 Nathuni Sah was an independent witness. There was no reason to disbelieve him. He discounts the presence of PW 6 and thus falsifies the claim of PW 6 to his being a witness of the alleged dying declaration made by the deceased. By implication PW 3, further discounts the version of PWs 4, 5 and 9 about the alleged dying declaration.

21. PW 7 Birju Das was another independent witness. In cross-examination, he stated that Methur Das did not mention the name of his assailant in his presence.

22. All the four witnesses (PWs 4, 5, 6 and 9) of the alleged dying declaration were not only highly interested in the prosecution but were inimically disposed towards the accused. In cross-examination, PW 4, had admitted: "we have got enmity with Ram Asrey Pandey and others". There was therefore every reason to suspect that the story of the alleged dying declaration made by the deceased had been falsely introduced in the inordinately belated F.I.R. after due deliberation, after the death of Methur Das.

23. Thus the evidence with regard to the alleged oral dying declaration of the deceased was also hopelessly contradictory and unbelievable.

24. To sum up, there was no credible evidence on record to bring home the charge to the appellant. The courts below were clearly in error in convicting the appellant on the basis of this manifestly unbelievable evidence produced by the prosecution. Accordingly, we allow this appeal, set aside the conviction of the appellant and acquit him of the charge levelled against him.

Appeal allowed.

AIR 1976 SUPREME COURT 2150

(From: 1971 Tax LR 264 (Delhi))

A. N. RAY, C. J., M. H. BEG AND
P. N. SHINGHAL, JJ.

Dalmia Cement Ltd., Appellant v.
The Commissioner of Income-tax, New
Delhi, Respondent.

Civil Appeal No. 1437 of 1971, D/-
10-9-1976.

(A) Income-tax Act (1922), Ss. 2 (4)
and 10 — 'Adventure in the nature of
trade' — What amounts to — Question of
profit, if material — Single and isolated
transaction — Burden of proving that it
was in nature of trade lay on Depart-
ment.

For determining whether a transac-
tion amounts to 'an adventure in the na-
ture of trade', no general principle can be
laid down to cover all cases because of
their varied nature. Each case has to be
decided on its own facts and circumstan-
ces. It is however well settled that even a
single and isolated transaction can be
held to be capable of falling within the
definition in S. 2 (4) of the Act if it bears
clear indicia of trade. It is equally well
settled that the fact that the transaction
is not in the way of business of the asses-
see does not in any way alter the charac-
ter of the transaction. Case law referred.

(Para 3)

Where it was a case of a single and
isolated transaction of purchase and sale,
the burden of proving that it was an ad-
venture in the nature of trade lay on the
department.

(Para 9)

The appellant placed an order in 1946
with a foreign company for supply of 4
complete units of cement manufacturing
machinery for its cement factories at
four places, one being at a place D.
Since the factory in D fell within terri-
tory of Pakistan on its constitution, the
appellant transferred the machinery
which was meant for D factory (herein-
after referred to as the D machinery) to a
new company known as O Cement Ltd.,
sometime in 1950-51 and charged only in-
voice price which it had paid to the for-
eign company. The appellant thereafter
asked for a higher price and after some
negotiations, the O company agreed on
4-12-1951 to pay a further sum of Rs. 7
lakhs. The question was whether the
transaction was an adventure in the na-
ture of trade.

Held that the Department succeeded
in proving that the transaction of sale in

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question was 'an adventure in the nature of trade' and fell within the definition of 'business' in S. 2 (4). 1971 Tax LR 264 (Delhi), Affirmed. (Para 13)

After the partition of the country the appellant could have cancelled the order for the import of the machinery but it did not do so and decided to import it with a view to supplying it to O. Company on suitable terms. It therefore resold it to the O factory. The intention of resale was therefore there almost from the beginning, and was really the dominant intention in importing the machinery after the partition of the country. The appellant therefore did not only have the dominant intention of selling the D machinery to its own advantage but, in doing so, it acted with the set purpose of taking an advantage of its position as the owner of the imported machinery of which the price had, on the appellant's own showing, gone up much higher. It was therefore a real transaction by way of an adventure in the nature of trade and was as such a business transaction within the meaning of Section 2 (4) of the Act. It does not matter if the appellant did not earn a profit immediately on delivering the machinery, and sold it without any profit in the first instance. The transaction would be an adventure in the nature of trade even if the question of profit was left out of consideration, and the appellant in fact acted with the set purpose of reselling the D machinery to its advantage and not by way of a favour or a gratuitous act. AIR 1955 SC 176 and AIR 1959 SC 359, Rel. on. (Para 7)

It is true that the question of asking for payment in excess of the cost price was raised by the appellant some time later, but its subsequent course of conduct in bringing about a substantial profit is a clear pointer to the real intention behind the sale. (Para 8)

No doubt, a question like the present has to be examined with reference to the indicia or characteristics of the trade, but it had not been shown in the face of the facts and circumstances of this case, which indicia or characteristics could be said to be lacking to take it out of the category of an adventure in the nature of trade. AIR 1955 SC 252 and AIR 1959 SC 1252 and AIR 1965 SC 1898, Distinguished. (Para 9)

Cases Referred: Chronological Paras
AIR, 1965 SC 1898 = (1965) 3 SCR 604

3, 12

(1961) 43 ITR 297 = (1961) 2 Mad LJ 199
10, 12

AIR 1959 SC 359 = 1959 Supp (1) SCR
646 3, 7, 10

AIR 1959 SC 1252 = 1959 Supp (2) SCR
846 3, 10, 12

AIR 1955 SC 176 = 26 ITR 765 3, 7

AIR 1955 SC 252 = 27 ITR 49 3, 10, 12

Mr. V. S. Desai, Sr. Advocate (Mrs. Leila Seth and Mr. Parveen Kumar, Advocate with him), for Appellant; Mr. S. T. Desai, Sr. Advocate (Mr. M. N. Shroff Advocate with him), for Respondent.

The Judgment of the Court was delivered by

SHINGHAL, J.:— This appeal by special leave is directed against the judgment of the Delhi High Court dated April 28, 1970 in a reference made by the Income-tax Appellate Tribunal (Delhi Bench A) under Section 66 (1) of the Income-tax Act, 1922, hereinafter referred to as the Act, in respect of the following question:—

"Whether on the facts and circumstances of the case the sum of Rs. 7 lakhs received from M/s. Orissa Cement Ltd. was pursuant to an adventure in the nature of trade and as such taxable under the Indian Income-tax Act, 1922?"
The High Court has answered the question in the affirmative.

2. We shall refer to the facts giving rise to the controversy in some detail when we state them in a chronological order. It may be mentioned, meanwhile, that the Dalmia Cement Ltd., hereinafter called the appellant, owned certain cement factories and it placed an order for the supply of four complete units of cement manufacturing machinery with M/s. F. L. Smidth and Co., Copenhagen, on February 7, 1946, to increase the production in the following factories:—

1. Shantinagar,
2. Dandot,
3. Dalmianagar,
4. Dalmiapuram.

Since the factory in Dandot fell within the territory of Pakistan on its constitution with effect from August 15, 1947, the appellant transferred the machinery which was meant for the Dandot factory (hereinafter referred as the Dandot machinery), to a new company known as Orissa Cement Ltd. sometime in 1950-51, and charged only the invoice price which it had paid to M/s. F. L. Smidth and Co. The appellant thereafter asked for a higher price and after some negotiations the Orissa Cement Ltd. agreed on Decem-

ber 4, 1951, to pay a further sum of Rs. 7 lakhs, in lieu of which 70,000 fully paid up ordinary shares of Rs. 10 each were given to the appellant in that company. The Income-tax Officer treated that amount as income earned by the appellant pursuant to an adventure in the nature of trade in 1952-53 assessment year, and taxed it as such. On appeal, the Assistant Appellate Commissioner also held in his order dated September 16, 1958 that the transfer of the Dandot machinery was an adventure in the nature of trade and the payment of Rs. 7 lakhs was a revenue receipt which was rightly taxed by the Income-tax Officer. The matter went up in appeal to the Income-tax Appellate Tribunal (Delhi Bench) which remanded the case to the Income-tax Officer by its order dated September 13, 1960, for report on certain specific points. On receipt of the Income-tax Officer's report, the Tribunal held that the transaction in question was 'certainly an adventure in the nature of trade' and dismissed the appeal. It however drew up a statement of the case, and that is how the aforesaid question of law was referred to the High Court under Section 66 (1) of the Act. The High Court held that by the time the appellant placed the despatch order with M/s. Smidth & Co., 'its intention was to purchase it with an idea to resell' and that the fact that it was a single and isolated transaction did not materially affect the case. In reaching that conclusion the High Court took the subsequent developments into consideration, and rejected the contention that the machinery was purchased by way of an 'investment'. The present appeal has been filed against that judgment of the High Court dated April 28, 1970.

3. Under Section 10 of the Act, income-tax is payable by an assessee under the head 'Profits and gains of business, profession or vocation', inter alia, in respect of the profits and gains of any 'business' carried on by him, and the controversy in this case is whether the receipt of the additional sum of Rs. 7 lakhs, over and above the cost of the Dandot machinery, could be said to arise out of any 'business' of the appellant. The term 'business' has been defined as follows in clause (4) of Section 2 of the Act:—

"(4) 'business' includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

The question in this case is whether the transaction was an 'adventure' in the

'nature of trade' within the meaning of the definition? Some decisions have been rendered by this Court on the point, and our attention has been invited to the decisions in *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax*, 26 ITR 765 = (AIR 1955 SC 176); *Kishan Prasad and Co. Ltd. v. Commissioner of Income-tax, Punjab*, 27 ITR 49 = (AIR 1955 SC 252); *G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax*, (1959) Supp 1 SCR 646 = (AIR 1959 SC 359); *Saroj Kumar Mazumdar v. The Commissioner of Income-tax, West Bengal, Calcutta*, (1959) Supp (2) SCR 846 = (AIR 1959 SC 1252) and *Janki Ram Bahadur Ram v. Commissioner of Income-tax, Calcutta*, (1965) 3 SCR 604 = (AIR 1965 SC 1898). Even so, no general principle can, for obvious reasons, be laid down to cover all cases of this kind because of their varied nature, so that each case has to be decided on the basis of its own facts and circumstances. It is however well-settled that even a single and isolated transaction can be held to be capable of falling within the definition if it bears clear indicia of trade (vide *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits*; *G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax* and *Saroj Kumar Mazumdar v. The Commissioner of Income-tax, West Bengal, Calcutta* (supra)). It is equally well settled that the fact that the transaction is not in the way of business of the assessee does not in any way alter the character of the transaction (vide *G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax*, and *Saroj Kumar Mazumdar v. The Commissioner of Income-tax, West Bengal, Calcutta* (supra)). It would not therefore help the appellant's case merely to urge either of these points for the answer to the question will depend on a consideration of all the facts and circumstances.

4. The question under consideration is essentially a mixed question of fact and law. It will therefore be desirable, in the first instance, to re-state the relevant facts in a chronological order.

5. As has been stated, the appellant owned some cement factories in various parts of India including the one in Dandot. It placed an order with M/s. Smidth & Co., Copenhagen, for the supply of four complete units of machinery for the manufacture of cement, to increase the production of its factory at Dandot and three other factories. A firm

order for all the four units was placed on February 7, 1946. It was confirmed by M/s. F. L. Smidth & Company on August 6, 1947 and the appellant was informed that the supply of the Dandot machinery would be made in various months from February 1948 to October 1948. India was partitioned, and Pakistan came into existence on August 15, 1947. Dandot fell in the territory of Pakistan. The appellant, which was an Indian Company, did not however cancel the order in respect of the Dandot machinery. On the other hand, a Director of the appellant informed the Orissa Government in his letter dated November 25, 1947 that it had 'got a cement plant for which it had placed order a couple of years back', of which early delivery was expected, and that it would be willing to put it in Orissa on 'suitable terms'. The appellant's General Manager held discussions with the Orissa Government on January 8, 1948 for the setting up of a cement factory in Orissa. It was recorded in the note of the proceedings of that meeting that the appellant had ordered machinery for replacing its cement plant, the said machinery was expected to be shipped at an early date and parts of it would start arriving in March, 1949. It was further stated that the complete supply of the plant was estimated to take about six months, and if the negotiations were fruitful the first lot of cement would be produced by the beginning of 1950. The appellant's representative insisted that a final decision might be taken at an early date so that the machinery which had to be shipped from abroad could be diverted, depending upon the decision, to the Calcutta or Bombay Port. The appellant thereafter wrote a letter to M/s. F. L. Smidth & Co. (Bombay) Ltd. on September 9, 1948 directing that the plant meant for the Dandot works might be diverted to Orissa. It was specially stated in the letter as follows:—

"There are certain equipments in the specifications of the plants for extension Nos. 3 and 4, which were peculiar to the layout and design for the extension at Dandot and Shantinagar and they will not now fit in exactly in the same manner in our proposed new factories. As such, it is essential that the whole specifications are carefully scrutinised and manufacture of the items which are peculiar to the lay out of Dandot and Shantinagar Works only should be kept in abeyance in order to suit the local conditions."

The plants were expected to arrive from March 1949 onwards but this would not have been possible without an import licence. The appellant obtained the licence from the Government of India and intimated to M/s. F. L. Smidth and Co. in its letter dated August 2, 1948 that it had been permitted to import in the Indian Dominion the two plants meant for Dandot and Shantinagar. The suppliers were accordingly requested to intimate the dates upto which extension was required for the import of the machinery. A formal agreement was made between the appellant and the Orissa Government on December 23, 1948. The Dandot machinery arrived in due course. It was delivered by the appellant to Orissa Cement Ltd. and its actual cost was debited to it. Quite some time thereafter, on April 7, 1970, a Director of the appellant wrote a letter to the Industries Minister of the Orissa Government that the machinery supplied to the Orissa Cement Ltd. should be revalued and the appellant allowed a higher price than the invoice price due to a rise in the cost of the cement plant at the time of supply as compared with the price at the time when it was originally ordered by the appellant. The name of one U. B. Mogensen was suggested for the revaluation of the machinery. This was agreed to by the State Government on June 4, 1950. Mogensen reported that the Orissa Cement Ltd. had benefited to the extent of almost Rs. 21 lakhs in the bargain. The Orissa Government passed a resolution dated December 4, 1951 allowing a further sum of Rs. 7 lakhs to the appellant and, in lieu of cash payment, allotted 70,000 fully paid up ordinary shares of Rs. 10 each of the Orissa Cement Ltd. to the appellant.

6. The above facts clearly establish that,—

(i) Even though the appellant initially placed an order on February 7, 1946 for the purchase of the Dandot machinery for improving the production in the Dandot factory, and the supply was not to commence until February, 1948, it did not make any effort to cancel that order even after Dandot was included in the territory of Pakistan with effect from August 15, 1947.

(ii) On the other hand, in pursuance of an enquiry by the Government of Orissa whether the appellant would be interested in putting up a cement plant in the State, one of the appellant's Directors informed the State Government on Nov-

ember 25, 1947 that it had got a cement plant for which it had placed an order a couple of years ago and that it could be put up in Orissa on suitable terms. The appellant's General Manager in fact met the State Government authorities in January, 1948 where it was reiterated that the machinery ordered by the appellant was expected to start arriving in March 1949 and could be diverted to Calcutta and that if the appellant's negotiations with the State Government were successful, the first lot of cement could be supplied by the beginning of 1950.

(iii) The negotiations with the Orissa Government proved successful and the appellant wrote a letter to M/s. F. L. Smidth and Co. on August 2, 1948 informing it that it had obtained the permission of the Government of India to import the Dandot machinery in India. The appellant also informed the suppliers on September 9, 1948 that it should divert the Dandot machinery to Orissa and supply the same according to the revised specifications to suit the local conditions.

(iv) A formal agreement was executed by the appellant and the Orissa Government on December 23, 1948 for the setting up of a cement factory in Orissa.

(v) The Dandot machinery arrived and was supplied by the appellant to the Orissa factory against cost price, which was debited to the Orissa Cement Company.

7. It would thus appear that long before the Dandot machinery was due, the appellant knew that it could not be used in Dandot. It has been found that after the partition of the country the appellant could have cancelled the order for the import of the machinery but it did not do so and decided to import it with a view to supplying it to Orissa on suitable terms. It therefore resold it to the Orissa factory in accordance with the terms and conditions of its negotiations with the State Government. The intention of resale was therefore there almost from the beginning, and was really the dominant intention in importing the machinery after the partition of the country. It is also quite clear that the appellant was not inclined to make it a gratuitous sale, but agreed to it only when it was able to secure a suitable agreement with the State Government for the setting up of a factory in Orissa. It was in fact the appellant's own case that the price of the Dandot machinery had gone up substantially. Even so, the appellant did not care

to utilise it for any of its own plants, but sold it to Orissa Cement Ltd. The appellant therefore did not only have the dominant intention of selling the Dandot machinery to its own advantage but, in doing so, it acted with the set purpose of taking an advantage of its position as the owner of the imported machinery of which the price had, on the appellant's own showing, gone up much higher. It was therefore a real transaction by way of an adventure in the nature of trade and was as such a business transaction within the meaning of Section 2 (4) of the Act. It does not matter if the appellant did not earn a profit immediately on delivering the machinery, and sold it without any profit in the first instance, for there can be no denying the fact that even if the appellant had not earned any profit whatsoever at the time of the sale or even thereafter, the transaction in the facts and circumstances of this case, would nonetheless have been an adventure in the 'nature of trade' and no other. We are fortified in this view by the decisions in *Narain Swadeshi Weaving Mills v. Commissioner, Excess Profits Tax* (AIR 1955 SC 176) (supra) and *G. Venkataswami Naidu and Co. v. The Commissioner of Income-tax* (AIR 1959 SC 359) (supra).

8. It is true that the question of asking for payment in excess of the cost price was raised by the appellant some time later, but its subsequent course of conduct in bringing about a substantial profit is a clear pointer to the real intention behind the sale. It was for that reason that the appellant's Director addressed a letter to the Minister of Industries of the Orissa Government on April 7, 1950 stating that the Dandot machinery should be revalued and the appellant allowed a higher price due to the rise in its price at the time of the supply. The entire correspondence in that respect has not been placed on record by the appellant, but it appears that the appellant was able to secure a further sum of Rs. 7 lakhs, under an agreement dated December 4, 1951, in lieu of which it was able to secure 70,000 fully paid up shares of Rs. 10. The appellant succeeded in doing so merely because it was able to substantiate its claim for a higher price, or profit, on the sole ground that it was entitled to it because of the increase in the price at the time of the sale. There is therefore nothing wrong in the view which has prevailed with the High Court that it was an adventure in the nature of trade.

9. It has been argued by Mr. V. S. Desai, for the appellant that as it was a single and isolated transaction of purchase and sale, the onus of proving that it was a transaction in the nature of trade lay on the department. This is a correct proposition of law and, as would appear from what has been stated above, we have examined the controversy on the assumption that the burden of proving that the transaction was an adventure in the nature of trade lay on the department. The ancillary argument of Mr. V. S. Desai that a question like the present has to be examined with reference to the indicia or characteristics of the trade, is also quite correct, but counsel has not been able to contend, in the face of the facts and circumstances mentioned above, which indicia or characteristics could be said to be lacking to take it out of the category of an adventure in the nature of trade.

10. All that Mr. V. S. Desai has pointed out is that there was no intention to make a profit when the Dandot machinery was sold to the Orissa Cement Ltd., and it has been urged that that would be sufficient to take it out of the category of an adventure in the nature of trade. Reference in this connection has been made to the decisions in *Kishan Prasad & Co. Ltd. v. Commissioner of Income-tax, Punjab* (AIR 1955 SC 252) (supra); *G. Venkataswami Naidu and Co. v. The Commissioner of Income-tax* (AIR 1959 SC 359) (supra); *Saroj Kumar Mazumdar v. The Commissioner of Income-tax, West Bengal, Calcutta* (AIR 1959 SC 1252) (supra), and *Ajax Products Ltd. v. Commissioner of Income-tax, Madras* (1961) 43 ITR 297 (Mad). We have given our reasons for the contrary view that the transaction would be an adventure in the nature of trade even if the question of profit was left out of consideration, and that the appellant in fact acted with the set purpose of reselling the Dandot machinery to its advantage and not by way of a favour or a gratuitous act. We have also shown how the appellant ultimately claimed and succeeded in securing a higher price merely on the ground that there was an appreciable increase in the price after the purchase of the Dandot machinery.

11. Lastly, it has been argued by Mr. V. S. Desai that in purchasing the machinery the appellant made a capital investment so that it was merely a capital asset. This argument is also futile for,

as has been shown, the appellant made the purchase with the dominant intention of reselling the machinery to advantage and made the resale only when it was able to enter into an agreement with the Orissa Government for the setting of a cement factory in that State on terms and conditions which were suitable from its point of view. It may also be stated that even in its own profit and loss account and balance sheet, the appellant treated the sale price as a revenue receipt and not as a capital investment. It was therefore an afterthought to claim that the initial purchase was by way of an investment and was a capital asset.

12. The facts of *Kishan Prasad and Co. Ltd. v. The Commissioner of Income-tax, Punjab* (AIR 1955 SC 252) (supra); *Saroj Kumar Mazumdar v. The Commissioner of Income-tax, West Bengal, Calcutta* (AIR 1959 SC 1252) (supra) and *Janki Ram Bahadur Ram v. Commissioner of Income-tax, Calcutta* (AIR 1965 SC 1898) (supra) referred to by Mr. V. S. Desai were different. In the case of *Kishan Prasad and Co. Ltd.* (supra) there was agreement to give the managing agency to the assessee on the erection of the mill because it had subscribed to shares worth Rs. 2 lakhs. The mill was not erected and the assessee sold the shares. There was therefore justification for holding that the purchase of the shares was an investment to acquire the managing agency and was not an adventure in the nature of trade. In *Saroj Kumar Mazumdar's case* (supra) there was a single transaction of sale of rights for the purchase of land measuring 8 acres by the assessee who was an Engineer by profession. His construction activities declined and that was why he sold his rights in the land for Rs. 74,000 odd in excess of the amount paid by him. The Income-tax Department however failed to prove that the assessee's dominant intention was to embark on a venture in the nature of trade as distinguished from capital investment. That was also therefore a different case. In the case of *Janki Ram Bahadur Ram* (supra) the assessee was a dealer in iron scrap and hardware. He agreed to purchase all rights of a company in a jute pressing factory, but sold it at a profit. It was held that as the property purchased by the assessee was not such that an inference that a venture in the nature of trade must have been intended could be raised, the profit was not liable to tax. It was held that a per-

son purchasing a jute press might intend to start his own business or he might let it out on favourable terms. The property was in fact let out by the earlier owner before the date of sale. That was also therefore quite a different case and cannot avail the appellant. In the remaining case of Ajax Products Ltd. (1961-43 ITR 297) (Mad) (supra) it was held that on the facts the assessee company having acquired the sick mill to open a new line of business, the purchase was really in the nature of an investment and the purchase and sale did not amount to an adventure in the nature of trade. That was therefore also quite a different case.

13. It would thus appear that in spite of the fact that the appellant withheld some of the correspondence bearing on the controversy, the Department has succeeded in proving that the transaction of sale in question was an adventure in the nature of trade and fell within the definition of 'business' in clause (4) of Section 2 of the Act. The High Court has rightly answered the question in the affirmative, and as we find no merit in this appeal, it is dismissed with costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2156

(From: Bombay)*

P. N. BHAGWATI AND S. MURTAZA FAZL ALI, JJ.

Triveni Prasad Ramkaran Verma, Appellant v. The State of Maharashtra, Respondent.

Criminal Appeal No. 264 of 1971, D/- 7-9-1976.

(A) Gold Control Rules (1963), Rule 126H (2) (d), 126P (2) (iv) and 126-A, Expl. Cl. (c) — Term "gold" includes smuggled gold — Offence can be committed in respect of such gold. AIR 1970 Cal 437, Overruled.

The Gold Control Rules 1963 are applicable alike to smuggled gold as to non-smuggled gold, and the inhibition of Rule 126H (2) (d) that no person other than a licensed dealer shall acquire gold except in accordance with a permit or authorisation

*(Criminal Appeal No. 650 of 1970 with Cri. Rev. No. 886 of 1970, D/- 20-8-1971—(Bom.)).

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granted by the Administrator is not confined in its operation to non-smuggled gold but applies equally in relation to smuggled gold. AIR 1970 Cal 437, Overruled. (Para 4)

The word "gold" is defined in clause (c) of the Explanation to Rule 126A to mean "gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and include any gold coin (whether legal tender or not), any ornament and any other article of gold." This definition does not restrict the meaning of the word "gold" to legal or non-smuggled gold. It is wide enough to include any kind of gold, whether smuggled or non-smuggled. The restrictions imposed by the Gold Control Rules, 1963 could not have been intended merely to apply to legal gold. The object and purpose of the restrictions would be frustrated by excluding from their ambit and coverage smuggled gold. The Gold Control Rules, 1963 seek to control and regulate dealings in gold and "gold" within the meaning of these rules must include not only non-smuggled gold but also smuggled gold. (Para 4)

(B) Gold Control Rules (1963), Rule 126P (2) (iv) — Conviction under — Sentence — Accused merely a carrier of gold for commission — Accused driven to this nefarious activity as he had lost his business as goldsmith — Sentence of imprisonment held was sufficient deterrent — Fine reduced from Rs. 3,000/- to Rs. 500/-. (Para 5)

Cases Referred: Chronological Paras
AIR 1970 Cal 437 = 1970 Cri LJ 1341 4

Mr. B. R. Agarwala, Advocate and Mr. P. B. Agarwal, Advocate, for Appellant; Mr. H. R. Khanna, Advocate and Mr. M. N. Shroff, Advocate, for Respondent.

Judgment of the Court was delivered by

BHAGWATI, J.:— The appellant was tried before the Presidency Magistrate, 25th Court, Mazgaon, Bombay for offence under clauses (a) and (b) of Section 135 read with Section 135 (ii) of the Customs Act, 1962 and Rule 126H (2) (d) read with Rule 126P (2) (iv) of the Gold Con-

trol Rules 1963. The prosecution case against the appellant was that on 7th September, 1965 about at 3.45 p.m. Inspector Tilwe, who was at the material time Sr. Grade Inspector of Customs attached to Gold Circle, Central Excise, Bombay, received information that two persons would be coming down from a building known as Hira Mahal, situated at Kalbadevi Road, and they will be carrying gold in the handle of a cane basket and also in their shoes. Inspector Tilwe, on receipt of this information, sent for Inspector Nichani and both of them kept guard outside Hira Mahal building from about 8.00 p.m. Around 8.45 p.m., the appellant accompanied by his maternal uncle's son, Dwarkaprasad, his son Dalip aged 9 years and his servant by the name of Mahadev, came out of Hira Mahal building. The appellant was carrying a basket in his hand and after coming out of the building, the appellant and his companions got into a victoria and proceeded towards Victoria Terminus Station. Inspector Tilwe and Inspector Nichani followed these persons and when the appellant and his companions got down from the Victoria and entered the platform, Inspector Tilwe accosted them and took them to the office of the Assistant Station Master and searched them there in the presence of three panchas. Two of the panchas were selected by Inspector Tilwe while the third volunteered to act as Pancha. On taking search, it was found that the shoes worn by the appellant and Dwarkaprasad had specially made cavities and four gold biscuits with foreign markings were found in the shoes of each of these two persons. The basket carried by the appellant also contained 27 gold biscuits with foreign markings concealed in the handle which was made of brass and which had a specially made cavity in it for concealing gold biscuits. While the search was going on, one Ticket Collector called Tharandas Bhatia arrived on the scene and he also witnessed the search. Inspector Tilwe seized the gold biscuits which were recovered from the appellant and Dwarkaprasad, in the reasonable belief that they were smuggled and hence liable to confiscation under

Section 111 of the Customs Act, 1962. This search and seizure was recorded in a Panchanama Ex. X, which was witnessed by the three panchas. Inspector Tilwe also seized from the appellant two first class Railway Tickets for the journey from Bombay to Kanpur, one Reservation Card and two Platform Tickets and so also were the basket and the shoes seized under the same Panchanama Ex. X. Inspector Tilwe then took the appellant and Dwarkaprasad to the Central Excise Office and recorded their statements in the presence of Inspector Nichani under Section 107 of the Customs Act, 1962. The statement of the appellant which is marked Ex. H was written by Dwarkaprasad in Hindi and was signed by the appellant. The appellant admitted in his statement that he was carrying smuggled gold concealed in the handle of the basket and shoes for being handed over to a firm called M/s. Pannalal Durgaprasad at Kanpur and that he had been doing this work for the last six months ever since his business as a goldsmith was closed down. Another statement of the appellant was also subsequently recorded by Inspector Tilwe on 22nd November, 1965 at the shop of the appellant and this statement was written by one Maganlal, an employee of the appellant, in Gujarati and was signed by the appellant. Both the appellant and Dwarkaprasad were thereafter prosecuted for offences under clauses (1) and (b) of Sec. 135 read with Section 135 (ii) of the Customs Act, 1962, and Rule 126H (2) (d) read with Rule 126P (2) (iv) of the Gold Control Rules, 1963. Dwarkaprasad pleaded guilty to the charge and was convicted and we are not concerned in this appeal with the conviction and sentence recorded against him. The appellant denied the charge and hence he was tried before the learned Presidency Magistrate. The only evidence led on behalf of the prosecution against the appellant was that of Inspector Tilwe and Tharandas Bhatia. None of the panchas was examined as a witness to prove the search and seizure. The learned Presidency Magistrate observed that in view of the fact that Tharandas Bhatia had not signed the Panchanama Ex. X nor his statement

had been recorded by the Customs Authorities or the Railway Police, and his name had also not been shown as a witness in the complaint, it would not be desirable to rely on his evidence against the appellant. But the learned Presidency Magistrate found the evidence of Inspector Tilwe satisfactory and convincing and on the strength of this evidence, he held the charge proved against the appellant and convicted the appellant of the offence under cl. (b) of Sec. 135 read with Section 135 (ii) of the Customs Act, 1962 and Rule 126H (2) (d) read with Rule 126P (2) (iv) of the Gold Control Rules, 1963 and sentenced him to suffer rigorous imprisonment for two months and to pay a fine of Rs. 500/- or in default to suffer rigorous imprisonment for two months for each of these two offences. Since there was no evidence to show that the appellant himself had smuggled the seized gold into India, he was acquitted of the charge under clause (a) of Section 135 read with Section 135 (ii) of the Customs Act, 1962.

2. The appellant preferred an appeal against his conviction and sentence but the High Court agreed with the view taken by the learned Presidency Magistrate and dismissed the appeal of the appellant. Hence the present appeal with special leave obtained from this Court.

3. It is true that the conviction of the appellant rests solely on the evidence of Inspector Tilwe. There were three panchas who witnessed the Panchanama Ex. X regarding search and seizure of gold from the appellant but unfortunately none of the three panchas could be examined, as they were not traceable in spite of efforts made by the prosecution. Two of the panchas undoubtedly remained present in the course of the adjudication proceedings but that was in December 1967. The trial before the learned Presidency Magistrate commenced in April 1969 and evidence was given by Inspector Tilwe in December 1969 and at that time none of the three panchas could be traced and brought for the purpose of giving evidence. The statement of Inspector Tilwe that "all the three panchas are now

not traceable in spite of great efforts" was not challenged in cross-examination and we must, therefore, proceed on the basis that none of the three panchas was available and if that be so, no adverse inference can be drawn against the prosecution for not examining any of the three panchas. Tharandas Bhatia was no doubt examined but the learned Presidency Magistrate preferred not to rely on his evidence and we think, he was right in doing so. Inspector Nichani could, of course have been examined as a witness, since he was present at the time of search and seizure, but his non-examination cannot help the appellant, since he was also an Inspector in the Customs Department like Inspector Tilwe and once Inspector Tilwe gave evidence, it would not have added to the weight of prosecution evidence by also examining him. The prosecution case against the appellant must, therefore, in the ultimate analysis stand or fall by the evidence of Inspector Tilwe. The learned Presidency Magistrate as well as the High Court accepted the evidence of Inspector Tilwe and we do not see any reason to interfere with the concurrent view taken by both these courts as regards the appreciation of his evidence. It was not the case of the appellant that he and Dwarkaprasad along with Dalip and Mahadev did not proceed from Hira Mahal building to Victoria Terminus or that they were not taken by Inspector Tilwe to the office of the Assistant Station Master for purpose of search or that gold was not found as a result of the search, but his defence was that the seized gold was found from Dwarkaprasad and not from him and that both the basket and the shoes belonged to Dwarkaprasad and he had nothing to do with the same. Now, it is difficult to see why Inspector Tilwe should have falsely implicated the appellant if, in fact, the seized gold was found only from the person of Dwarkaprasad and the appellant was completely innocent. It may also be noticed that the case of the appellant was that Mahadev was the servant of Dwarkaprasad and it was Dwarkaprasad who was going from Bombay to Kanpur along with his servant Mahadev and the two Railway Tickets from

Bombay to Kanpur were meant for Dwarkaprasad. But it is difficult to understand why in that event there should have been two first class Railway Tickets. Mahadev could not possibly be travelling by first class along with his master. The fact that there were two first class Railway Tickets shows that the appellant and Dwarkaprasad were going to travel from Bombay to Kanpur. This is also borne out from the statement Ex. H given by the appellant to Inspector Tilwe. The appellant tried to wriggle out of the statement Ex. H by showing that it was taken from him under threat and was not a voluntary statement containing the true facts. But it is evident from the contents of the statement Ex. H that it is a genuine document. There are several details in the statement Ex. H which could never have been dictated by Inspector Tilwe. There is inherent evidence in the contents of the statement Ex. H showing that the statement is true. It was admitted in the statement Ex. H, that the appellant was carrying gold from Bombay to M/s. Pannalal Durgaprasad at Kanpur and this statement is clearly supported by the seizure of two First Class Railway Tickets from Bombay to Kanpur. It is true that the reservation card seized at the time of search did not show in whose name the reservations were made and it would have been better if the prosecution had summoned the railway authorities to produce the Reservation Chart of the train for the purpose of showing in whose name the reservations were made. But even so, the fact that the reservation card was seized from the appellant shows that the appellant was travelling from Bombay to Kanpur. We do not see any cogent reasons for taking a different view from that taken concurrently by the learned Presidency Magistrate and the High Court in regard to the evidence of Inspector Tilwe and we think this evidence is sufficient to found the conviction of the appellant.

4. The appellant, however, contended that even if it be held that gold was found from the person of the appellant, as alleged by the prosecution, it was smuggled gold and hence not covered by the Gold

Control Rules, 1963 and, in the circumstances, no offence under Rule 126H (2) (d) read with Rule 126P (2) (iv) could be said to have been committed by the appellant in acquiring such gold. The argument of the appellant was that the Gold Control Rules, 1963 apply only in relation to what may be called legal gold or non-smuggled gold and smuggled gold is outside their scope and ambit and hence acquisition of smuggled gold would not constitute an offence under the Gold Control Rules 1963. This is an argument of despair and cannot be sustained even for a moment. Rule 126H (2) (d) provides, inter alia, that no person other than a licensed dealer shall buy or otherwise acquire or agree to buy or acquire gold, not being ornaments, except in accordance with a permit granted by the Administrator or in accordance with such authorisation as the Administrator may make in this behalf. The word 'gold' is defined in cl. (c) of the explanation to R. 126A to mean "gold, including its alloy, whether virgin, melted, remelted, wrought or unwrought, in any shape or form, of a purity of not less than nine carats and include any gold coin (whether legal tender or not), any ornament and any other article of gold." This definition does not restrict the meaning of the word 'gold' to legal or non-smuggled gold. It is wide enough to include any kind of gold, whether smuggled or non-smuggled. The restrictions imposed by the Gold Control Rules, 1963 could not have been intended merely to apply to legal gold. The object and purpose of the restrictions would be frustrated by excluding from their ambit and coverage smuggled gold. The Gold Control Rules, 1963 seek to control and regulate dealings in gold and 'gold' within the meaning of these rules must include not only non-smuggled gold but also smuggled gold. We fail to see on what principle of construction can smuggled gold, which is 'gold' within the meaning of the definition, be excluded from the operation of these Rules. There is no scope for inferring any such exclusion nor is there anything in the Rules which supports such exclusion. Take, for example, Rule 126 which says that a dealer shall not

make or manufacture any article of gold other than ornament. Can it be suggested for a moment that this Rule does not prohibit a dealer from making or manufacturing articles out of smuggled gold? Then again, look at Rule 126C. It provides, inter alia, that no dealer shall make, manufacture or prepare any ornament having gold of a purity exceeding fourteen carats. Can a dealer make an ornament of smuggled gold having purity exceeding fourteen carats without committing a breach of this Rule? Rule 126-I provides that every person shall make a declaration to the Administrator as to the quantity, description and other prescribed particulars of gold owned by him. How can a person, who has smuggled gold, say that he is not bound to make a declaration under this Rule? The object of requiring a declaration is that the Government should know what is the gold possessed by each person, so that dealings in gold can be controlled and regulated and this object would be thwarted if smuggled gold were not subject to the requirement of declaration. Then again consider Rule 126D which says that no person shall make advance or grant any loan to any other person on the hypothecation, pledge, mortgage or charge of any gold other than ornament, unless such gold has been included in a declaration. If smuggled gold were outside the scope of this rule, it would be open to a person to advance moneys on the security of smuggled gold without involving any violation of this rule. That surely could not have been the intention of the Government in making the Gold Control Rules, 1963. We are aware that there is a decision of the Calcutta High Court in *A. M. Sinha v. Prohlad Chandra*, (AIR 1970 Cal 437) where a Division Bench has taken the view that "declaration under Rule 126P is in respect of legal gold as opposed to smuggled gold and no question of declaration in respect of smuggled gold can arise under Gold Control Rules, 1963," but we do not think this decision represents the correct law on the point. We are of the view that the Gold Control Rules 1963 are applicable alike to smuggled gold as to non-smuggled gold, and the inhibition of

Rule 126H (2) (d) that no person other than a licensed dealer shall acquire gold except in accordance with a permit or authorisation granted by the Administrator is not confined in its operation to non-smuggled gold but applies equally in relation to smuggled gold. The learned Presidency Magistrate and the High Court were, therefore, right in convicting the appellant under R. 126H (2) (d) read with Rule 126P (2) (iv) of the Gold Control Rules, 1963.

5. Since the appellant is convicted of the offence under R. 126P (2) (iv) of the Gold Control Rules, 1963, the sentence of imprisonment to be imposed on him cannot be less than six months and the High Court was right in enhancing the sentence to six months' imprisonment. But so far as the sentence of fine is concerned, we do not think that the facts and circumstances of the case justify a heavy fine of Rs. 3,000/- for each of the two offences for which the appellant is convicted. It appears from the statement of the appellant Ex. H that he was a carrier of gold for M/s. Pannalal Durgaprasad of Kanpur and the purchase price of gold was provided substantially by this Kanpur firm and the appellant was merely to receive some commission. The appellant was a goldsmith who had lost his business for the last six months and perhaps economic necessity drove him to carry on this nefarious activity. The sentence of imprisonment which has been imposed on the appellant would be sufficient deterrent to him and many others who indulge in this anti-social activity which is calculated to disrupt the economy of the country. We feel that in the circumstances, the ends of justice would be met if the sentence of fine is reduced from Rs. 3,000/- to Rs. 500/- for each of the two offences.

6. We accordingly confirm the conviction of the appellant as also the sentence of imprisonment imposed on him but reduce the sentence of fine from Rs. 3,000/- to Rs. 500/- for each of the two offences for which the appellant is convicted, with a direction that in default of payment of fine the appellant will suffer rigorous

imprisonment for a period of two months. The appeal is allowed to this limited extent.

Sentence reduced.

AIR 1976 SUPREME COURT 2161

(From: Allahabad)

P. N. BHAGWATI AND S.
MURTAZA FAZL ALI, JJ.

Mohd. Ashfaq, Appellant v. State
Transport Appellate Tribunal U. P.
and others, Respondents.

Civil Appeal No. 871 of 1974,
D/- 10-9-1976*

**(A) Motor Vehicles Act (1939),
Sections 58 (2) Proviso and 68F (1D).
Proviso — Renewal of permits —
Time limit prescribed by Proviso to
S. 58 (2) whether applies in case of
an application for renewal of a permit
under the proviso to S. 68F (1D).**

The scheme of Chapter IVA does not exclude the applicability of the provisions contained in Section 57 and the proviso to sub-section (2) of Section 58. Chapter IVA contains a fasciculus of sections commencing from Sec. 68A and ending with Section 68-J. (Para 6)

Where a scheme is published under Section 68-C, no permit in respect of a route specified in the scheme can be granted or renewed during the intervening period between the publication of the scheme under Section 68-C and the publication of the approved scheme, except a temporary permit to the State Transport Undertaking under sub-section (1-A) or failing that, a temporary permit to any other person under sub-sec. (1-C) of S. 68F, with this qualification that an existing permit can be renewed for a limited period. The holder of an existing permit would obviously ex necessitate have to make an application, if he wants renewal of his permit and the application for renewal would be considered by the Regional Transport Authority. (Para 6)

S. 57 lays down the procedure to be followed in dealing with an ap-

* (C. M. W. P. No. 2128 of 1973, D/- 3-4-1973—(All.)).

IT/IT/D128/76/LGC

1976 S. C./136 X G—12

plication for grant of a permit and by reason of Section 58 sub-section (2), that procedure is applicable also in relation to an application for renewal of a permit. There is also a time limit laid down in the proviso to sub-section (2) of Section 58 which says that an application for renewal of a permit shall be made not less than 120 days before the date of expiry of the permit. These provisions in Section 57 and the proviso to sub-section (2) of Section 58 on their plain language apply to every application for renewal of a permit and it is indeed difficult to see what difference there is between an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F and any other application for renewal of a permit. An application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F is as much an application for renewal as any other. It had to be specially provided for in the proviso to sub-section (1-D) of Section 68-F, because sub-section (1-D) imposes a prohibition on grant or renewal of permit during the intervening period between the publication of a scheme under Sec. 68-C and the publication of the approved scheme and, if the proviso were not enacted, renewal of an existing permit expiring after the publication of the scheme under Section 68-C would have been barred. This, the Legislature did not want and hence the proviso was introduced permitting renewal of an existing permit though for a limited period, despite the general prohibition enacted in sub-section (1-D). This renewal was not intended to be some special kind of renewal different from any other ordinary renewal of a permit. There is, therefore, no reason in principle why the provisions enacted in Section 57 and the proviso to sub-section (2) of Section 58 should not apply in case of an application for renewal of a permit under the proviso to sub-section (1-D) of Sec. 68-F. (Para 6)

Moreover, it is implicit in the enactment of Section 68-B that Chapter IV-A is not a self-contained Chapter to which the other provisions of the Act are inapplicable. If Chapter IV-A were a self-contained Code by itself, there would have been no

need to give overriding effect to the provisions in that Chapter as against the other provisions of the Act. Section 68-F, sub-section (3) also proceeds on the assumption that, but for its enactment, an order made by the Regional Transport Authority under sub-section (1) or sub-sec. (2) of Section 68-F would have been appealable under Section 64 and it was to exclude the applicability of Section 64 that sub-section (3) of Section 68-F was enacted. These two circumstances clearly point to the conclusion that the other provisions of the Act, to the extent to which their language warrants, apply in relation to proceedings under Chapter IVA, save in so far as they may be, expressly or by reason of repugnance or inconsistency, overridden. (Para 6)

(B) Motor Vehicles Act (1939), Section 58 (2) Proviso and (3) — Renewal of permits — Delay in filing application for renewal of permit — Section 5 of the Limitation Act, whether applies. (Limitation Act (1963), Ss. 5 and 29 (2)).

The proviso to sub-section (2) requires that an application for renewal of a permit should be made not less than 120 days before the date of expiry of the permit. But sub-sec. (3) vests a discretion in the Regional Transport Authority to entertain an application for renewal of a permit even if it is beyond time, but in that case the delay should not be of more than fifteen days. The word used in sub-s. (3) is "may" and not "shall" and the Regional Transport Authority is given a discretion to entertain an application for renewal of a permit even where it is beyond time, though not more than 15 days. It may condone the delay or it may not, depending on the circumstances of each case. The discretion is to be exercised not on any arbitrary or fanciful grounds or whim or caprice of the Regional Transport Authority, but it is to be a judicial discretion. The discretion is obviously to be exercised where sufficient cause for not making the application for renewal within time is made out by the applicant. This criterion can legitimately be imported from Section 5 of the Limitation Act, 1963 which contains an allied

provision for condonation of delay where an application is made beyond time. It could never have been the intention of the Legislature that even where there is no sufficient cause for delay in making an application for renewal, the Regional Transport Authority should still be bound to entertain the application for renewal merely on the ground that the delay is of not more than 15 days. Sub-section (3) enacts a provision for condonation of delay in making an application for renewal and not a provision extending the time limit specified in the proviso to sub-section (2) in all cases as a matter of course. (Paras 7, 8)

Section 29 (2) of the Limitation Act, 1963 makes Section 5 applicable in the case of an application for renewal unless its applicability can be said to be expressly excluded by any provisions of the Act. Sub-section (3) of Section 58 in so many terms says that the Regional Transport Authority may condone the delay in making of an application for renewal and entertain it on merits provided the delay is of not more than 15 days. This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-section (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Sec. 5 in cases where an application for renewal is delayed by more than 15 days. (Para 8)

Thus where the application for renewal of permit was admittedly late by more than 15 days, the delay was not condonable and the R.T.A. was right in rejecting the application as time barred. (Para 8)

Mr. Yogeshwar Prasad, Sr. Advocate, Miss Rani, Advocate for M/s. Bagga, Advocates, for Appellant; Mr. G. N. Dikshit, Sr. Advocate and Mr. O. P. Rana, Advocate with him, for Respondents Nos. 1 and 2.

Judgment of the Court was delivered by

BHAGWATI, J.— This appeal by special leave is directed against an order passed by the High Court of Allahabad rejecting a writ petition filed by the appellant challenging the validity of an order of the State Transport Appellate Tribunal confirming an order of the Regional Transport Authority rejecting the application of the appellant for renewal of his stage carriage permit for the route Nagina-Jaspur.

2. The route Nagina-Jaspur lies within the jurisdiction of the Regional Transport Authority Bareilly. The appellant and his brother Mohd. Afaq held a stage carriage permit for this route for some years and it was due to expire on 1st July 1971. Before the expiration of the period of permit, however, a scheme was prepared and published by the State Transport Undertaking under Section 68C of the Motor Vehicles Act, 1939 (hereinafter referred to as 'the Act') and this scheme covered the route Nagina-Jaspur. The publication of this scheme did not affect the validity of the permit of the appellant and Mohd. Afaq and they continued to ply their motor vehicles on the route Nagina-Jaspur on the strength of the permit. During the currency of the permit, several amendments of a far-reaching character were made in the Act by Act 56 of 1969 and sub-sections (1A) to (1D) were introduced in Section 68F after sub-section (1). These sub-sections are material and they may be reproduced as follows:

"68F (1A) Where any scheme has been published by a State Transport Undertaking under Section 68C, that Undertaking may apply for a temporary permit, in respect of any area or route or portion thereof specified in the said scheme, for the period intervening between the date of publication of the scheme and the date of publication of the approved or modified scheme, and where such application is made, the State Transport Authority or the Regional Transport Authority, as the case may be, shall, if it is satisfied that it is necessary to increase, in the public interest, the number of vehicles operating in such area or route or portion

thereof, issue the temporary permit prayed for by the State Transport Undertaking.

(1B) A temporary permit issued in pursuance of the provisions of sub-section (1A) shall be effective,—

(i) if the scheme is published under sub-section (3) of Section 68D, until the grant of the permit to the State Transport Undertaking under sub-section (1), or

(ii) if the scheme is not published under sub-section (3) of Section 68D, until the expiration of the one week from the date on which the order under sub-section (2) of Section 68D is made.

(1C) If no application for a temporary permit is made under sub-section (1A), the State Transport Authority or the Regional Transport Authority, as the case may be, may grant, subject to such conditions as it may think fit, temporary permit to any person in respect of the area or route or portion thereof specified in the scheme and the permit so granted shall cease to be effective on the issue of a permit to the State Transport Undertaking in respect of that area or route or portion thereof.

(1D) Save as otherwise provided in sub-sec. (1A) or sub-section (1C), no permit shall be granted or renewed during the period intervening between the date of publication, under Section 68C of any scheme and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service in relation to an area or route or portion thereof covered by such scheme:

Provided that where the period of operation of a permit in relation to any area, route or portion thereof specified in a scheme published under Section 68C expires after such publication, such permit may be renewed for a limited period, but the permit so renewed shall cease to be effective on the publication of the scheme under sub-section (3) of Section 68D."

Since the permit of the appellant and Mohd. Afaq was going to expire on 1st July, 1971, the appellant made an application for renewal of the permit under the proviso to sub-section (1D) of Section 68F and submitted

the application to the Regional Transport Authority on 22-3-1971. When the application came up for hearing before the Regional Transport Authority, there was admittedly no objector against it, but the Regional Transport Authority took the view that under the proviso to sub-section (2) of Section 58 an application for renewal of a permit is required to be made not less than 120 days before the date of expiry of the permit and even if there is delay in making the application, it can be condoned under sub-section (3) of Section 58 but only if it is a delay of not more than 15 days and since in the present case the application for renewal of the permit was made by the appellant on 22nd March, 1971, it was late by 18 days and hence the delay was not capable of being condoned and in this view, the Regional Transport Authority by an order D/- 28-3-1973 rejected the application for renewal of the permit as time-barred.

3. The appellant preferred an appeal to the State Transport Appellate Tribunal and in the appeal the appellant challenged the correctness of the order of the Regional Transport Authority. The State Transport Appellate Tribunal, however, agreed with the view taken by the Regional Transport Authority and held that in view of the specific prohibition contained in sub-section (3) read with the proviso to sub-section (2) of Section 58 it was not competent to the Regional Transport Authority to condone the delay in making of the application for renewal of the permit, since the delay was of more than 15 days. The State Transport Appellate Tribunal also observed that in any event the material produced before the Regional Transport Authority did not make out any sufficient cause for not making the application for renewal of the permit within time and hence even if there was no statutory bar against condonation of delay of more than 15 days, this was not a fit case in which the delay should be condoned. The State Transport Appellate Tribunal accordingly confirmed the order of the Regional Transport Authority.

4. This led to the filing of a writ petition by the appellant in the

High Court of Allahabad. The High Court summarily rejected the writ petition stating that no ground had been made out for exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution. Hence the appellant brought the present appeal with special leave obtained from this Court.

5. Two contentions were urged on behalf of the appellant in support of the appeal. The first contention was that the time-limit specified in the proviso to sub-section (2) of Section 58 was not applicable in case of an application for renewal of a permit under the proviso to sub-section (1D) of Section 68F and the Regional Transport Authority was not entitled to reject the application of the appellant for renewal of his permit as time-barred. It has also contended in the alternative that even if the time limit set out in the proviso to sub-section (2) of Sec. 58 was applicable, sub-section (3) extended such time limit by fifteen days and even if thereafter there was any delay beyond the extended time limit, it could be condoned by the Regional Transport Authority for sufficient cause by reason of Section 5 read with Section 29, sub-section (2) of the Limitation Act, 1963. The second contention which followed on the acceptance of the last contention was that the appellant had sufficient cause for not preferring the application for renewal of his permit within the extended time limit and hence the Regional Transport Authority should have condoned the delay and entertained the application on merits. The validity of both these contentions was disputed on behalf of respondents 1 and 2 and it was urged that the time limit specified in the proviso to sub-section (2) of Sec. 58 was applicable in the present case and the only delay which could be condoned was a delay of 15 days and not more and in any event, there was no sufficient cause made out by the appellant for not making the application for a renewal within time and hence the application for renewal was rightly rejected as time-barred. We shall proceed to consider the merits of these rival contentions.

6. The first question which arises for consideration on these con-

tentions is as to whether the time limit prescribed by the proviso to sub-section (2) of Section 58 applies in case of an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F. The argument of the appellant was that Chapter IVA which contains, inter alia, Section 68F, is a self-contained chapter and nothing in the other provisions of the Act applies to proceedings under that chapter and hence neither the procedure under Section 57 nor the time limit specified in the proviso to sub-section (2) of Section 58 has any application to an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F. This argument is, in our opinion, manifestly wrong. The scheme of Chapter IVA is clear and it does not exclude the applicability of the provisions contained in Section 57 and the proviso to sub-section (2) of Section 58. Chapter IVA contains a fasciculus of sections commencing from Section 68A and ending with Section 68-J. Section 68-A defines certain expressions used in Chapter IVA. Section 68-B gives overriding effect to the provisions contained in Chapter IVA by saying that these provisions shall have effect, notwithstanding anything inconsistent therewith contained in Chapter IV or in any other law for the time being in force. Section 68-C provides that where any State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport service in relation to any route should be run and operated by the State Transport Undertaking, a scheme may be prepared by the State Transport Undertaking giving particulars of the nature of the services proposed to be rendered, the route proposed to be covered and other prescribed particulars and such scheme shall be duly published. Certain categories of persons are empowered by Section 68-D sub-section (1) to file objections against the scheme published under Section 68-C and the State Government may then, after considering such objections and hearing the parties, approve or modify the scheme

under sub-section (2) of Section 68-D. Section 68-D sub-section (3) provides that the scheme as approved or modified under sub-section (2) shall be published in the Official Gazette and it shall thereupon become final and shall be called the approved scheme and the routes to which it relates shall be called the notified routes. Section 68-E provides for cancellation or modification of the scheme. Then follows Section 68-F which is material for our purpose. Sub-section (1) of that section provides for issue of a permit to the State Transport Undertaking in respect of a notified route after publication of an approved scheme. But what is to happen during the period between the publication of a scheme under Section 68-C and the publication of the approved scheme under sub-section (3) of Section 68-D? That is taken care of by sub-sections (1A) to (1-D) of Section 68F. Sub-section (1-D) provides that for this intervening period, the State Transport Undertaking may apply for a temporary permit in respect of a route specified in the scheme and where such application is made, the Regional Transport Authority shall, if it is satisfied that it is necessary to increase, in the public interest, the number of vehicles operating on such route, issue the temporary permit prayed for by the State Transport Undertaking. What shall be the duration of such temporary permit is laid down in sub-section (1-B). Sub-section (1-C) deals with the situation where no application for a temporary permit is made by the State Transport Undertaking and it says that in such a case, the Regional Transport Authority may grant temporary permit to any person in respect of a route specified in the scheme. Sub-section (1-D) imposes a prohibition that "save as otherwise provided in sub-section (1-A) and sub-section (1-C), no permit shall be granted or renewed during the period intervening between the date of publication under Section 68-C of any scheme and the date of publication of the approved or modified scheme, in favour of any person" in relation to a route covered by such scheme, but this is subject to a proviso that where the period of opera-

tion of a permit in relation to any route "specified in a scheme published under Section 68-C expires after such publication, such permit may be renewed for a limited period." It will, therefore, be seen that where a scheme is published under Sec. 68-C, no permit in respect of a route specified in the scheme can be granted or renewed during the intervening period between the publication of the scheme under Section 68-C and the publication of the approved scheme, except a temporary permit to the State Transport Undertaking under sub-section (1-A) or failing that, a temporary permit to any other person under sub-section (1-C), with this qualification that an existing permit can be renewed for a limited period. The holder of an existing permit would obviously ex necessitate have to make an application, if he wants renewal of his permit and the application for renewal would be considered by the Regional Transport Authority. The question is: can this application for renewal be made at any time and when it is made, what procedure would govern it? Section 57 lays down the procedure to be followed in dealing with an application for grant of a permit and by reason of Section 58 sub-section (2), that procedure is applicable also in relation to an application for renewal of a permit. There is also a time limit laid down in the proviso to sub-section (2) of Section 58 which says, in so far as relevant, that an application for renewal of a permit shall be made not less than 120 days before the date of expiry of the permit. These provisions in Section 57 and the proviso to sub-section (2) of Section 58 on their plain language apply to every application for renewal of a permit and it is indeed difficult to see what difference there is between an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F and any other application for renewal of a permit. An application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F is as much an application for renewal as any other. It had to be specially provided for in the proviso to sub-section (1-D) of Section 68-F, because sub-section (1-D) imposes a

prohibition on grant or renewal of permit during the intervening period between the publication of a scheme under Section 68-C and the publication of the approved scheme and, if the proviso were not enacted, renewal of an existing permit expiring after the publication of the scheme under Section 68-C would have been barred. This, the Legislature did not want and hence the proviso was introduced permitting renewal of an existing permit though for a limited period, despite the general prohibition enacted in sub-section (1-D). This renewal was not intended to be some special kind of renewal different from any other ordinary renewal of a permit. There is, therefore, no reason in principle why the provisions enacted in Section 57 and the proviso to sub-section (2) of Section 58 should not apply in case of an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F. If the procedure set out in Section 57 does not apply in such a case, there is no other procedure prescribed by the Act which can possibly be invoked and the result would be that there would be no procedure for dealing with such an application for renewal and in that event, how would the objections be invited against the application for renewal and within what time and who would be entitled to be heard and when. And equally if the time limit specified in the proviso to sub-section (2) of Section 58 does not apply, there would be no time-limit for making such an application for renewal and it would be possible to make it any time, even after the expiry of the period of the permit and the Regional Transport Authority would be bound to consider it. That surely could never have been the intention of the legislature. Moreover, it is implicit in the enactment of Section 68-B that Chapter IV-A is not a self-contained chapter to which the other provisions of the Act are inapplicable. If Chapter IV-A were a self-contained Code by itself, there would have been no need to give overriding effect to the provisions in that chapter as against the other provisions of the Act. Section 68-F, sub-section (3) also proceeds on the assumption that, but for its enact-

ment, an order made by the Regional Transport Authority under sub-section (1) or sub-section (2) of Sec. 68-F would have been appealable under Section 64 and it was to exclude the applicability of Section 64 that sub-section (3) of Section 68-F was enacted. These two circumstances clearly point to the conclusion that the other provisions of the Act, to the extent to which their language warrants, apply in relation to proceedings under Chapter IVA, save in so far as they may be, expressly or by reason of repugnance or inconsistency, overridden. We must, therefore, reject the first contention of the appellant which seeks to exclude the applicability of the proviso to sub-section (2) of Section 58 to an application for renewal of a permit under the proviso to sub-section (1-D) of Section 68-F.

7. That takes us to the next question as to the applicability of Section 5 of the Limitation Act, 1963 to an application for renewal of a permit. It would be convenient at this stage to refer to the provisions of sub-sections (2) and (3) of Section 58, which, so far as material, read as follows:

"(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit:

Provided that the application for the renewal of a permit shall be made—

(a) in the case of a stage carriage permit or a public carrier's permit, not less than one hundred and twenty days before the date of its expiry; and

(b) in any other case, not less than sixty days before the date of its expiry:

Provided further that, other conditions being equal, an application for renewal shall be given preference over new applications for permits.

(3) Notwithstanding anything contained in the first proviso to sub-section (2), the Regional Transport Authority may entertain an application for the renewal of a permit after the last date specified in the said proviso for the making of such an application, if the application is

made not more than fifteen days after the said last date and is accompanied by the prescribed fee."

The proviso to sub-section (2) requires that an application for renewal of a permit should be made not less than 120 days before the date of expiry of the permit. But, notwithstanding this provision, the Regional Transport Authority may, under sub-section (3), entertain an application for renewal of a permit after the last date specified in sub-section (2), "if the application is made not more than 15 days after said last date and is accompanied by the prescribed fee." Sub-section (3) thus vests a discretion in the Regional Transport Authority to entertain an application for renewal of a permit even if it is beyond time, but in that case the delay should not be of more than fifteen days. The word used in sub-section (3) is "may" and not "shall" and the Regional Transport Authority is given a discretion to entertain an application for renewal of a permit even where it is beyond time, though not more than 15 days. It may condone the delay or it may not, depending on the circumstances of each case. The discretion is to be exercised not on any arbitrary or fanciful grounds or whim or caprice of the Regional Transport Authority, but it is to be a judicial discretion. It is true that the criterion which is to guide the Regional Transport Authority in the exercise of its discretion is not articulated in sub-section (3), but it is implicit in every conferment of discretion on a judicial or quasi-judicial authority that the discretion is to be exercised in a judicial manner on well-settled legal principles. It would not be right to attribute to the legislature an intention to confer unguided and unfettered discretion on the Regional Transport Authority which is a quasi-judicial authority. The discretion is obviously to be exercised where sufficient cause for not making the application for renewal within time is made out by the applicant. This criterion can legitimately be imported from Section 5 of the Limitation Act, 1963 which contains an allied provision for condonation of delay where an application is made beyond time. It could never have been the

intention of the Legislature that even where there is no sufficient cause for delay in making an application for renewal, the Regional Transport Authority should still be bound to entertain the application for renewal merely on the ground that the delay is of not more than 15 days. Sub-section (3) enacts a provision for condonation of delay in making an application for renewal and not a provision extending the time limit specified in the proviso to sub-section (2) in all cases as a matter of course. If the intention of the Legislature were that in every case delay of not more than 15 days in making an application for renewal should be condoned as of course, there was no need for a separate provision in sub-section (3), but the Legislature could have very well specified "one hundred and five days" instead of "one hundred and twenty days" in the proviso to sub-section (2).

8. It is, therefore, clear that sub-section (3) of Section 58 confers a discretion on the Regional Transport Authority to entertain an application for renewal when it is made beyond the time limit specified in the proviso to sub-section (2), but not more than 15 days late and the discretion is to be exercised in favour of entertaining the application for renewal when it is shown that there was sufficient cause for not making it in time. Now the question which arises is: does Section 5 of the Limitation Act, 1963 apply so as to empower the Regional Transport Authority, for sufficient cause, to entertain an application for renewal even where it is delayed by more than 15 days? Section 29, sub-section (2) of the Limitation Act, 1963 makes Section 5 applicable in the case of an application for renewal unless its applicability can be said to be expressly excluded by any provision of the Act. The only provision of the Act sought to be pressed into service for this purpose was sub-section (3). Does sub-section (3) expressly exclude further extension of time under Section 5? If it does, then Section 5 cannot be availed of by the appellant for condonation of the delay. Sub-section (3) in so many terms says that the Regional Transport Authority may condone the de-

lay in making of an application for renewal and entertain it on merits provided the delay is of not more than 15 days. This clearly means that if the application for renewal is beyond time by more than 15 days, the Regional Transport Authority shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-section (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of Section 5 in cases where an application for renewal is delayed by more than 15 days. This provision may seem harsh, but it has been deliberately and advisedly made because the question of renewal of a permit must obviously be decided before the expiration of the period of the permit and in view of the elaborate procedure set out in Section 57 for dealing with an application for renewal, a certain minimum period before the expiration of the period of the permit must be provided within which this procedure can be completed so that the renewal can, if at all, be granted well in time before the permit expires. If an application for renewal could be entertained even if made at any stage, it would dislocate the procedural machinery set out in Section 57 and that is why the Legislature prescribed in sub-section (3) of Section 58 that the delay in making an application for renewal may be condoned by the Regional Transport Authority only if it is of not more than 15 days. Here, the application made by the appellant for renewal of his permit was admittedly late by more than 15 days and hence the delay was not condonable and the Regional Transport Authority was right in rejecting the application for renewal as time barred.

9. We must, in the circumstances, dismiss the appeal, but in view of the peculiar facts of the case we make no order as to costs.

Appeal dismissed.

AIR 1976 SUPREME COURT 2169

(From: Madhya Pradesh)*

**H. R. KHANNA, N. L. UNTWALIA
AND JASWANT SINGH, JJ.****Virendra Singh, Appellant v.
Vimal Kumar, Respondent.****Civil Appeal No. 1212 of 1974,
D/- 8-9-1976.**

(A) Representation of the People Act (1951), Ss. 86, 83 (1) (b) — Election petition — Particulars of corrupt practices against successful candidate — Allegations in petition, sufficiently clear and precise — Affidavit accompanying petition conforming to form prescribed — Failure to give particulars of printing of pamphlet — Not detrimental — Petition, held not liable to be dismissed in view of Section 99, C. P. C. — (Civil P. C. (1908), S. 99) — AIR 1975 SC 968, Followed. (Para 7)

(B) Representation of the People Act (1951), Ss. 86, 100 (2), 116-A — Election petition — Corrupt practice — Setting aside of election of successful candidate — Appeal against — Duty of Court.

Where in appeal against setting aside of election of successful candidate, T on ground of corrupt practice the appellant's counsel concedes that the contents of certain leaflet do cast a reflection on the personal conduct and character of another candidate and as such would fall within the mischief of Section 123 (4), the question which is required to be determined in such a case is whether it was T who got the offending leaflet printed. It is necessary to go into the question of printing of the leaflet as the finding in respect thereof is bound to have an important bearing on the question of its distribution either by T or with his consent and a discussion of the evidence regarding printing provides a satisfactory method of assuring oneself as to whether the distribution was made, as alleged, by T or with his consent. AIR 1975 SC 968, Followed.

(Para 9)

(C) Representation of the People Act (1951), Ss. 123 (4), 127-A — Wit-

ness printing offending leaflet, if would make him an accomplice — Section 127-A, if has any relevance. (Evidence Act (1872), S. 133)

(D) Evidence Act (1872), S. 114 — Election petition against successful candidate, T — Corrupt practice — Witness printing offending leaflet against another candidate after receiving letter from T through R — Statement of above witness found to be possessing ring of truth — Omission on part of T to contradict that witness by examining R who was his election agent — Held it could be presumed that R was not prepared to support T by refuting statement of above witness. (Para 12)

(E) Representation of the People Act (1951), S. 123 (4) — Corrupt practice — Publication of offending leaflet — Means distribution of the printed material. AIR 1975 SC 968, Followed (Obiter). (Para 18)

(F) Representation of the People Act (1951), S. 100 — Election petition — Corrupt practice — Distribution of offending leaflet by returned candidate or his election agent or with their consent — Leaflet found to contain false statement of facts calculated to injure personal conduct and character of another candidate with a view to prejudice his election prospects — Election of returned candidate must be declared void. Ele. Petn. No. 4 of 1972, D/- 26-4-1974 (Madh Pra), Affirmed. (Para 23)

(G) Representation of the People Act (1951), S. 100 — Election petition — Corrupt practice — Distribution of offending leaflet by returned candidate or his election agent or with their consent — Leaflet found to contain false statement of facts calculated to injure personal conduct and character of another candidate with a view to prejudice his election prospects — Election of returned candidate must be declared void. Ele. Petn. No. 4 of 1972, D/- 26-4-1974 (Madh Pra), Affirmed. (Para 23)

(H) Representation of the People Act (1951), S. 100 — Election petition — Corrupt practice — Distribution of offending leaflet by returned candidate or his election agent or with their consent — Leaflet found to contain false statement of facts calculated to injure personal conduct and character of another candidate with a view to prejudice his election prospects — Election of returned candidate must be declared void. Ele. Petn. No. 4 of 1972, D/- 26-4-1974 (Madh Pra), Affirmed. (Para 23)

Cases Referred: Chronological Paras
AIR 1975 SC 968 = (1975) 3 SCC
788 7, 9, 18

Mr. Hardayal Hardy, Sr. Advocate, (Mr. S. K. Gambhir, Advocate with him), for Appellant; Mr. D. V. Patel, Sr. Advocate, (M/s. B. Jindal, M. M. L. Srivastava and E. C. Agarwala, Advocates with him), for Respondent.

Judgment of the Court was delivered by

JASWANT SINGH, J.:— This appeal under Section 116-A of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') is directed against the judgment and order dated April 26, 1974, of Indore Bench of the High Court of Madhya Pradesh whereby the election of the appellant to the Madhya Pradesh Legislative Assembly from Kachrod Assembly Constituency No. 247 at the general elections of 1972 has been set aside under Section 100 (1) (b) of the Act on the election petition filed by Vimal Kumar Choudhury, respondent herein, who was an elector in the said constituency.

2. Pursuant to the notifications issued under Section 30 of the Act calling upon the aforesaid constituency to elect a member to the M. P. Legislative Assembly, nomination papers by the appellant and some others were filed on February 8, 1972. On scrutiny of the nomination papers held by the Returning Officer on February 9, 1972, nomination of 8 candidates was found valid. Out of the said 8 candidates, 3 withdrew their candidature with the result that only five candidates including the appellant who was set up by Bhartiya Jan Sangh and Rajendra Jain (P. W. 39) who was set up by the Indian National Congress contested the election. The poll took place on March 8, 1972. On March 12, 1972, the appellant was declared elected as a result of counting of the polled votes which showed that he had secured 23,572 votes as against 22,327 secured by Rajendra Jain (P. W. 39), his nearest rival. On April 24, 1972, the respondent herein presented an election petition challenging the election of the appellant alleging commission by the latter of

various acts of corrupt practices. The particulars of corrupt practices alleged to have been committed by the appellant were set out by the respondent in paragraphs 13, 14 and 15 of his election petition. In paragraph 13 of the election petition, it was *inter alia* stated as under:—

"(13) That the respondent has committed the corrupt practice of publication of false statement of fact in relation to the personal character and/or conduct of Shri Rajendra Jain (hereinafter referred to as the 'Congress Candidate' falling in the purview of Section 123 (4) of the Act as per the facts and particulars mentioned hereinafter.

Leaflet

(13) (xi). That the Congress candidate is the follower of the Jainism wherein the eating of cow meat is absolutely prohibited. Shri Rajendra Kumar Jain does not eat meat at all. Amongst Hindus who form a majority of the voters in the Constituency, cow is regarded as a sacred animal and worshipped like God. Persons who eat cow meat are looked with hatred by the Hindus and are discarded from the society.

(13) (xii). That the respondent/Election Agent got printed and distributed a leaflet entitled:

"Beware, understand the Congress Candidate." (Leaflet is attached hereto and marked as Annexure 'A').

(13) (xiii). That the leaflet Annexure 'A' contains the following statement of facts which are false, which the respondent either believed to be false or did not believe to be true in relation to the personal character and/or conduct of the Congress Candidate, being the statements reasonably calculated to prejudice the prospects of Congress candidate's election:

".....What to speak of other things, Rajendra Jain went on tour to those countries where beef is prepared and served in Hotels and there he took beef even. Do you want to cast your vote in favour of a person who is atheist, who is a beef eater and is devoid of Dharma."

(13) (xiv). That the particulars regarding the date, place, time and name regarding the distributors of

Annexure 'A' are given hereinbelow:—

Sr. Date	Place	Name of Distributor	Time
(a) 5-3-72	Khachrod (Shukarvariya Chowk). in the meeting of Jan Sangh at which the respondent and his election agent Shri Anirudda Hada were also present.	Rampratap s/o Ramsukh, Khachrod.	About 8.00 P. M.
(b) 6-3-72	Nagda	Ramsingh r/o Ganesh Chowk, Birlagram, Nagda.	9.00 A. M. to 11.00 A. M.

3. The election petition was vigorously contested by the appellant. In the course of the written statement filed by him, the appellant denied to have any concern with or knowledge of the aforesaid leaflet and averred that during the election time, he never saw any such leaflet; that it was only in the course of the election petition that he came to know of the leaflet and that he had no knowledge of the truth or falsity of the contents thereof. The appellant further averred that it was only after the defeat of Rajendra Jain that the story of the leaflet was manoeuvred and manufactured for the purpose of the election petition. The appellant further averred that he did not do anything to prejudice the prospects of the election of Rajendra Jain.

4. On the pleadings of the parties, the learned Judge (to whom the election petition was assigned for trial and disposal by the Chief Justice of the High Court) framed a number of issues but it is only with the following issues with which we are concerned in this appeal:—

"(4) (a). Whether the leaflet Annexure 'A' was published by or with the consent of the respondent by the persons and on the dates mentioned in para (13) (xiv) of the petition?

(b) If so, whether the said leaflet contained false statements in relation to the personal character and conduct of the congress candidate Rajendra Jain which the respondent did not believe to be true or believed to be false?"

5. On consideration of the evidence adduced by the parties during the course of the regular trial of the petition, the learned trial Judge allowed the election petition and set aside the election of the appellant

under Section 100 (1) (b) of the Act. The findings arrived at by the learned Judge in so far as they are relevant for the purpose of this appeal are as follows:—

"Though the findings on most of the issues are against the petitioner yet it has been found that the pamphlet Ex. P-10 which was a false statement with regard to the personal conduct and character of the candidate Rajendra Jain was got printed by the respondent at the printing press of P. W. 24 Ramprasad. The defence raised by the respondent with regard to this pamphlet has been found to be not established. It has been held that it was the respondent who himself by letter Ex. P-20 got this pamphlet printed in the printing press of P. W. 24 Ramprasad. The evidence given by the petitioner about its distribution by Ram Singh (P. W. 21) and Rampratap Dhakad (not examined) with the consent of the respondent has been disbelieved. However, it has been found as a fact that it was the respondent himself who got 2000 copies of this pamphlet printed and published. This is, therefore, a clear case where the respondent is guilty of getting this pamphlet printed and published against the congress party candidate Rajendra Jain. The respondent is, in the light of the aforesaid finding, clearly guilty of committing the corrupt practice as mentioned in subsection (4) of Section 123 of the Representation of the People Act. When such a pamphlet is published by the returned candidate the only inference that can be drawn is that the publication was reasonably calculated to prejudice the prospects of the election of the other contesting candidate Rajendra Jain. Consequently under S. 100 (1) (b) the election of the respondent is liable to be declared void and set aside."

6. The trial Judge, however, left the parties to pay and bear their own costs of the petition. It is against this judgment and order that the present appeal has been preferred.

7. Mr. Hardy, who has taken great pains to present the case of the appellant has, in the first instance, attempted to lead us to the realm of hypotechnicalities. He has tried to pick up faults in the verification on the election petition and the affidavit accompanying the petition and has urged that the petition ought to have been dismissed by the High Court in limine under S. 86 of the Act in view of the fact that the verification and the affidavit did not contain sufficient particulars of the corrupt practices attributed to the appellant and did not at all give particulars of printing of the offending leaflet. He has further urged that the petition was also liable to be dismissed as the copy of the petition meant to be served on the appellant was not accompanied by a copy of Annexure 'A' i.e. Exh. P-10. We find ourselves unable to accede to these contentions. The allegations of corrupt practice and particulars thereof as given in paragraph 13 of the election petition reproduced above are sufficiently clear and precise. The affidavit accompanying the petition in support of the allegations of corrupt practice and the particulars thereof also conform to the form prescribed for the purpose. The appellant had an easy access to the court record and could have no difficulty in gathering the necessary material to meet the case set up by the respondent by a reference to the leaflet (Exh. P-10) which formed an annexure to the election petition. It is also now well settled that failure to give particulars of printing of the pamphlet is not detrimental and cannot lead to the dismissal of the petition. (See *Prabhu Narayan v. A. K. Srivastava*, (1975) 3 SCC 788 = (AIR 1975 SC 968). That apart, the petition could also not have been dismissed in view of Section 99 of the Code of Civil Procedure which clearly says that a defect which does not affect the merits of the case or the jurisdiction of the Court cannot invalidate the decision. The prelimi-

nary contentions of Mr. Hardy cannot, therefore, be sustained.

8. Continuing his arguments, Mr. Hardy while fairly and rightly conceding that the contents of the aforesaid leaflet (Exh. P-10) do cast a reflection on the personal conduct and character of Rajendra Jain (PW 39) and as such fall within the mischief of Section 123 (4) of the Act, has vehemently assailed the aforesaid findings of the trial Judge with regard to the printing and publication of the leaflet (Exh. P-10) by the appellant. He has contended that the evidence adduced in the case does not at all establish that it was the appellant or his election agent or any one of his supporters who got the offending leaflet (Exh. P-10) printed or published or that the leaflet was distributed to the members of the public of Khachrod Constituency with the consent of the appellant or his election agent to prejudice the election prospects of Rajendra Jain (P. W. 39).

9. In view of the concession made by Mr. Hardy that the contents of the aforesaid leaflet (Exh. P-10) do cast a reflection on the personal conduct and character of Rajendra Jain (P. W. 39) and as such would fall within the mischief of Section 123 (4) of the Act, the only point that survives for decision in this appeal is whether the High Court was right in setting aside the election of the appellant on the ground of 'publication' by him or with his consent of the leaflet which according to the respondent contained false statement of facts as to the personal character and conduct of Rajendra Jain (P. W. 39) and was reasonably calculated to prejudice the prospects of the latter's election to the State Legislative Assembly in the general elections of 1972. The first and foremost question which is required to be determined in this connection is whether it was the appellant who got the offending leaflet printed. It is necessary to go into the question of printing of the leaflet (Exh. P-10) as the finding in respect thereof is bound to have, as held by this Court in *Prabhu Narayan's case* (AIR 1975 SC 968) (*supra*), an important bearing on the ques-

tion of its distribution either by the appellant or with his consent and a discussion of the evidence regarding printing provides a satisfactory method of assuring oneself as to whether the distribution was made, as alleged, by the appellant or with his consent.

10. Now the proof regarding printing of the leaflet (Exh. P-10) consists of the evidence of Ramprasad (P. W. 24) who is the Manager of Kamla Printing Press, Ujjain, which is owned by his wife. Mr. Hardy has stressed that the statement of Ramprasad is untrustworthy; that his conduct does not inspire confidence and that his statement being that of an accomplice cannot be relied upon without independent corroboration. Though Mr. Hardy has levelled trenchant criticism against the evidence of Ramprasad (P. W. 24), we are not inclined to agree with him. There is nothing strange about the conduct or behaviour of Ramprasad which may impel us to discard his testimony. Despite the searching cross-examination to which he was subjected, his credit has remained unshaken. The mere fact that he printed the offending leaflet cannot clothe him with the character of a guilty associate or partner in the crime of corrupt practice within the meaning of Section 123 (4) of the Act, which consists in the publication by the candidate or his agent or by any other person with the consent of the candidate or his election agent, of any statement of fact which is false or which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate which is reasonably calculated to prejudice the prospects of that candidate's election. In the instant case, Ramprasad (P. W. 24) was neither the election agent of the appellant nor is there any allegation that he published the offending leaflet. Section 127-A of the Act on which Mr. Hardy has placed strong reliance in support of his contention that Ramprasad (P. W. 24) was in the position of an accomplice has no relevance. It has nothing to do with the offence in question. The omission on the part of Ramprasad to send to the concerned District Magis-

trate a copy each of the declaration and the printed material as required by sub-section (2) of Section 127-A of the Act may lay him open to prosecution for an offence under sub-section (4) of Section 127-A of the Act but would not make him an accomplice or render his statement untrustworthy. Ramprasad (P. W. 24) has affirmed that on February 22, 1972, Rajaram from Khachrod came to him and made inquiries from him regarding the printing charges of a leaflet, and that he turned up again on the following day with letter (Exh. P-20) from the appellant and told him that he had been sent by him. The witness has further deposed that Rajaram departed after handing over to him the letter (Exh. P-20), the draft or manuscript of the leaflet (Exh. P-21) which had to be printed and the printing charges amounting to Rs. 45/-. He has further stated that the charges were acknowledged by him the same day by means of a receipt of the even date; that on February 24, 1972, when he had completed the composition of draft of the leaflet, Anirudh Hada (R. W. 1), an advocate of Ujjain, came to him and after telling him that he was the representative and worker of the appellant, went through the printed proof (Exh. P-23) of the leaflet (Exh. P-10) and advised him that the name of Rajaram Parmar appearing at one place on the first sheet and at two places on the second sheet in the proof should be removed and replaced by the words 'a citizen of Khachrod'. The witness has further stated that 2,000 copies of the leaflet were printed by him on February 25, 1972 and handed over to Rajaram. The statement of Ramprasad (P. W. 24) receives strong corroboration not only from the various documents viz. the draft (manuscript) (Exh. P-21), carbon copy of receipt (Exh. P-22), proof (Exh. P-23) of the offending leaflet, carbon copy of the bill (Exh. P-24), entry (Exh. P-25) in his cash book dated February 24, 1972 regarding the payment of the printing charges of Rs. 45/- and entry (Exh. P-26) in his Order Book Register in respect of the leaflet produced by him but also from the letter (Exh. P-20) which admittedly bears the signatures of the appellant and con-

tents whereof are in the handwriting of his brother, Surendra Singh. The letter runs as follows:—

23-2-72

Shri Ramprasadjji,
Kamala Press,
Ujjain.

Please print 2000 pamphlets of the matter which I have sent through Rajaram. I need this pamphlet early. Hence print it within a day or two. I am sending Rs. 45/- with Rajaram, which please accept. The proof will be seen by Hadaji, who will come to you.

Sd/- Kunwar Virendrasingh, Member,
Legislative Assembly,
M. P. Constituency
Khachrod District Ujjain."

11. The above letter, it would be seen, contains intrinsic evidence which goes a long way to support the testimony of Ramprasad (P. W. 24). It clearly establishes (i) its own despatch to the witness by the appellant through Rajaram; (ii) the despatch to the witness by the appellant through Rajaram of the draft or manuscript of the matter to be printed, (iii) the placing of the order by the appellant for printing of 2,000 copies of the manuscript (Exh. P-21) in the form of leaflets; (iv) the remittance by the appellant through Rajaram of Rs. 45/- to defray the printing charges; and (v) the advice by the appellant to the witness that the proof would be seen by Mr. Anirudh Hada. Although Mr. Hardy has tried hard to persuade us to hold that the letter could not have been written by or at the instance of the appellant, we are not inclined to agree with him. There is nothing unusual in the contents of the letter being in the hand of Surendra Singh in view of the statement of Chander Singh (R. W. 25) (corroborated as it is by the clear admission of the appellant himself) that the relations between the two brothers i.e. Surendra Singh and the appellant remained cordial from the time of the wedding of the appellant's daughter which took place in August, 1967 to nearly four months after the general elections of 1972 and that in the said general elections, Surendra Singh

worked with the appellant and also accompanied him sometimes.

12. That Ramprasad's (P. W. 24) statement possesses a ring of truth and he was not trumped up by any of the arch enemies of the appellant including Surendra Singh and Rajendra Jain (P. W. 39) as Mr. Hardy would have us believe is manifest from another telling circumstance viz. the significant omission on the part of the appellant to contradict Ramprasad (P. W. 24) by examining Rajaram who was no other than his own polling agent as is evident from Exhibit P-30 which admittedly bears the signatures of the appellant. It can, therefore, be safely presumed that Rajaram was not prepared to support the appellant by refuting the statement of Ramprasad (P. W. 24).

13. The assertion of the appellant that he deputed his brother, Surendra Singh along with Chander Singh (R. W. 25) to go to Ranasan in the State of Gujarat to bring his jeep from his relative, Thakur Harish Chander Singh, who was not returning the same despite several demands made from him through letters and telegrams; that while so deputing his brother he handed over to him six blank official letterheads which were used by him as a Member of the State Legislative Assembly after putting his signatures and affixing the rubber stamp of his designation thereon so that they might be utilized for making reports/complaints to the Police or other officials of the Transport Department in case his relative refused to return his jeep and that Surendra Singh misused one of the aforesaid letterheads and fabricated Exh. P-20 as his relations with him became strained over the demand for division of the landed property which was got mutated by his father during his lifetime in the name of Surendra Singh's son is nothing but a tissue of lies woven to escape the grave consequences of addressing the letter (Exh. P-20) to Ramprasad (P. W. 24). The contents of the letter (Exh. P-20) being, therefore, in the hand of Surendra Singh is not a circumstance which can reasonably arouse suspicion regarding its genuineness. On the contrary, it is consistent with the normal course

of human conduct. It may well be that the appellant being otherwise busy, dictated the contents of the letter (Exh. P-20) to his brother, Surendra Singh and thereafter put his own signatures thereon.

14. It cannot also be overlooked that the appellant has been shifting his stand from time to time with regard to the aforesaid blank sheets to suit his own convenience. Whereas at one place in the complaint (Exh. P-33) filed by him on July 31, 1973, in the Court of Magistrate 1st Class, Khachrod, he averred that he delivered those forms to Chand Singh Raghubanshi and Berulal, Driver, at another place in the same complaint, he made a veiled averment to the effect that the letterheads were handed over by him to his brother, Surendra Singh. The plea taken by the appellant that he gave six blank letterheads with his signatures thereon to his brother, Surendra Singh, is also falsified by the First Information Report (Exh. R-79) made by him to the Station House Officer, Police Station, Chhatrapura, Indore, on September 26, 1973 wherein he appears to have stated that Surendra Singh sold his Fiat car No. MPO. 1241 by forging his signatures on a document. If the appellant had in fact handed over six blank letterheads with his signatures thereon to Surendra Singh as asserted by him, the latter could have easily used one of those letterheads.

15. It is also worthy of note that whereas at the foot of the complaint (Exh. P-33), the appellant cited Chand Singh, s/o Saman Singh Raghubanshi, resident of Mosi Gate, Khachrod as his witness, in the instant election petition he has produced Chander Singh, s/o Chandrabhansingh of Khachrod as his witness in proof of the handing over of the aforesaid six letterheads bearing his signatures to Surendra Singh. It is also difficult to believe that the appellant would hand over half a dozen blank letterheads bearing his signatures to his brother, Surendra Singh specially when his wife, according to his own admission in the report (Exh. R-84) dated July 26, 1973 accompanied his brother to Ranasan. All these circumstances furnish a proof

positive of the falsity of the statement of the appellant in regard to the circumstances in which letter (Exh. P-20) came into existence.

16. The foregoing discussion leaves no room for doubt that it was the appellant who got the offending leaflet printed at the Kamla Printing Press, Ujjain.

17. This takes us to the crucial question of the distribution of the offending leaflet by the appellant or his election agent or by some other person with the consent either of the appellant or his election agent.

18. Though the appellant and his election agent, Anirudh Hada, Advocate (R. W. 1) have asserted that they had no connection with the distribution of the leaflet and the learned counsel for the appellant has also sought to make capital out of the High Court's observation at one place that the distribution of the leaflet was not by the appellant or with his consent and at another place that the appellant himself was responsible for the publication of the leaflet (which according to the decision of this Court in Prabhu Narayan's case (AIR 1975 SC 968) (supra) means distribution of the printed material), we shall show by reference to the unimpeachable, direct and circumstantial evidence which the High Court has failed to consider in its proper perspective that the only conclusion which could reasonably have been arrived at was that the distribution of the leaflet (which has not been disbelieved by the High Court to have been made) was by and with the consent of the appellant or his election agent.

19. As already stated the respondent had alleged in the election petition that the leaflet was distributed on two different dates and at two different places in his Constituency — (i) on March 5, 1972 at Shukravariya Bazar, Khachrod at the meeting of Jan Sangh at which the appellant and his election agent, Anirudh Hada, advocate were seated on the dais and (ii) on March 6, 1972 at Nagda. The distribution of the leaflet on March 5, 1972 is alleged to have been made by Rampratap and on March 6, 1972 by Ram Singh (P. W. 21). We propose to discuss the

evidence with regard to these two distributions separately.

20. That a public meeting was organized and held on the afternoon of March 5, 1972 by the Jan Sangh Party in Shukravariya Bazar, Khachrod, at which the Rajmata of Gwalior, the appellant and his election agent, Anirudh Hada, advocate (R. W. 1) were seated on the dias and which was addressed by the Rajmata of Gwalior admits of no doubt as the same is admitted by both the appellant and his election agent, Anirudh Hada (R. W. 1) as also by the appellant's witness, Ramdas (R. W. 24). It is only the distribution of the leaflet (Exh. P-10) at this meeting which is denied by them. The denial cannot, however, be sustained in view of clear and convincing evidence of Badrilal (P. W. 15), Nanalal (P. W. 27), Khursheed Ahmed (P. W. 35) and Shaitanmal Sisodia (P. W. 38). All these witnesses have categorically stated that at the aforesaid meeting at which besides others the Rajmata of Gwalior, the appellant and his election agent, Anirudh Hada (R. W. 1) were seated on the dias, they saw leaflet (Exh. P-10) which appeared to have been issued in the name of a Nagrik of Khachrod being distributed to the persons who had assembled to attend the meeting by Rampratap Dhaked of Khachrod. The witnesses have further stated that in the aforesaid leaflet (Exh. P-10), it was inter alia written that Rajendra Jain "while touring abroad had taken cow meat." If the appellant or Anirudh Hada had nothing to do with the distribution of the leaflet, there was nothing to stop them from restraining Rampratap from distributing the same or admonishing him for doing so. It is no doubt true that the respondent has not been able to produce Rampratap in proof of his allegation but it cannot be lost sight of that the former did summon the latter as his witness but he did not appear despite service. In the course of the statement made by him as his own witness, the respondent has explained that on Rampratap's omission to appear before the Court as his witness despite service, he contacted the latter to enquire about the reason for his non-appearance and was told by

the latter that he could not attend the Court since his brother was married to the niece of Vardiram (R. W. 30) and his appearing as a witness in the Court would strain his relations with Vardiram. In the course of his statement, Vardiram (R. W. 30), who is a staunch worker of Jan Sangh and who appears to have worked for Jan Sangh and addressed public meetings in support of its candidates during the last general elections had to admit that his real nephew was engaged to the daughter of Rampratap. It is also significant that though Rampratap was also summoned as a witness by the appellant, the latter gave him up on December 12, 1973. It is, therefore, crystal clear that the non-appearance of Rampratap as a witness for the respondent was entirely due to his anxiety to maintain cordial relations with Vardiram. The totality of the evidence adduced in the case, therefore, leaves no room for doubt that the distribution of the leaflet (Exh. P-10) at the meeting of the Jan Sangh party held on the afternoon of March 5, 1972 in Shukravariya Bazar, Khachrod, was with the consent of the appellant or his election agent, Anirudh Hada, advocate (R. W. 1). The distribution of the copies of the leaflet (Exh. P-10) at Nagda on March 6, 1972 also stands proved by the direct evidence of Ram Singh (P. W. 21), Ajit Singh (P. W. 22), Shankar Singh (P. W. 23) and Jawahar Lal (P. W. 37).

21. Ram Singh (P. W. 21) who besides being an employee of the Gwalior Rayon Mills is a newspaper hawker has stated that during the last general elections, he worked for Thakur Virendrasingh who was a candidate of the Jan Sangh party. He has further stated that two days before the date of voting, he distributed free of cost about 300 copies of leaflet (Exh. P-10) in which it was stated that Rajendra Jain was a meat eater, that he eats beef and that the voters should know him. The witness has unequivocally stated that it was the appellant who gave him the leaflets and asked him to distribute the same and told him that his remuneration for this job would be duly paid to him and that subsequently, Rs. 4/- were paid to him as remuneration for distributing

of plaintiff's witnesses to indicate how he considered their testimony to be credible or reliable. On the question of existence of passage and the width of passage there was discrepancy in the statements of plaintiff's witnesses. Whereas according to plaintiff (P. W. 1) the width of passage was 7-8 Ft. according to P. W. 2 it was 5 Ft. and according to P. W. 3 it was little over 3 cubits. Further, there was discrepancy between pleading and evidence also. Whereas in the plaint the suggestion was that the passage was 10 Ft. wide, in the witness box the plaintiff stated that it was 7 or 8 Ft. wide. I am of the opinion that this is a case in which this Court is entitled to interfere with the finding of fact recorded by the District Judge on the question of acquisition of easementary right by prescription because he did not apply his mind to the ingredients of Section 15 of the Easements Act. Section 15 provides that a person acquires right by prescription where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for 20 years. He did not try to determine whether the user of the plaintiff was as of right or permissive. In my opinion there was no reliable evidence to support the lower appellate Court's findings about the existence of a 5 Ft. wide passage between plots Nos. 354 and 340 and all that was established from the admissions of defence witnesses was that there was a 1 cubit wide Mend existing between these two plots and it was this Mend which was being used by the plaintiff as a passage. It is common knowledge that in this country people pass on the Mend of a field without the person holding the field raising any objection. The mend of a field is permitted to be used by people in this way traditionally with reciprocal understanding. Such user of the Mend for going about must, therefore, be presumed to be permissive and has no foundation in any right within the meaning of Section 15 of the Easements Act. It was held in the case of *Smt. Bailey v. Rama Shankar Lal*, (1975) 1 All LR 435 = (AIR 1975 All 461) that use of ridges of a field for passing to and fro would always be permissive user. With this view I am in respectful accord. This view is supported also by a Division Bench authority of the Madras High Court in the case of *Kunjammal v. Rathnam Pillai* (AIR 1922 Mad 5). In that case a Bench of the Madras High Court approved the observations of Justice Banerjee in *Sheikh Khoda Buksh v. Sheikh Tajuddin* ((1904) 8 Cal WN 359) and observed:

"In India there are conditions and cir-
1976 All./27 X G—13

cumstances such as nature and character of the servient land, the friendship or relationship of parties to be taken note of, before a court can come to the conclusion that the exercise of a right of way can be held to have been as of right."

4. India is predominantly an agrarian country where, speaking generally, the relation between cultivators is cordial and rests on mutual regard for the convenience of others. It is, therefore, too common for one cultivator to pass over the Mend of another cultivator as a means of access to his own field and such user of the Mend of one's field by another for purposes of agricultural operations and allied activities is, generally speaking, never objected to and is, therefore, nothing but permissive. No easementary right, therefore, can be acquired in this country by use of a Mend as a way unless there is clear evidence of such user as a matter of right. I am, therefore, of the opinion that the finding of the lower appellate Court that a right of way was acquired by respondent Ram Das over the Mend existing between plots Nos. 340 and 354 cannot be sustained in law in view of the requirements of Section 15 of the Indian Easements Act. The claim was rightly rejected by the trial court on the ground of necessity in the face of evidence of an alternative route being available to the respondent. In the result the appeal must succeed.

5. The appeal is accordingly allowed and the judgment and decree dated 19-2-1970 passed by the District Judge, Sultanpur, are set aside and the judgment and decree of the trial Court dated 9-5-1969 are restored. The appellant will get costs of this appeal from the contesting respondent No. 1.

Appeal allowed.

AIR 1976 ALLAHABAD 417

(LUCKNOW BENCH)

T. S. MISRA, J.

Ranjit Singh and others, Appellants
v. Ram Nath Singh and others, Respondents.

Second Appeal No. 361 of 1970, D/-
3-4-1975.*

(A) U. P. Zamindari Abolition and
Land Reforms Rules 1952, Rule 110-B

*(Against judgment and decree passed by
S. L. Tripathi Temporary Civil and S. J.,
Rae Bareilly, in Civil Appeal No. 39 of
1969, D/- 7-11-1970.)

IS/JS/D548/75/MVJ

clause (c) — Maintainability of suit when State Government was not impleaded as a party. (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 117.)

Rule 110-B would be attracted to those suits in which plaintiff claimed the land or any of the things vested in the Gaon Sabha. Where in the suit the plaintiffs had not made any claim in the land vested in Gaon Sabha nor had set up any claim in the land commonly called Galiyara but had sought demolition of wall and other constructions which had been erected by the defendants on the pathway:

Held that the suit was not the one contemplated by clause (c) of Rule 110-B. Consequently the suit was maintainable without impleading the Government.

(Para 2)

(B) Easements Act (1882), Section 12 — Who may acquire easements — Residence in a house abutting on the public lane — Whether right of easement or to use for encroachment in the public lane could be acquired.

It is true that the right to use a public Highway is not in the nature of an easement but the right to use the pathway is an incident of public right over it. AIR 1929 All 504 and AIR 1954 SC 728, Rel. on.

The plaintiffs in the instant case claimed in the plaint that their house abutted on the pathway in question and that their right to egress or ingress through their door fixed in the northern wall of their Ahata which opened towards the pathway and their right to flow water of their Nabdan were adversely affected and his access to the pathway was obstructed.

Held, that the plaintiffs being the owners of the house which adjoined the pathway had rights of passing through the same and flowing the water of their Nabdan which existed prior to the encroachment. The right of access to the pathway at all points where the house adjoins the pathway belongs to the owner of the house as also its occupiers and they can sue for removal of the obstruction interrupting that right. (Para 6)

Cases Referred: Chronological Paras
AIR 1954 SC 728 = 1955 SCR 707 6
AIR 1929 All 504 = 118 Ind Cas 520 6

JUDGMENT:— This appeal by the defendants 1 to 3 arises out of a suit for demolition of a wall and another construction raised by them on a piece of land commonly called Galiyara. The alleged constructions were made in such a

way as to block the door of the plaintiffs fixed in their northern boundary wall and also the flow of drain water. The wall in dispute was said to have been constructed just adjacent to the plaintiffs' boundary wall and that gave rise to the suit. The plaintiffs alleged that they had a right to egress and ingress through that door which had illegally been blocked by the defendants-appellants. They further alleged that they had a right to flow their drain water over the land in dispute on which the construction in dispute had been raised. The defendants resisted the suit on a variety of grounds. They pleaded, inter alia, that they had made constructions on their own land, that the defendants had not interfered with any easementary rights claimed by the plaintiffs, that the plaintiffs had, in fact, not acquired any easementary right and the suit was not maintainable in the absence of the State of Uttar Pradesh, as a defendant in the case. The trial Court having found that the defendants had made constructions on 'rasta' and blocked the plaintiffs' door without any right upheld the claim of the plaintiffs for demolition of the wall which, according to the trial court, had been raised by the defendants illegally and without any justification. The suit was accordingly decreed. Against that decision an appeal was preferred by the defendants which too was dismissed. The appellate court below found that the plaintiffs' house had been constructed 17 or 18 years before the institution of the suit, that the plaintiffs had not acquired any easementary right of way or any right to flow his drain water over it by way of easement. It, however, found that the constructions in question had been made by the defendants on a Galiyara land over which the plaintiff had a right to pass through and, therefore, concurring with the trial court it held that the defendants had made encroachment on the Galiyara land which was liable to be removed. The appeal was, in these circumstances dismissed. Being aggrieved by that decision the defendants 1 to 3 have come up to this court in second appeal.

2. For the appellants it was urged at the outset that the suit, as framed, was not maintainable inasmuch as the plaintiffs have not impleaded the State of U. P. In support of this contention reliance was placed on the provisions of Rule 110-B of the U. P. Zamindari Abolition and Land Reforms Rules read with

Section 117 of the U. P. Zamindari Abolition and Land Reforms Act, I find no merit in this contention. R. 110-B requires the State Government to be made a party in suits by persons claiming the land or any of the things vested in a Gaon Sabha or local authority under Sec. 117 of the said Act. Section 117 provides that at any time after the publication of the notification referred to in Section 4, the State Government may, by notification in the gazette, declare that as from a date to be specified in this behalf, all or any of the following things, namely, tanks, ponds private ferries, water channels, pathways and abadi sites which had vested in the State under this Act shall vest in the Gaon Sabha or any other local authority established for the whole or part of the village in which the said things are situate. The Gaon Sabha was impleaded in the suit as a defendant but the State of U. P. was not impleaded. It was not disputed that the land had vested in the Gaon Sabha concerned under Section 117 of the Act. Rule 110-B would be attracted to those suits in which the plaintiff claimed the land or any of the things vested in the Gaon Sabha. In the instant case the plaintiffs had not made any claim in the land vested in the Gaon Sabha. The pathway, no doubt is vested in the Gaon Sabha but in the suit, which had, given rise to this appeal, the plaintiff did not set up any claim in the land commonly called Galiyara. They, in fact, sought demolition of the wall and the other constructions which had been erected by the defendants on the pathway. Such a suit, in my view, was not the one contemplated by clause (c) of Rule 110-B of the Rules. It was, however submitted that the plaintiffs had asserted that they had a right to pass through that pathway and to flow their drain water over it and this amounted to setting up a claim on the Galiyara land. This submission has no substance. As pointed out earlier the plaintiff had sought the removal of encroachment made by the defendants in the pathway. They had not put up any claim in the land constituting the pathway.

3. It was next urged that the lower appellate court had set up a new case for the plaintiffs and the defendants were thereby prejudiced in their defence. The submission in this behalf was that the plaintiffs had not come with an assertion that the defendants had made an encroachment on the public pathway but had, in fact, filed the suit with the alle-

gation that they had easementary right of passage and flowing drain water over the land in question. It was submitted that the lower appellate court having held that the plaintiffs had not acquired any easementary right as alleged should have dismissed the suit but instead of doing so it proceeded to decree the suit on the ground that the defendants had illegally raised constructions on the land constituting the pathway. This, it was urged, was a new case which the appellate court below should not have set up for decreeing the suit. I find no substance in this submission. In the plaint it was alleged by the plaintiffs that the constructions had been made on the 'Galiyara' land. The matter was further clarified by the plaintiffs in their replication. The defendants had also in para 12 of the written statement took an alternative plea that in case they are not found to be the owners of the land in dispute the land will belong to Gaon Sabha. Therefore, the defendants were not taken by surprise as is now being contended and were not prejudiced in their defence. Both the courts below found as a fact that the land over which the constructions in dispute were raised formed part of the Galiyara (pathway). This finding is a finding of fact based on evidence and is conclusive in second appeal.

4. It was then urged that in view of the provisions of Section 4 of the Specific Relief Act the plaintiffs were not entitled to maintain the suit inasmuch as specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law. Section 4 of the Specific Relief Act, in my view, is not attracted to the facts of the case. The plaintiffs had alleged that their house abutted on the pathway in question, and that they had a right of passage and also a right to flow water of their Nabdan over that land. Since the defendants had blocked the pathway by making illegal constructions thereon the plaintiffs filed the suit for the reliefs mentioned above. The suit, in these circumstances and with these allegations, was, in my view, maintainable.

5. It was next urged that no injunction should have been granted by the courts below in view of the provisions of clauses (h) and (j) of Section 41 of the Specific Relief Act which provide that an injunction cannot be granted when equally efficacious relief can be obtained by

any other usual mode of proceeding except in case of breach of trust or when the plaintiff has no personal interest in the matter. I have already pointed out above that the plaintiffs had personal interest in the matter and, therefore, clause (j) of Section 41 would not be a bar to the reliefs sought for. The learned counsel for the appellants, however, submitted that proceedings under S. 133, Cr. P. C. were also initiated which ended in dismissal and, therefore, sub-clause (h) of Section 41 would be an impediment for granting relief of injunction. Exhibit A-1, however, shows that the application moved under Section 133, Cr. P. C. was rejected on the ground, inter alia, that civil litigation between the parties with respect to the wall in question had already commenced. That being so, the provisions of sub-clause (h) of Section 41 would not be available to be invoked in the case.

6. The learned counsel for the appellants then urged that as it was not established that the pathway in question had been narrowed to such an extent as to destroy its user the plaintiffs had no right to have the wall and other constructions demolished and at any rate, the plaintiffs, who merely happened to reside in a house abutting on the public lane, could not sue for alleged encroachment in the alleged lane for no right of easement could be acquired over the public lane. In support of his contention he placed reliance on *Bahal Singh v. Mohammad Yusuf*, (AIR 1929 All 504) and *Saghir Ahmad v. State of U. P.*, (AIR 1954 SC 728). It is correct that the right to use a public highway is not in the nature of an easement but the right to use the pathway is an incident of public right over it. As held in *Saghir Ahmad's case* (supra) once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business. The plaintiffs in the instant case claimed in the plaint that their house abutted on the pathway in question and that their right to egress or ingress through their door fixed in the northern wall of their Ahata which opened towards the pathway and their right to flow water of their Nabdan were adversely affected and his access to the pathway was obstructed. These facts have been found to be correct by the Courts below. The plaintiffs

being the owners of the house which adjoined the pathway had rights of passing through the same and flowing the water of their Nabdan which existed prior to the encroachment. The right of access to the pathway at all points where the house adjoins the pathway belongs to the owner of the house as also its occupiers and they can sue for removal of the obstruction interrupting that right. The fact that the plaintiffs had opened another door towards the east of their house or that they could have access to the pathway through some other entrance would not debar them from seeking demolition of the illegal constructions raised by the defendants on the pathway. They were definitely inconvenienced by these illegal constructions. Hence, it could be presumed that they had been put to special damage. At any rate, the constructions had been made in village pathway and the suit could, therefore, lie without proof of special damage and without seeking aid of the provisions of Section 91, Code of Civil Procedure. Submissions of the learned counsel to the contrary are without merit and are, therefore, rejected.

7. There is no merit in this appeal, which is accordingly dismissed with costs.

Appeal dismissed.

AIR 1976 ALLAHABAD 420

FULL BENCH

K. B. ASTHANA, C. J., M. N. SHUKLA
AND T. S. MISRA, JJ.

Mata Badal Pandey and another, Appellants v. The Board of Revenue and others, Respondents.

Special Appeal No. 622 of 1965, D/- 24-3-1976.*

(A) U. P. Encumbered Estates Act (25 of 1934), S. 23-B — Execution of decree of Special Judge — Nature of — Collector while acting under S. 23-B, whether executes decree or acts as administrator.

Under the Act the Collector executes the decree passed by the Special Judge and the execution is carried out in accordance with the provisions of Chapter V. Though this Chapter is headed as 'Execution of decrees and liquidation of debts' and Ss. 23 and 23-B of the said Chapter

*(Against judgment of S. N. Singh, J., in W. P. No. 3459 of 1962, D/- 27-10-1965.)

talk of liquidation of debts but that alone would not mean that the Collector does not execute the decree of the Special Judge. Under the Scheme of this Chapter it appears the process of execution in the circumstances envisaged in Ss. 23 and 23-B is described as liquidation.

(Para 13)

When S. 19 confines the Collector to execute the decree in accordance with the provisions of Chapter V then all what is provided in Chapter V is nothing but the process of execution as with the aid of provisions under that Chapter the Collector discharges his duty and function for executing the decree transmitted to him by the Special Judge. It cannot be said that Collector while acting under S. 23-B acts as an Administrator or a Liquidator. AIR 1953 SC 521, Distinguished.

(Paras 13, 14, 21)

(B) U. P. Encumbered Estates Act (25 of 1934), Ss. 22, 23, 23-B — Collector when performing his duties and function under Ch. 5, whether is a Court.

The Collector has all the trappings of a court. He is required to issue notices, hear parties and by judicial application of his mind give his award which is described in the rules as 'liquidation award'. Ss. 22 and 23 themselves are indicative of the fact that the Collector is nothing but a court when performing his function under Chapter V. Hence the Collector is a court when performing his duties and functions under Chapter V of the 1934 Act.

(Paras 15, 21)

(C) U. P. Encumbered Estates Act (25 of 1934), S. 23-B — Collector, whether attaches or puts to sale the compensation or rehabilitation grant bonds in liquidating the debts — 1972 All LJ 875, Overruled. (Civil P. C. (1908), O. 21, Rr. 51, 52).

When a court reserves a property for the purpose of realising its value in discharge of the debts or any other kind of liability on the owner of such property and the owner cannot deal with that property, it would amount to attachment of such property. The test is that when a court in legal process reserves to itself the power of disposal of any property to the exclusion of its owner, such a reservation would amount to attachment of that property.

(Para 18)

When the bonds are requisitioned and placed at the disposal of the Collector, the same being movable property mere absence of any prohibitory order on the landlord-debtor would not affect in any

way the power of the Collector to dispose them of according to law. When the bonds representing the money value of the compensation and rehabilitation grant payable to the landlord themselves are in the custody of a public officer, then actual seizure thereof and their deposit in court will complete the attachment as contemplated by Rules 51 and 52 of Order XXI of the Civil Procedure Code. This is exactly what takes place. The Collector having secured for himself the power of disposal to the exclusion of the landlord-debtor the attachment would be complete. 1972 All LJ 875, Overruled.

(Paras 19, 21)

In order to discharge the debt secured or unsecured in respect of which a decree has been made by the Special Judge the Collector transfers or entrusts such number of bonds whose money value is equal to the debt to be discharged. Thus it is the money notionally in the shape of bonds which is paid to the creditor in discharge of the debt. There is no sale conducted by the Collector. It is the money which is at his disposal in the shape of bonds which under the law is delivered to the creditor. There is no element of sale involved.

(Paras 20, 21)

Once compensation money and rehabilitation grant payable to the landlord in the shape of bonds is placed at the disposal of the Collector by the Compensation Officer or by the Rehabilitation Grant Officer, as the case may be the requirements of law are substantially complied with. The manner or mode in which the Collector assumes control of the bonds hardly will matter. Even if the Officer places the bonds at the disposal of the Collector without waiting for any formal requisition in writing, the requirements of law would be satisfied.

(Para 22)

(D) U. P. Zamindars' Debt Reduction Act (15 of 1953), S. 9 — U. P. Encumbered Estates Act (25 of 1934), S. 23-B (as introduced in 1954) — Execution in respect of unsecured debt — Benefit under S. 9 of the former Act, if open — 1962 All LJ 223 and 1972 All LJ 875, Overruled.

When the Legislature in 1954 amended the Encumbered Estates Act introducing Sections 23-A and 23-B in the principal Act of 1934, it would be presumed that it had knowledge that the debts of Zamindars in respect of which decrees were passed by the Special Judge under S. 14 (7) of the 1934 Act still remained undischarged as proceedings in execution for liquidating such debts were pending

under Chapter V of the 1934 Act in the Court of the Collector. Thus the 1952 Act and 1934 Act as amended in 1954 can be said to be twin measures for ameliorating the lot of landlords and affording them equitable relief against their debts when such debts whether secured or unsecured were realised against the value of the compensation and rehabilitation grant awarded to them on the acquisition of their estates. (Para 26)

Where there is some doubt or ambiguity in any provision in the authoritative English text, it is permissible to look into the Hindi text to remove the doubt of ambiguity. Since in the Hindi version the phrase used is 'Kurki Ya Neelam', the ambiguity in the English authoritative text due to use of the conjunction 'and' can be resolved by taking recourse to the Hindi text and it would be legitimate to read the phrase in the authoritative English text as "attachment or sale." (Para 29)

When the Legislature enacted subsection (1) of Sec. 23-B of the 1934 Act, it introduced the phrase 'without prejudice to the provisions of S. 8 of the U. P. Zamindars' Debt Reduction Act 1952'. Thus intention was to caution the Collector that he will keep in mind the provision that compensation bond and rehabilitation bonds at his disposal representing the money value of compensation and rehabilitation grant payable to an intermediary for a mortgaged estate must be utilised to discharge the liability of the debt charged over such estate. If any balance is left then it may be utilised towards payment of unsecured debt. (Para 31)

The power of Collector to take recourse to the provisions of S. 9 of the 1952 Act while liquidating a debt through execution of a decree under Chapter V remains unimpaired and unaffected. Mere omission to introduce a clause in the 1952 Act does not manifest contrary intention of the Legislature. The Collector is justified in giving benefit of Sec. 9 of the 1952 Act to the Zamindar-debtor. When the object of both the Acts is the same, that is, to afford relief to an ex-intermediary on account of his reduced capacity after abolition of Zamindari and when the debts are to be discharged against the compensation and rehabilitation grant payable for acquisition of the Zamindari, the relief of reduction will all the more be needed. Hence, the benefit of S. 9 of the 1952 Act will be available to a judgment-debtor when a decree is executed in respect of an unsecured debt under Sec-

tion 23-B (2) by attachment or sale of the compensation and rehabilitation grant payable to the debtor Zamindar. 1962 All LJ 223 and 1972 All LJ 875, Overruled; Writ Petn. No. 3459 of 1962, D/- 27-10-1965 (All), Affirmed. (Para 31)

Cases Referred: Chronological Paras

AIR 1974 All 106 (FB)	3, 29
1972 All LJ 875	18, 19, 29, 31
1962 All LJ 223 = 1962 All WR (HC) 18	29, 31
AIR 1962 All 240 = 1961 All LJ 900 (FB)	3
AIR 1961 SC 1534 = (1962) 2 SCR 1	3, 29
AIR 1959 All 208 = 1958 All LJ 719	3, 29
AIR 1953 SC 521 = 1954 SCR 506	13

G. P. Bhargava, A. N. Bhargava, K. N. Tripathi and V. K. S. Chaudhary, for Appellants; V. B. Singh, L. B. Singh, T. P. Singh, R. R. Singh, Rajeshwari Pd. and Standing Counsel, for Respondents.

K. B. ASTHANA, C. J.:— One Drig Vijai Bahadur Singh, a Zamindar took a loan on the foot of a promissory note executed by him in favour of Mata Badal Pandey and Krishna Murari. The promissory note remained unpaid when the executant thereof applied for liquidation of his debts under the U. P. Encumbered Estates Act, hereinafter referred to as the 'Act'. A Special Judge I Grade on 20-4-1937 passed a decree under Sec. 14 of the said Act, which decree was eventually modified by the Chief Court at Lucknow on 14-2-1942 and a sum of Rs. 3,380 plus costs, Rs. 64 and Rs. 110/3/- as interest were found due. The decree was to carry future interest at the rate of 4½% per annum upto the date of realisation. The said decree was transmitted to the Collector for execution under Section 19 of the said Act. During the pendency of the execution proceedings U. P. Zamindari Abolition and Land Reforms Act came into force. All the landed properties of the Zamindar respondent were acquired and he was awarded compensation and rehabilitation grant bonds.

Drig Vijai Bahadur Singh died and was succeeded by his son Ran Vijai Bahadur Singh, who was substituted for his father in the execution proceedings. The compensation bonds payable to Ran Vijai Bahadur Singh were sent by the Compensation Officer on 28-12-56 to the Collector under Section 23-A of the Act. There were certain secured debts also against the Zamindar respondent and they were first ordered to be paid off under Section 23-B (1) of the Act realisable from the compensation bonds on their face

value. The Collector then proceeded to liquidate the unsecured debts under Section 23-B of the Act from the balance of compensation bonds. There arose some dispute as to the calculation of the interest at the decretal rate. The Collector further reduced the debt under Section 9 of the U. P. Zamindars' Debt Reduction Act of 1952 despite the objection raised by the decree-holder that the debt in question being an unsecured debt could not be reduced by the Collector. The creditors then went up in appeal before the Commissioner but it was substantially dismissed with a slight modification as regards the interests payable.

The creditors then filed a revision before the Board of Revenue on the ground that the Collector had no jurisdiction to reduce the debt in question. The Board of Revenue held that the Collector had jurisdiction to reduce the debt but set aside that part of the order of the Commissioner by which interest upto the date of award was granted in terms of the decree and restored the order of the Collector for grant of interest upto 30-6-1952. The judgment of the Board of Revenue after concurrence of another member was finally delivered on 31-3-1962. A review application filed by the creditors against the judgment of the Board of Revenue was also dismissed on 23-10-1962. The creditors Mata Badal Pandey and Krishna Murari then filed a writ petition in this Court under Article 226 of the Constitution impugning the order of the Board of Revenue and all the proceedings leading to the revision before the Board of Revenue. Ran Vijai Bahadur Singh was impleaded as respondent No. 4 to the writ petition, the Board of Revenue, the Additional Commissioner and the Collector, being respondents Nos. 1, 2 and 3, respectively.

The writ petition was contested by Ran Vijai Bahadur Singh. The main question which arose in the writ petition revolved round the controversy whether Section 9 of the U. P. Zamindars' Debt Reduction Act applied and the Collector in liquidating the unsecured debts under the Encumbered Estates Act had jurisdiction to reduce such debts. A subsidiary question of award of interest was also raised. The learned Single Judge by his judgment dated 27-10-65 dismissed the writ petition holding that Section 9 of the Zamindars' Debt Reduction Act was applicable to the execution of a decree for unsecured debts under Chapter V of the U. P. Encumbered Estates Act when

realised against compensation and rehabilitation grant bonds. The learned Judge also upheld the view that interest could be calculated upto 1952 determined by the Board of Revenue. The petitioner-creditors being aggrieved then filed a Special Appeal from the aforesaid decision of the learned Single Judge. On hearing the learned counsel for the parties, the Division Bench felt that the matter was not free from difficulty and referred the following two questions to a Full Bench:—

"1. Whether benefit of Section 9 of the U. P. Zamindars' Debt Reduction Act, 1952 should be available to a judgment-debtor in the proceedings under Chapter V of the U. P. Encumbered Estates Act?

2. Will it make any difference if the bonds are suo motu sent by the Compensation Officer to the Collector instead of being requisitioned by the Collector?"

2. No question was referred by the Division Bench as regards the award of interest. This is how the matter has come before the Full Bench.

3. When the case was heard by the Full Bench, a controversy arose as to whether the English translation of U. P. Zamindars' Debt Reduction Act will prevail over the Hindi text of the Act. An argument was made on behalf of the creditor-appellants that under Section 9 of the Zamindars' Debt Reduction Act only when decree is executed by attachment and sale, the decretal amount is to be reduced. Hindi text of the said Act was pressed into service by the other side to show that while provisions of Section 9 of the Act in English contemplates both attachment and sale of the bonds, the Hindi text warrants that it can be either and since the compensation bonds which were the substitute of the Zamindari property, were attached in execution of the decree, the debt could be reduced. On the basis of five Judges' decision in *Smt. Ram Rati v. Gram Samaj Jehwa*, 1974 All WR 163 = (AIR 1974 All 106) (FB) it was argued that the authorised text in English language will prevail over the original Hindi text of the Act and this Court administering the law ought to resolve the controversy on the basis of the English text by applying the general principles of interpretation of English Statutes and by finding the meaning thereof from English dictionaries.

The other side relied upon a Division Bench decision in the case of *Haji Lal Mohammad Biri Works, Allahabad v.*

Sales Tax Officer, Allahabad (AIR 1959, All 208) in which a view was taken that any apparent ambiguity in the English translation of an Act enacted in Hindi can be resolved by making use of the Hindi text of the Act and this view of the High Court was approved expressly by the Supreme Court in the case of *J. K. Jute Mills Co. Ltd. v. State of U. P.* (AIR 1961 SC 1534). We found that in the case of *Smt. Ram Rati v. Gram Samaj* (supra) neither of the said decisions has been noticed. The five Judges' Full Bench seems to have been much influenced by earlier decision of three Judges' Full Bench in *J. S. Mills Ltd. v. Presiding Officer, I.-T. (III), U. P., Allahabad* (AIR 1962 All 240) (FB) wherein it was held that in case of diversion of two versions, that is in Hindi and English, the English version would prevail and would be supreme. In this state of law, the Full Bench referred the following question of law to a larger Bench of seven Judges:—

"Whether it will be a sound rule of interpretation or construction of statutes that if there appears to be some doubt or ambiguity in the authorised text in English language of an Act enacted in Hindi by the Legislature of Uttar Pradesh, then for resolving the ambiguity or doubt and for ascertaining the correct meaning thereof, reference can be made to the corresponding Hindi text and reliance placed thereon?"

4. The seven Judges' Full Bench by majority answered the above question in the following manner:—

"We are, therefore, of opinion that where there is some doubt or ambiguity in any provision in the authoritative English text, it is permissible to look into the Hindi text to remove the doubt or ambiguity."

5. With the above answer of the larger Full Bench the parties addressed before us their arguments. For the sake of convenience, we, hereinafter, describe the U. P. Encumbered Estates Act, 1934, as 'the 1934 Act' and the U. P. Zamindars' Debt Reduction Act, 1952, as 'the 1952 Act'.

6. On behalf of the creditor-appellants their learned counsel submitted that the debts secured against the proprietary rights in Zamindari properties are to be liquidated under Section 23-B (1) of the 1934 Act to which specifically the benefit of Section 8 of the 1952 Act has been extended but the benefit of Sec. 9 of 1952 Act, which in its terms applies to

unsecured debts has not been expressly extended to liquidation of debt under sub-section (2) of Section 23-B of 1934 Act dealing with liquidation of unsecured debts, hence the Collector will have no power to reduce the amount decreed in respect of an unsecured debt. It was strenuously urged that a comparison of the two sub-sections of Section 23-B of 1934 Act make it abundantly clear that the Legislature has consciously denied the benefit of the 1952 Act in respect of unsecured debts while extending its benefit to secured debts.

The submission was that the reason underlying this distinction is that the debts secured on proprietary rights in Zamindari property can only be liquidated by sale of proprietary rights in Zamindari properties, hence the benefit of Section 8 of the 1952 Act was extended, purposely for reducing the burden on the Zamindar but an unsecured debt would not entail any such burden on the Zamindar so as to deserve reduction. Our attention was drawn to the definition of secured debt under the 1952 Act, which means a debt secured against Zamindari property, i. e., the proprietary interest or against Zamindari property along with other immovable property. It was suggested that as a consequence of the abolition of Zamindari and vesting thereof in the State the security available to a secured creditor against which he could enforce his security was no longer available and its value in compensation bonds stood reduced, hence it would have been highly inequitable if there was no corresponding reduction in the Zamindar's liability in respect of the property which formed security for the debt. Therefore, the amendment of 1934 Act was made for giving relief to the Zamindars to meet the disadvantage and inequity directly flowing from the abolition of Zamindari.

7. It was then argued, alternatively, on behalf of the creditor-appellants that even assuming that the provisions of Section 9 of the 1952 Act apply to liquidation of unsecured debts under Section 23-B of 1934 Act, on the facts of the instant case the ingredients of Section 9 of 1952 Act were not fulfilled. The argument was developed somewhat in the following manner:—

A decree granted under sub-section (7) of Section 14 of the 1934 Act has to be executed only in accordance with the provisions of the 1934 Act and in no other way. Under Section 19 of the 1934 Act a

Special Judge is bound to send the decrees granted under Section 14 (7) to the Collector for execution in accordance with the provisions of Chapter V of the 1934 Act which deals with the execution of decrees and liquidation of debts. Chapter V of 1934 Act in its scheme makes a clear distinction between the liquidation of debt and execution of decrees. Reference was made to Sections 22, 23-A and 23-B of 1934 Act as dealing with the liquidation of debts and Section 24 of 1952 Act as dealing with the execution wherein the Collector for realising the value of the debtor's property may exercise all the powers of the Civil Court for the execution of a decree. The English text of Section 9 of 1952 Act was then referred to.

It was pointed out that its provision will apply only (i) when the decree relates to an unsecured debt passed in a suit to which the said Act applied, (ii) the decree is executable by a court, and (iii) the execution is by attachment and sale of the bonds granted to the judgment-debtor. It was contended that while the first ingredient is fulfilled in the instant case, the second and third ingredients of 1952 Act were not fulfilled inasmuch as under Section 23-B the Collector only liquidates a debt as Administrator of the Estate of the debtor and does not execute the decree as a court by attachment and sale of any property. It was urged that there is a clear distinction between the liquidation of a debt through realisation of bonds under Section 23-B and execution of the decree for realising the value of the debtor's property through proceedings under Section 24.

8. The above were then the basic arguments advanced on behalf of the creditor-appellants, as regards the first question referred.

9. In respect of question No. 2, it was submitted that the Collector did not requisition from the Compensation Officer the compensation bonds and the rehabilitation grant bonds but the Compensation Officer of his own placed the said bonds at the disposal of the Collector, thus it could not be said that the Collector attached the said bonds; that the Collector received those bonds as a liquidator of the debts and the effect, therefore, of the sending of the bonds by the Compensation Officer suo motu would be that the bonds were neither attached nor sold hence Section 9 of the 1952 Act would not be attracted as it applies only when an

attachment and sale of the property takes place.

10. In reply, the learned counsel for the respondent first cleared the ground by placing undisputed facts. He drew our attention to the affidavits exchanged between the parties and some annexures thereto. He showed that the award dated 6-6-1959 made by the Collector did not say that the debts will be paid out of the properties other than the Zamindari Abolition Compensation bonds and rehabilitation grant payable to the respondent. It was further shown that the creditors never asked the Collector to execute the decree against the property of the respondent other than the Zamindari Abolition Compensation and Rehabilitation Grant Bonds and there was nothing on the record to show that the debtor had any property other than the Zamindari Abolition Compensation and Rehabilitation Grant Bonds against which the decree could have been executed by the Collector. It was submitted that when the debts are to be liquidated against the Zamindari Compensation and Rehabilitation Grant Bonds, the requirement of law under Sec. 23-A of 1934 Act is that those bonds must be placed at the disposal of the Collector.

The Collector will then at first under Section 23-B (1) of the 1934 Act for liquidating the secured debts in order of priority ranked by the Special Judge utilise the bond placed at his disposal under Section 23-A. If any balance out of the compensation and rehabilitation grant bonds remains in the hands of the Collector after utilising the same in accordance with the provisions of sub-section (1), such balance would be utilised by the Collector in discharging the debts other than the secured debts. The submission was that in the instant case with the Collector there had remained a balance of compensation and rehabilitation grant bonds and since the Collector had utilised the same to discharge the unsecured debt of the appellant-creditors, he was perfectly within jurisdiction to give benefit of the 1952 Act to the respondent Zamindar.

11. It was contended that 1952 Act was enacted with the object of making a provision for scaling down of debts of the Zamindars whose estates had been acquired under the U. P. Zamindari Abolition and Land Reforms Act, 1950, and the said Act embraces within its ambit both secured and unsecured debts. It makes provision by its Section 9 that

where a decree relating to an unsecured debt was executed by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant for his estate, the court executing the decree notwithstanding anything in any law enter satisfaction in accordance with the formula given in the Schedule of the said Act.

This being the policy, it was urged that there was no tenability in the argument that the law did not protect the respondent by extending him the benefit of reduction under the 1952 Act when the Collector proceeded towards utilising the balance out of the bonds remaining with him in satisfaction of the unsecured debt of the respondent. The submission was that the benefit of scaling down of debt will always be available to a Zamindar debtors whose debt is to be satisfied from the Zamindari compensation and rehabilitation grant bonds, payable to him under the U. P. Zamindari Abolition and Land Reforms Act. Thus it was contended that mere absence of reference to the provisions of Section 9 of the 1952 Act in sub-section (2) of Section 23-B of the 1934 Act will not change the position against the respondent and deprive him of the benefit of application of the formula of reduction contained in the Schedule of 1952 Act.

12. In regard to question No. 2 the reply was that on the facts it appears that the Collector had sought for a report from the Encumbered Estates Clerk regarding the details of the Zamindari Abolition Compensation and Rehabilitation Grant Bonds payable to the ex-intermediary and on receiving the report from the office of Compensation Officer, he ordered the Treasury Officer, Pratapgarh to receive the bonds and keep the same in the Treasury as a valuable security and as the bonds in fact always remained in official custody and had never been handed over to the respondent, the order of the Collector just referred to would be nothing but attachment of the said bonds. The submission thus was that on the facts of the case the second question would not arise as the bonds were required by the Collector for liquidating the debts in execution of the decree of the Special Judge. Alternatively, it was suggested that even assuming that they were sent by the Compensation Officer suo motu, a fact which, it is said, is not true as the bonds were still always with the Compensation Officer, the order of the Collector would be

for attachment and the legal position would not change.

13. On the arguments of the parties the first question that arises for consideration is whether the Collector in the proceedings under Chapter V of the 1934 Act acts as a court and executes a decree. Under Section 19 of the Act a Special Judge sends the decrees granted under sub-section (7) of Section 14 to the Collector for execution in accordance with the provisions of Chapter V. It is clear, therefore, that under the Act the Collector executes the decree passed by the Special Judge and the execution is carried out in accordance with the provisions of Chapter V. Though this Chapter is headed as 'Execution of decrees and liquidation of debts' and Sections 23 and 23-B of the said Chapter talk of liquidation of debts but that alone to my mind would not mean that the Collector does not execute the decree of the Special Judge. Under the Scheme of this Chapter it appears the process of execution in the circumstances envisaged in Sections 23 and 23-B is described as liquidation.

I am not impressed with the contention that in the scheme of Chapter V when the Collector proceeds for realisation of value of the debtor's property under Section 24 of the Act it is only then he executes the decree. To my mind whole of Chapter V deals with the execution of decrees. Execution of transmitted decree is nothing but the process for carrying into effect the decree passed by the Special Judge for discharging the debt. May be the process of discharging the debt is termed as liquidation of debt but it is through the process of execution that such liquidation takes place. Whatever proceedings the Collector takes under Chapter V, they remain confined to execution of a decree transmitted by the Special Judge to him. The Act itself lays down that under Chapter V the function of the Collector is nothing but to execute the decree of the Special Judge in accordance with the provisions laid down therein.

It is not possible to accept the argument advanced on behalf of the appellant creditor that Chapter V can be divided into two distinct parts conferring different powers on the Collector viz. (i) for liquidation of debts and (ii) for execution of the decree. Introduction of such dichotomy in Chapter V would mean that the Collector when proceeding under Sections 23 and 23-B of Chapter V, is not executing the decree but doing something

which is not contemplated by Section 19 of the Act. When Section 19 confines the Collector to execute the decree in accordance with the provisions of Chapter V then all what is provided in Chapter V is nothing but the process of execution as with the aid of provisions under that Chapter the Collector discharges his duty and function for executing the decree transmitted to him by the Special Judge. The highly sophisticated argument that the Collector under Chapter V when he proceeds under Section 23-B is an Administrator or a Liquidator does not appeal to me.

A reference was made to the case of Deputy Commr., Hardoi v. Ram Krishna (AIR 1953 SC 521) and it was submitted that the Supreme Court described the proceedings under the U. P. Encumbered Estates Act as administrative proceedings and, therefore, the Collector was nothing but an Administrator of the estate. The observation which the learned Judges of the Supreme Court made in that judgment in paragraph 6 at page 524 was to the following effect:—

"It is apparent from the provisions of the Act cited above that U. P. Encumbered Estates Act is no more nor less than a Code for the administration of the assets of the landlord debtor and for giving relief to him in a number of ways against the contractual right....."

14. I do not think any such inference can be drawn from the said observations of the learned Judges of the Supreme Court that under Chapter V of the Act the Collector does not execute the decree but administers the estate just as an Official Receiver under the Provincial Insolvency Act or a Liquidator of a Company under the Companies Act. The Supreme Court in the case cited above was not concerned with the nature of the function of the Collector under Chapter V of the Act. The ratio of the decision in *S. C. Swarup v. Raghupati Rikh*, (1970 All LJ 189) does not appear to me to lead to the conclusion that the Collector under Chapter V of the Act does not execute a decree. The Division Bench was concerned with the function of Official Receiver under the Provincial Insolvency Act, when realising the Zamindari Compensation bonds and in selling them while administering the estate of the insolvent and in that connection the Bench concerned observed that the Official Receiver does not take any proceedings for execution of the decree by attachment and sale of compensation or rehabilitation grant for the

estate and then concluded that since the Official Receiver was not executing a decree by attachment and sale of the bonds, Section 9 of the U. P. Zamindars Debt Reduction Act was not attracted. The Division Bench had no occasion in that case to consider the nature of the role and function of the Collector under Chapter V of the U. P. Encumbered Estates Act. I have no hesitation in holding that under Section 23-B the Collector executes the decree of the Special Judge according to the injunction implicit in Section 19 of the 1934 Act.

15. The next question that arises is whether the Collector is a court while carrying on the proceedings under Chapter V of the Act. The word 'Court' has not been statutorily defined under any of the two Acts with which we are concerned. There is no doubt in my mind, considering the nature of the functions under the provisions of various chapters and the rules, under the 1934 Act that the Collector has all the trappings of a court. He is required to issue notices, hear parties and by judicial application of his mind give his award which is described in the rules as 'liquidation award'. Sections 22 and 23 of the 1934 Act themselves are indicative of the fact that the Collector is nothing but a court when performing his function under Chapter V. Section 22 provides that the Collector shall allow the debtor a period of two months within which he may put into court the whole or any part of the amount due from him. Likewise, Section 23 (1) and (2) both envisage payment into court. It has not been suggested neither it can be that the court envisaged by Sections 22 and 23 of Chapter V is some instrumentality or organ other than the Collector himself.

It is well known that for performance of his judicial duties under the law the Collector sits in a court which is known as the court of the Collector. The provisions of Sections 57 and 58 of the 1934 Act put it beyond doubt that the Collector under Chapter V of the said Act is a court. Section 57 says that the Collector subject to the rules framed by the State Government may transfer any proceeding under this Act which are pending in his court to the court of Assistant Collector 1st Class under Section 54 and he may withdraw any proceeding so transferred. Section 58 empowers the Board of Revenue to transfer any proceeding under this Act from the court of one Collector to

that of any other Collector. Sub-sec. (2) of Section 46 also contemplates the Collector to be a court when it lays down that the Board of Revenue at any time on its own motion for a sufficient reason call for the record of proceedings of any case under this Act which is pending into court of a Collector or has been decided by a court. Thus the Legislature itself has described the Collector as a court. I have no difficulty, therefore, in holding that the Collector is a court when performing his duties and functions under Chapter V of the 1934 Act.

16. Thus the contention advanced on behalf of the petitioner-creditors that the Collector neither executes any decree nor is he a court when exercising his power conferred by Section 23-B of the 1934 Act fails.

17. The next limb of the argument that under Section 23-B (2) of the 1934 Act the Collector neither attaches nor puts to sale the compensation or rehabilitation grant bonds in liquidating the debts may now be considered.

18. If, of course, the strict procedure for attachment of the property, as laid down in the Civil Procedure Code, and then its sale in execution of a decree is the only criterion to judge the nature of the action contemplated in Chapter V of the 1934 Act, then the answer may be that no such attachment and sale takes place but that to my mind will not be a correct approach. When a court reserves a property for the purpose of realising its value in discharge of the debts or any other kind of liability on the owner of such property and the owner cannot deal with that property, in my view, would amount to attachment of such property. The test is that when a court in legal process reserves to itself the power of disposal of any property to the exclusion of its owner, such a reservation would amount to attachment of that property.

On behalf of the creditor appellants reliance was placed on a Division Bench decision of this Court in *Kishori Saran v. Gauri Shanker* (1972 All LJ 875) wherein it was held that since the Compensation Officer is a public officer within the meaning of Order XXI, Rule 52 of the Civil Procedure Code, the bonds under his custody could not be said to have been attached unless a notice under Rule 52 of Order XXI of the Civil Procedure Code was issued by the court, followed by a prohibitory order to the judgment-debtor as mentioned under Rule 54 of Order 21

of the Code of Civil Procedure, thus a mere requisition by the Collector under Section 23-A of the 1934 Act read with Rule 31 of the Act cannot be called attachment of the bonds. It will be seen that the reasoning of the learned Judges to come to such a conclusion was entirely based on the provisions of the Civil Procedure Code. The learned Judges did notice the fact that the bonds when requisitioned are placed at the disposal of the Collector but held that that did not amount to a valid attachment as it was not followed by a prohibitory order as contemplated under Rule 54 of Order XXI of the Civil Procedure Code. It was mainly on this ground that the learned Judges observed:—

"It seems doubtful if this can be called attachment of the bonds."

19. They only expressed a doubt but refrained from expressing a definite opinion. With great respect to the learned Judges constituting the Bench in *Kishori Saran v. Gauri Shanker* (1972 All LJ 875) (supra) I do not share their doubt. When the bonds are requisitioned and placed at the disposal of the Collector thus coming under his control and the same being movable property mere absence of any prohibitory order on the landlord-debtor would not affect in any way the power of the Collector to dispose them of according to law. Moreover, Rule 54 of Order XXI applies only to attachment of an immovable property. A reference to Rules 43 and 46 of Order XXI of the Civil Procedure Code will be more apt. When the bonds representing the money value of the compensation and rehabilitation grant payable to the landlord themselves are in the custody of a public officer, then actual seizure thereof and their deposit in court will complete the attachment as contemplated by Rules 51 and 52 of Order XXI of the Civil Procedure Code. This is exactly what takes place.

Section 23-A of the 1934 Act lays down that the Collector shall require the Compensation Officer and Rehabilitation Grant Officer to place at his disposal in pursuance of Section 70 of the U. P. Zamindari Abolition and Land Reforms Act the amount of compensation money and rehabilitation grant payable to the landlord in respect of his proprietary right in the land found liable to attachment or sale under the provisions of sub-section (2) of Section 19. Rule 31 under the 1934 Act provides that after the amount of compensation money and rehabilitation

grant payable to the landlord is placed at the disposal of the Collector then he shall expend the amount so recovered in liquidation of the debt of the debtor-landlord in accordance with the provisions of Section 23-B of the Act and the balance, if any, shall be refunded to him. I think, it is clear from the scheme that the Collector having secured for himself the power of disposal to the exclusion of the landlord-debtor the attachment would be complete.

20. The next question then requiring consideration is whether in realising the money value of the compensation and rehabilitation grant bonds in fully discharging the debt, the Collector puts to sale such bonds. The compensation and rehabilitation grant payable to an ex-intermediary under the U. P. Z. A. & L. R. Act is represented by the bonds. Under Section 70 of the said Act when the Compensation Officer is required by a court or authority before whom any suit or proceeding is pending which directly or indirectly affects or is likely to affect the right of any person to receive the whole or part of the compensation then the Compensation Officer will have to place the amount so payable at the disposal of the requisitioning court or the authority and the same then shall be disposed of in accordance with the orders of such court or authority. With regard to rehabilitation grant Section 79-A of the U. P. Z. A. & L. R. Act provides for the eventuality which brings about a similar result. It must, however, be kept in view that the so-called bonds only represent the money.

The law requires compensation and rehabilitation grant to be paid in money. It is the compensation money and rehabilitation grant payable to the landlord in the shape of bonds in respect of his proprietary right in land which is put at the disposal of the Collector. In order to discharge the debt secured or unsecured in respect of which a decree has been made by the Special Judge the Collector transfers or entrusts such number of bonds whose money value is equal to the debt to be discharged. Thus it is the money notionally in the shape of bonds which is paid to the creditor in discharge of the debt. It is difficult, therefore, to accept the argument advanced on behalf of the respondent zamindar that the bonds as such are sold in execution of the decree for discharging his debt. In my judgment no sale takes place of the bonds as such even if the bonds be regarded as nego-

tiabile instruments. There is no sale conducted by the Collector. It is the money which is at his disposal in the shape of bonds which under the law is delivered to the creditor. There is no element of sale involved.

21. The result of the discussion above is:

(i) that the Collector is a court when exercising jurisdiction under Sec. 23-B of the 1934 Act;

(ii) that in liquidating the debt under Section 23-B of the 1934 Act the Collector executes the decree passed by the Special Judge under sub-section (7) of Section 14 and transmitted under Section 19 of the said Act;

(iii) that the Collector attaches the compensation money or the rehabilitation grant payable in the shape of bonds and executes the decree in discharging the debt by delivering the money or its value in the shape of bond to the creditor; and

(iv) that no sale takes place of any property in execution of the decree when the decree is executed against the compensation and rehabilitation grant bonds under Section 23-B of the 1934 Act.

22. As a result of the discussion above, I have no difficulty in answering the second question referred by the Division Bench. My attention has not been drawn to any provision in the 1934 Act or any rule framed thereunder prescribing any particular form in which the Collector will require the Compensation Officer or the Rehabilitation Grant Officer, as the case may be, to place at his disposal the compensation money and rehabilitation grant payable to the landlord. Thus to my mind it would not be legitimate to over-emphasise the act or requisition. Once compensation money and rehabilitation grant payable to the landlord in the shape of bonds is placed at the disposal of the Collector by the Compensation Officer or by the Rehabilitation Grant Officer, as the case may be, to my mind the requirements of law are substantially complied with. The manner or mode in which the Collector assumes control of the bonds hardly will matter. Even if the Officer places the bonds at the disposal of the Collector without waiting for any formal requisition in writing, the requirements of law would be satisfied.

23. I would answer the question No. 2 referred in the negative.

24. In regard to the first question referred, on the argument of the learned

counsel for the creditor-appellants two points arise, namely, (i) Whether the absence of mention of Section 9 of the 1952 Act in sub-section (2) of Section 23-B of the 1934 Act necessarily rules out the applicability of Section 9 of the 1952 Act and the debtor-zamindar loses the benefit of reduction of his debt or the decretal amount? and (ii) assuming that absence of mention of Section 9 of the 1952 Act in sub-section (2) of Section 23 of the 1934 Act does not rule out the applicability of Section 9 of the 1952 Act, still the Zamindar debtor would not be entitled to the benefit of those provisions as Sec. 9 of the 1934 Act in terms would not apply.

25. Taking the first point formulated above, it should be borne in mind that when the 1952 Act was enforced with effect from 21st May, 1953, Sections 23-A and 23-B of the 1934 Act did not exist. They were introduced as amendments to the 1934 Act by U. P. Act No. 13 of 1954, known as the U. P. Encumbered Estates (Amendment) Act, 1954. Section 14 of the Amending Act enacted Sections 23-A and 23-B to be included in the principal Act. The Amending Act's long title shows that it was an Act to amend the U. P. Encumbered Estates Act, 1934 for certain purposes. The 1934 Act aimed at the preservation of estates in liquidating the accumulated debts of the indebted Zamindars and was a measure to bring relief to the class of landlords who were surrounded by creditors and whose estates were heavily encumbered. Many measures were enacted whose provisions brought much needed relief to the indebted Zamindars and afforded them a wholesome benefit in liquidating and discharging their debts secured or unsecured, which otherwise would not have been available to them under the ordinary law.

It is a matter of legislative history when the 1934 Act was passed, there was no question of the abolition of the proprietary rights of the landlord in land. It was in 1951 that the U. P. Z. A. and L. R. Act was enforced abolishing all proprietary rights of the Zamindars and awarding them compensation and rehabilitation grant in return for the acquisition of their estates by the State. Considering the plight in which a large number of Zamindars were put by abolition of Zamindari, other enactments were passed for affording them relief, one of which was the 1952 Act, known as U. P. Zamindars Debt Reduction Act. The long title of this Act shows that it was enacted to provide for scaling down of debts of Zamindars whose

estates had been acquired under the provisions of the U. P. Z. A. & L. R. Act, 1950. The statement of objects and reasons was as follows:—

"The Zamindari Abolition Committee made certain recommendations as regards the scaling down of intermediaries debts. They pointed out that our existing debt laws do not take into account the special problem of the reduced capacity of the landlord to pay his debts due to abolition of Zamindari. To the Committee it appeared sound and equitable that after the abolition of Zamindari the landlords' debts should be reduced in proportion to the reduction in the value of his land consequent upon the abolition. Government after carefully considering the various recommendations of the Committee have incorporated their decisions in the Bill which is being presented before the Legislature....."

26. As the statement of Objects shows, the Legislature appreciated the reduced capacity of the landlord to pay off his debts for the reason of abolition of Zamindari and it was considered sound and equitable that after the abolition of Zamindari the landlord's debt should be reduced in proportion to the reduction in the value of the land consequent upon the abolition. Section 3 of the 1952 Act provided for reduction of debts at the time of passing of the decree. Section 4 conferred power on the court to reduce the debt after passing of the decree. Section 6 provided for decree for reduced amount. Section 8 provided for secured debts realisable from compensation money and rehabilitation grant payable to the ex-intermediary under the provisions of the U. P. Z. A. & L. R. Act. Section 9 provided for a formula for scaling down of the debt when a decree was executed against the bonds granted to the judgment-debtor on account of compensation and rehabilitation grant for his estate in regard to unsecured debt.

When the Legislature in 1954 amended the Encumbered Estates Act introducing Sections 23-A and 23-B in the principal Act of 1934, it would be presumed that it had knowledge that the debts of Zamindars in respect of which decrees were passed by the Special Judge under sub-section (7) of Section 14 of the 1934 Act still remained undischarged as proceedings in execution for liquidating such debts were pending under Chapter V of the 1934 Act in the Court of the Collector. Thus the 1952 Act and 1934

Act as amended in 1954 can be said to be twin measures for ameliorating the lot of landlords and affording them equitable relief against their debts when such debts whether secured or unsecured were realised against the value of the compensation and rehabilitation grant awarded to them on the acquisition of their estates. I think it would be legitimate, taking into view the avowed object of the Legislature, to construe and apply these laws in a manner complementing and supplementing each other in order to achieve the object for which they were enacted.

27. The authorised English translation of Section 9 of the 1952 Act is as follows:—

Sec. 9. "Where a decree to which this Act applies relating to other than as secured debt is executed by attachment and sale of the bonds granted to the judgment-debtor on account of compensation or rehabilitation grant for his estate, the court executing the decree shall, notwithstanding anything in any law enter satisfaction in accordance with the formula given in Schedule II." (Underlining mine)

28. However, the Hindi version which is the original language in which the Act was enacted by the Legislature is as follows:—

"१-सुरक्षित ऋण को छोड़कर अन्य ऋण से सम्बद्ध कोई डिक्ली जिसके विषय में यह अधिनियम प्रवृत्त हो; वाद-रूणी को उसके आस्थान के विषय में प्रतिकर अथवा पुनर्वासन के रूप में दिये गये बन्धों (bonds) की कुर्की या नीलाम द्वारा निष्पादित कि जाय, तो डिक्ली का निष्पादन करने वाला न्यायालय, किसी विधिमें किसी बात के होते हुए भी, अनुसूचि २ में बताये हुए सूत्र के अनुसार अदायगी प्रमाणित कर देगा।"

29. Then an argument was made on behalf of respondent Zamindar to interpret Section 9 in the manner that the phrase 'attachment and sale' occurring in the Section be read as 'attachment or sale'. This Court repelled the argument in the cases of Bhawani Shanker v. Govind Das (1962 All LJ 223) and Kishori Saran v. Gauri Shanker (1972 All LJ 875) (supra). These decisions were rendered before the controversy in this Court as to the competition between Hindi version of the Statute and its authorised English translation was still unsettled. In the instant case itself on behalf of the appellant-creditors it was submitted that the English version must prevail and be re-

garded as supreme as held by the Full Bench of this Court in the case of Smt. Ram Rati v. Gram Samaj (AIR 1974 All 106) (FB) (supra).

The Supreme Court in the case of J. K. Jute Mills v. State of U. P. (AIR 1961 SC 1534) (supra) specifically approved the principle of interpretation laid down by this Court in the case of Haji Lal Mohammad Bidi Works v. Sales Tax Officer (AIR 1959 All 208) (supra) that if there was an apparent ambiguity in the translation of the Act enacted in Hindi then that can be resolved by making use of the Hindi text. We doubted the correctness of the Full Bench case of Ram Rati v. Gram Samaj (AIR 1974 All 106) (FB) (supra). The matter was then referred to a Full Bench of seven Judges, which has now declared that where there is some doubt or ambiguity in any provision in the authoritative English text, it is permissible to look into the Hindi text to remove the doubt of ambiguity. Since in the Hindi version the phrase used is 'Kurki Ya Neelam', the ambiguity in the English authoritative text due to use of the conjunction 'and' which ambiguity was canvassed before the two Division Benches of this Court but now we can resolve it by taking recourse to the Hindi text and it would be legitimate to read the phrase in the authoritative English text as 'attachment or sale'. The Legislature itself has used such phrase in Section 19 (2) and (6) of the 1934 Act.

30. Having thus cleared the deck, I may now consider whether the specific mention of Section 8 of the 1953 Act in sub-section (1) of Section 23-B, which relates to execution of debts secured against the proprietary rights in land for which compensation and rehabilitation grant was payable, shows a manifest intention on the part of the Legislature that when a decree is executed in respect of an unsecured debt under Section 23-B (2) by attachment or sale of the compensation and rehabilitation grant payable to the debtor Zamindar, he would not be entitled to the scaling down of the decretal amount in accordance with the formula in Schedule II of the said Act and there would be no power in the executing court to reduce the amount accordingly.

31. It would be seen that Section 8 of the 1952 Act deals with the debts realisable from compensation money and rehabilitation grant in respect of a secured debt. By its sub-section (1) it provides that the reduced amount found in the

case of a judgment debtor or mortgagor, as the case may be, under Sections 3 or 4 of the said Act as respects mortgaged estates shall not be legally recoverable otherwise than out of the compensation and rehabilitation grant payable to such mortgagor or judgment-debtor in respect of such estate. Thus an estate which is charged to secure a debt it is the compensation and rehabilitation grant for such an estate which can only be utilised for discharge of the reduced amount of debt and such debt cannot be recovered from compensation and rehabilitation grant payable in respect of other estate. Sub-section (1) of Section 8 of the 1952 Act lays down a rule that when a decree for the secured debt is executed, the value of the debt would be taken to be $\frac{3}{4}$ th of the amount as found and the debt would stand discharged against compensation bond of such value.

In so far as the recovery against rehabilitation grant payable in respect of mortgaged estate is concerned, the decree shall also be executed to the extent of $\frac{3}{4}$ th of such grant payable for the mortgaged estate. Sub-section (1) of Section 23-B of 1934 Act is framed so as not to affect the provisions of Section 8 of the 1952 Act. The scheme is clear. When the Legislature enacted sub-section (1) of Section 23-B of the 1934 Act, it introduced the phrase 'without prejudice to the provisions of Section 8 of the U. P. Zamindars Debt Reduction Act, 1952'. Thus intention was to caution the Collector that he will keep in mind the provision that compensation bond and rehabilitation bonds at his disposal representing the money value of compensation and rehabilitation grant payable to an intermediary for a mortgaged estate must be utilised to discharge the liability of the debt charged over such estate. If any balance is left then it may be utilised towards payment of unsecured debt.

In case the secured debt is not fully discharged against those bonds and any part of it remains out-standing, then the Collector for liquidating it will not utilise the compensation and rehabilitation bonds representing the value of another estate belonging to the debtor Zamindar which was not mortgaged or charged with any liability but will take recourse to the procedure prescribed by Section 24 of the 1934 Act. Since the unsecured debt is not charged on any estate no question will arise for discharging the debt only from the compensation or rehabilitation grant payable for any mort-

gaged or charged estate, therefore, there was no necessity to caution the Collector. But that will not mean that if the Collector has power under any other law to scale down the unsecured debt he could not exercise that power while executing a decree for liquidating the unsecured debt under sub-section (2) of Section 23-B of the 1934 Act. As already observed, above, two Acts in question, namely, the 1934 and 1952 Acts are two enactments complementing and supplementing each other for affording the needed relief to the ex-intermediary whose capacity to pay his debt was reduced after the abolition of Zamindari.

It would be legitimate to hold that had the intention been not to afford any relief of scaling down of an unsecured debt as provided for under Section 9 of the 1952 Act, it would have expressly said so. In my judgment, the power of Collector to take recourse to the provisions of Section 9 of the 1952 Act while liquidating a debt through execution of a decree under Chapter V remains unimpaired and unaffected. Mere omission to introduce a clause in the 1952 Act does not manifest contrary intention of the Legislature. I think the Collector was right in giving benefit of Section 9 of the 1952 Act to the Zamindar-respondent. It is not possible to countenance the argument of the learned counsel for the creditor-appellants that if the decree was executed for discharging the debt by realising the value of some property which was not an estate under Section 24 of the 1934 Act the debt could be scaled down under Section 9 of the 1952 Act, but it cannot be scaled down in liquidating the unsecured debt under Section 23-B of the 1934 Act.

This is an argument which appears to be fallacious. When the object of both the Acts is the same, that is, to afford relief to an ex-intermediary on account of his reduced capacity after abolition of Zamindari and when the debts are to be discharged against the compensation and rehabilitation grant payable for acquisition of the Zamindari, the relief of reduction will all the more be needed. I am unable to agree with the view taken by the Division Benches in the cases of Bhawani Shanker v. Govind Das (1962 All LJ 223) (supra) and Kishori Saran v. Gauri Shanker (1972 All LJ 875) (supra).

32. In my judgment, all the conditions are satisfied for attracting Sec. 9 of the 1952 Act:

(i) the decree is one to which the said Act applies, (ii) the decree is being executed by a court and (iii) it is being executed by attachment of the compensation and rehabilitation grant payable to the landlord.

33. My answer to the first question, therefore, would be in the affirmative.

M. N. SHUKLA AND T. S. MISHRA, JJ.:— We agree.

BY THE COURT

34. Our answer to the first question is in the affirmative, and our answer to the second question is in the negative.

35. Let the papers be returned to the Division Bench concerned with the above answers.

Answered accordingly.

AIR 1976 ALLAHABAD 433

K. B. ASTHANA, C. J. AND SATISH CHANDRA, J.

Dalip Singh and others, Petitioners v. The Deputy Director of Consolidation, Moradabad Camp and others, Opposite Parties.

Civil Misc. Writ Petition No. 4017 of 1973, D/- 5-12-1975.

(A) U. P. Consolidation of Holdings Act (5 of 1954), S. 5 — Suit for cancellation of sale deeds — S. 4 notification during pendency of suit — Suit abates under S. 5 and subject-matter of suit, viz., validity of sale deeds could be adjudicated upon by consolidation authorities.

(Para 6)

Cases Referred: Chronological Paras

AIR 1973 SC 2451 = (1973) 2 SCC 535 5
1969 All LJ 768 = 1969 All WR (HC) 435 5

Krishna Murari Sinha, for Petitioners; G. N. Varma, Standing Counsel, for Opposite Parties.

SATISH CHANDRA, J.:— Harbans Singh, respondent No. 2, purchased the plots in dispute by a sale deed dated September 15, 1956 for Rs. 4,000-00. The sale deed mentioned not only Harbans Singh but also his two minor sons, namely, Kiran Pal Singh and Kiran Singh, respondents Nos. 3 and 4, as purchasers. Subsequently, Harbans Singh, on March 15, 1962, sold a two-third share in the plots in dispute to Dalip Singh, petitioner No. 1,

for Rs. 9,000-00. The remaining one-third share in the plots was sold to petitioners Nos. 2 and 7 for a sum of Rupees 4,500-00.

2. In 1967, Harbans Singh's sons, namely, respondents Nos. 3 and 4, filed a suit for the cancellation of the aforesaid two sale deeds executed by Harbans Singh, on the ground that they being minors, the sale deeds were invalid in respect of their shares in the plots. During the pendency of the suit, a notification under Section 4 of the U. P. Consolidation of Holdings Act was published. Thereupon the suit was abated by the Court.

3. The two sons of Harbans Singh filed an objection in the consolidation proceedings which was partly allowed by the Consolidation Officer. The matter was taken up in appeal. The Settlement Officer held:

"In the sale deeds, he (Harbans Singh) has admitted that the land was purchased by him with his own money in his name and also in the name of his sons."

The Settlement Officer held that the real purchaser of the land was Harbans Singh, his sons being only Benamidars. He was, therefore, entitled to sell the land to the petitioners. On this view, the sale deeds were upheld and the objections of the two sons of Harbans Singh were repelled.

4. The respondents went up in revision. At the hearing, the petitioners were not represented because their counsel was ill. The Deputy Director proceeded to hear the revision in their absence. He went into the merits of the revision and held that it was not open to the Settlement Officer to give a finding on the question whether the names of the two sons of Harbans Singh were entered as Farzi because there was no such plea taken in the objections by them. On this principal finding, the revision was allowed and it was directed that the names of Kiran Pal Singh and Kiran Singh, the two sons of Harbans Singh, will be recorded along with Jhutha Singh and Dalip Singh.

5. Aggrieved, the purchaser Harbans Singh filed a writ petition in this Court. At the hearing of the writ petition, it was, inter alia, urged before the learned Single Judge that in view of the decision of the Supreme Court in *Gorakh Nath v. Hari Narain Singh*, (1973) 2 SCC 535 = (AIR 1973 SC 2451), the question of the validity of the two sale deeds could not be adjudicated upon by the consoli-

dation authorities and that the sale deeds are binding on the parties unless they are set aside by a decree of the regular court. The learned Single Judge felt that there was some conflict between the decision of this Court in *Jagarnath Shukla v. Sita Ram Pande*, 1969 All LJ 768, which decision was specifically approved by the Supreme Court and, certain observations made by the Supreme Court in *Gorakh Nath Dube's case*.

6. It has been seen that the suit filed by the respondents covered both the sale deeds. The suit was for cancellation. It was abated under Section 5 of the Consolidation of Holdings Act. Section 5 aforesaid applies when a court finds that in view of Section 49 of the Act, a regular suit is not maintainable because the points for adjudication can be adjudicated upon by the consolidation authorities. The necessary effect of this order of abatement was that subject-matter of the suit namely, the validity of the two sale deeds, could be adjudicated upon by the consolidation authorities. It is well settled that a decree or order which has become final, operates as *res judicata* even though it may proceed upon an erroneous decision of a question of law. In view of the doctrine of *res judicata*, none of the parties could object to the consolidation authorities going into the validity of the two sale deeds. They were entitled to adjudicate upon their validity.

7. On merits, the position is that the Deputy Director has held that the Settlement Officer's finding was that the sale deeds were Farzi. We have seen the order of the Settlement Officer and we are unable to uphold this view of the Deputy Director. The Settlement Officer held:—

"In the sale deeds he (Harbans Singh) has admitted that the land was purchased by him with his own money in his name and also in the name of his sons. Sri Harbans Singh sold this land with a great benefit and with this money he purchased the land in village Salampur Bitara. It is admitted by Kiran Pal Singh that they live with their parents in village Salempur Bitara and live upon that land. This clearly shows that Harbans Singh himself purchased this land originally for himself with his own money and got the names of his sons also entered in a Farzi manner."

The finding is not that the sale deeds were Farzi but that the names of the two sons were entered Farzi. In other words, the minors were Benamidars. The actual purchaser was Harbans Singh.

8. The Deputy Director was of the opinion that there was no issue on the specific point and so the Settlement Officer ought not to have gone into this question. Issue No. 3 was 'are the sale deeds invalid'? In our opinion, this issue covered the question whether the sale deeds could be held to be invalid and whether Harbans Singh was alone the owner or whether the minors were also vendees with him. The Deputy Director, in our opinion, was in error in short-circuiting the finding of the Settlement Officer on the view that there was no issue on this point. The Deputy Director did not go into the merits of this finding. Under the circumstances, his order cannot be sustained.

9. In the result, the petition succeeds and is allowed. The impugned order of the Deputy Director is set aside. The matter is sent back to him for a decision of the matter afresh in accordance with law and in the light of the observations made above. Parties shall bear their own costs.

Petition allowed.

AIR 1976 ALLAHABAD 434

M. P. SAXENA, J.

Balbir Singh and another, Applicants
v. Smt. Kalawati, Respondent.

Civil Revn. No. 394 of 1975, D/- 1-3-1976.*

(A) Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S. 39 — Deposit of rent in court — Ejectment suit — Tenant's son depositing rent on his own behalf and not on behalf of his father — Held, it could not enure to the benefit of tenant.

(Para 9)

(B) Transfer of Property Act (1882), S. 106 — Plea of invalidity of notice — Failure to raise plea at early stage of litigation (raised for first time in revision) — Plea would be deemed to have been waived. AIR 1956 Assam 113 and AIR 1971 Delhi 98, Rel. on. (Paras 10, 11)

(C) Transfer of Property Act (1882), S. 106 — Notice to quit — Landlord treating addressee as trespasser — Notice to take effect in case addressee treated himself as tenant — Validity.

*(Against judgment and decree passed by D. L. Soni, 3rd Addl. Dist. J., Muzaffarnagar.)

ET/GT/B571/76/MBR

There was no ambiguity in the notice to quit. At one place in the notice the landlord gave out that the addressee had entered into wrongful possession of the premises in question. But it was made clear in the notice that the landlord intended to terminate the tenancy on expiry of 30 days in case the addressee regarded himself as a tenant of the premises. According to the addressee the premises was in his tenancy and no forcible possession was taken thereon. In the circumstances, the notice cannot be treated as invalid. 1967 All LJ 395, Distinguished; AIR 1918 PC 102; 1967 All LJ 764; AIR 1933 Cal 260 and AIR 1952 Cal 221, Rel. on. (Paras 12, 13)

(D) Provincial Small Cause Courts Act (1887), S. 15 — Suit for ejectment — Plaintiff treating defendant as trespasser in respect of one of the rooms and claiming possession of entire accommodation—Jurisdiction of Small Cause Court.

The plaintiff claimed rent and demanded possession from defendant of the entire accommodation of three rooms including the room of which possession was alleged to have been taken wrongfully by the defendant. The notice to quit was also given on the allegation that if the defendant regarded himself as a tenant he should deem his tenancy to be terminated on expiry of 30 days. In the circumstances, after the Civil Laws Amendment Act came into force, the suit was cognizable by the Small Cause Court only and could not be filed on regular side. (Para 6)

Cases Referred: Chronological Paras

1975 All LR 360 = 1975 All WC 420	7
AIR 1971 Delhi 98 = 1970 Ren CR 552	11
1967 All LJ 395 = 1967 All WR (HC)	445
	12
1967 All LJ 764 = 1967 All WR (HC)	573
	13
AIR 1968 SC 471 = (1968) 2 SCR 20	17
AIR 1965 SC 101 = (1964) 5 SCR 239	16
AIR 1956 Assam 113	10
AIR 1952 Cal 221	15
AIR 1933 Cal 260 = 36 Cal WN 918	14
AIR 1918 PC 102 = 45 Ind App 222	

12, 14

B. Dayal and Vishnu Sahai, for Applicants; P. C. Gupta, for Respondent.

ORDER:— This is a defendants' revision application under Section 115 of the Civil Procedure Code against the judgment and order dated 7-2-1975 passed by the 3rd Additional District Judge, Muzaffarnagar.

2. Briefly stated the facts are that the plaintiff-opposite party had filed a

suit for ejectment of the defendants applicants from the accommodation in suit and for the recovery of arrears of rent etc. It was alleged that Balbir Singh defendant No. 1 had taken one room and one Kothri on a monthly rent of Rs. 25 for a period of two months. He took wrongful possession over one more Kothri (N) which was formerly let out at Rs. 14 per month. In spite of his transfer he did not vacate the premises and allowed his son defendant No. 2 to remain in possession of the same along with other members of his family. He committed default in payment of rent and started creating nuisance. The requisite notice to quit was given but in vain. Hence the suit.

3. Both the defendants contested the suit. According to them defendant No. 2 alone was a tenant of the entire premises on a rent of Rs. 14 per month and no ground for his eviction was made out. They denied having received any notice to quit.

4. The suit was tried by the Judge Small Cause Court, Muzaffarnagar. He arrived at the conclusion that the defendant No. 1 and not defendant No. 2 was the tenant of the premises in suit; that defendant No. 1 had not entered into wrongful possession of the Kothri 'N' but it was in his tenancy from before; that the rent of the entire accommodation was Rs. 14 per month; that the notice to quit was valid and that the defendant No. 1 was liable to ejectment because he committed default in the payment of rent. He further held that the said defendant having failed to deposit rent on the first date of hearing was not entitled to the benefit of Section 39 of U. P. Act 13 of 1972 and that defendant No. 1 did not create any nuisance. Accordingly the suit for possession over both the rooms and kitchen and for the recovery of Rs. 350 as arrears of rent from 1-9-1968 to 11-10-1970 and for the recovery of Rs. 131 as damages for use and occupation from 12-10-1970 to 22-7-1971 at Rs. 14 per month was decreed against defendant No. 1 pendente lite and future mesne profits were also awarded at the same rate subject to payment of court-fees in the Execution Department.

5. Both the defendants filed a revision under Section 25 of the Small Causes Courts Act but remained unsuccessful. They have now come up in revision under Section 115 of the Civil Procedure Code mainly on four grounds.

6. In the first place it is urged that the Small Cause Court Judge had no jurisdiction to try the suit. It is based on two grounds, firstly, because the plaintiff had regarded defendant No. 1 as a trespasser of Kothari 'N' and suit for possession thereon should have been filed on regular side and could not be tried by the Small Cause Court. There is no force in this contention because on a reading of the entire plaint it is evident that the plaintiff demanded possession from defendant No. 1 of the entire accommodation including the Kothri 'N' even if he claimed to be its tenant. As will be just discussed the notice to quit was also given on the allegation that if defendant No. 1 regarded himself as a tenant he should deem his tenancy to be terminated on the expiry of 30 days from the date of receipt of the notice. The plaintiff claimed rent of the entire accommodation. Therefore, after the Civil Laws Amendment Act came into force, the suit was cognizable by the Small Cause Court only.

7. The jurisdiction of the Small Cause Court to try the suit is further assailed on the ground that the case was transferred to his court not from the court in which it was instituted but from a transferee court, and in view of *K. K. Saxena v. S. N. Misra* (1975 All LR 360), Section 9 of the Civil Laws Amendment Act is not applicable to suits in transferee courts. This contention also does not carry force because the suit was originally instituted in the court of Munsif, Muzaffarnagar. On 17-8-1971 it was transferred to the court of the 1st Additional Munsif but on 11-1-1972 it was again transferred to the parent court. It was from the court of Munsif, Muzaffarnagar that it was transferred to the court of Small Causes. Therefore the transfer was perfectly valid and the Small Cause Court was competent to try it.

8. In the second place it is urged that in deciding the question whether the relationship of landlord and tenant existed between the plaintiff and the defendant No. 1, the trial court relied on an affidavit Ex. 5 filed by Naresh Kumar (son of defendant No. 1) in another suit admitting that his father was a tenant of the premises in suit. It is urged that Naresh Kumar being alive the affidavit filed by him was inadmissible in evidence. It is true that the affidavit was not admissible in evidence but even if it is ruled out of consideration, there remains sufficient material on the record to hold that

defendant No. 1 was a tenant of the suit property. The trial court has discussed that piece of evidence also and has made correct appraisalment of the same.

9. The third contention that there was no default in the payment of rent inasmuch as the defendant No. 2 had deposited the entire rent in court under Section 39 of the New Act has no force because defendant No. 2 had deposited that amount on his own behalf and not on behalf of his father who was the tenant. It could not enure to the benefit of defendant No. 1. Therefore this contention is without force.

10. Lastly, it is urged that the notice to quit was invalid inasmuch as the plaintiff did not treat defendant No. 1 as a tenant of the kothri and could not have any intention to terminate his tenancy in respect of the same. Before going into the merit of this contention it is important to state that in his written statement the defendant No. 1 had challenged simply the receipt of notice and not its validity. The validity of notice was not challenged even in the grounds of revision under Section 25 of the Small Cause Courts Act nor this point was pressed before that court. Even in this revision the ground on which validity is attacked has not been specifically set out. In *Kishanlal Singol v. Hari Kisson Lohia*, (AIR 1956 Assam 113) it is observed:—

"The question about notice to quit is not purely a question of law, but is a mixed question of law and fact. Hence if under the terms of the contract the tenants are entitled to a notice of one month instead of 15 days, they may be taken to have waived the same and to have been satisfied with the sufficiency and validity of the notice especially when they raise the point about the factum of service of notice only."

11. Again in *Batoc Mal v. Rameshwar Nath*, (AIR 1971 Delhi 98) the observation is:—

"The failure of the tenant to raise the objection regarding the non-compliance with Section 106 of the T. P. Act at an early stage of the litigation would amount to a waiver of the plea by him." I am in respectful agreement with the aforesaid observations. Defendant No. 1 challenged only the service of notice and not its validity. He will therefore, be deemed to have waived the plea of invalidity of notice. So far as the service of notice is concerned there is ample material on the record to prove that it was duly served on the said defendant.

12. Even on merit the contention carries no force because there is no ambiguity in the notice and the plaintiff clearly communicated to defendant No. 1 her intention that the tenancy will stand terminated on the expiry of 30 days if he treated himself to be the tenant of the kothari 'N'. Learned counsel for the revisionists relies on the case of *Pattan Din v. Sardar Karan Singh* (1967 All LJ 395) to show that if there was no tenancy at the time of giving the notice in the contemplation of the person giving the notice then it would not be a notice terminating the tenancy. There can be no controversy about this principle because that was a case in which the plaintiff was not at all inclined to treat the defendant as a tenant. He had given a notice treating him as a licensee. In the plaint also the defendant was treated as a licensee and damages for use and occupation were claimed from him. As against it in the notice Ex. 2 where at one place the plaintiff gave out that defendant No. 1 had entered into wrongful possession of the Kothari 'N' she also made it clear that in case he regarded himself as a tenant of the same he should treat his tenancy to be terminated on the expiry of 30 days from the date of receipt of the notice. In this connection reference may be made to certain cases laying down that such a notice will be valid. In *Harihar Banerji v. Ramshashi Roy* (AIR 1918 PC 102) the observation is:—

"The principles governing the construction of a notice to quit laid down by English cases are equally applicable to cases arising in India and they establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further, they are to be construed not with a desire to find fault in them which would render them defective but to be construed ut res magis valeat quam pereat doe."

13. In *Mushtaq Husain v. Mohammad Saddiq* (1967 All LJ 764) a Division Bench of this Court observed:—

"The requirement that a notice terminating a tenancy must not be vague but must be clear and unambiguous is for

the benefit of the understanding of the receiver of the notice and not the giver of the notice."

There can be no manner of doubt that in the instant case defendant No. 1 knew the correct position. According to him the Kothari 'N' was in his tenancy and forcible possession was not taken thereon. Therefore, he had no reason to construe the notice in any other manner except for terminating his tenancy.

14. A similar position arose in the case of *Secy. of State v. Madhu Sudan*, (AIR 1933 Cal 260) in which notice proceeded on the footing that the defendants were trespassers and not lessees or licensees. A Division Bench of that Court relying on the case of *Harihar Banerje v. Ram Shashi Roy* (AIR 1918 PC 102) (supra) held that the giver of a notice is not bound to admit the person to whom it is given as a tenant; a notice is good notwithstanding that the addressee is described therein as a trespasser if the latter knows his position.

15. Again in *Nagendranath v. Jotish Chandra* (AIR 1952 Cal 221) this question came up for consideration and it was observed that the essential requisite is whether the person intended to be bound by the notice was asked to vacate the premises in question on the expiry of 30 days. Unquestionably in the instant case defendant No. 1 was informed that if he treated himself as a tenant of the Kothari 'N' he should regard his tenancy as terminated on the expiry of 30 days, which allegation was ultimately found to be true.

16. In *Mangilal v. Sugan Chand* (AIR 1965 SC 101) a notice was given simply saying 'Pay arrears of rent within one month, failing which suit for ejectment will be filed'. It was held to be a valid notice under Section 106 of the T. P. Act.

17. In *Calcutta Credit Corporation Ltd. v. Happy Homes (P) Ltd.* (AIR 1968 SC 471) it was held:

"Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. Whether the notice is given by the landlord or the tenant the party to whom it is given is entitled to insist upon it and it cannot be withdrawn without the consent of both."

It proceeded on the principle that if the person to whom notice is given accepts the position that he is a tenant then he cannot resile from it. In view of this discussion, I am in judgment that the notice to quit served on defendant No. 1 was valid.

18. The revision application is dismissed with costs to the opposite party. The revisionists are allowed three months' time to vacate the premises.

Revision application dismissed.

AIR 1976 ALLAHABAD 438

K. B. ASTHANA, C. J. AND J. M. L. SINHA, J.

Nisar Ahmad and others, Petitioners v. The Rent Control and Eviction Officer, Kanpur and others, Respondents.

Civil Misc. Writ No. 187 of 1971, D/-25-3-1976.

(A) U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7-D — Non-payment of excess water charges — Landlord, if justified in asking tenants to pay such charges — Fact that liability to pay these dues lies on landlord, if immaterial — 1956 All LJ 23, Overruled.

Under the scheme of Municipal Acts water tax is charged for normal water supplied through the pipes and taps installed in any house or building within the municipal or corporation area. Any excess water consumed over and above the existing normal limit is also to be paid for and it is called excess water charges. It is not a regular tax. (Para 2)

The landlord would be perfectly justified in asking the tenants to pay the excess water charges, no matter under the law the responsibility of payment of all the municipal dues relating to house or building situate in the municipal area or corporation area, also lies on the landlord. But there is nothing in law to prevent the tenant himself depositing the dues to escape from the rigours of law, for his own advantage and benefit. Distinction between effect of non-payment of water tax and that of extra water charges pointed. (Para 5)

A tenant cannot be permitted to consume as much water as he liked even to the extent of wasting it thus increasing the burden of the landlord and then turning upon him to pay for all what they have enjoyed on the threat of taking re-

course to the machinery of law regulating control and letting out of accommodation. 1956 All LJ 23, Overruled. (Para 5)

Whether the provisions of Sec. 7-D of the U. P. (Temporary) Control of Rent and Eviction Act 1947, would be attracted to an act of omission of a landlord, the consequence of which is cutting off of water supply by the Corporation authorities. (Quaere). It was assumed in the instant case that landlord may come within the mischief of S. 7-D. (Para 4)

Cases Referred: Chronological Paras
AIR 1958 SC 444 = 1958 Cri LJ 814 1, 3
1956 All LJ 23 1, 4, 5

Bashir Ahmad for Petitioners; K. M. Dayal, Shambhu Pd., K. M. Sinha, Standing Counsel, for Respondents.

K. B. ASTHANA, C. J.:— The petitioners are landlords of an accommodation in Kanpur city. Opposite parties 3 to 9 and 11 are its tenants. The owner of this accommodation formerly was one Mohd. Ishaq. Before the petitioners purchased the accommodation from Mohd. Ishaq, water connection of the accommodation had been cut off by the Corporation of Kanpur as excess water charges had not been paid. When the petitioners became the owners of the accommodation the opposite parties 3 to 9 and 11 were tenants and the water connection stood cut off. After the petitioners acquired the ownership of the accommodation the opposite parties Nos. 3 to 9 and 11, filed an application under Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act (U. P. Act III of 1947), for restoration of water connection as an amenity of which the tenants stood deprived of. The petitioners filed an objection to the effect that they were not responsible for cutting off the water connection and no action of the petitioners resulted in the deprivation of tenants from getting water from the tap installed in the accommodation. This objection did not prevail.

The Rent Control and Eviction Officer directed the petitioners as landlords to restore the water connection within specified time or face penal action as enjoined by the provisions of law. The petitioners filed this petition under Art. 226 of the Constitution seeking the quashing of the order passed by the Rent Control and Eviction Officer and for other necessary directions. It is alleged by the petitioners that they were not at all responsible for the action taken by the Corporation authorities in cutting off the water connection for default of payment of excess

water charge, that when the water connection was cut off the petitioners were not the landlord of the accommodation and the excess water was consumed by the tenants themselves hence they were responsible to pay the price for it to the Corporation and the petitioners cannot be said to have cut off the water connection. According to the opposite parties the petitioners were responsible under the law to preserve the supply of water in the accommodation so that an essential amenity could be enjoyed by the tenants and if by any act of omission or commission, the Corporation authorities cut off the water connection in the eye of law it would be an act of the petitioners and they are bound to restore the water connection.

When the matter came up before the learned Single Judge, it appeared to him that the Supreme Court in *Kanaiyalal Chandulal Monim v. Indumati T. Potdar* (AIR 1958 SC 444) laid down a law which supported the contention that the provisions of the nature as are contained in Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act, being penal in nature, are to be strictly construed and their scope could not be extended by interpretation and the cutting off of water connection could not be said to be an act of the petitioner as he had on his own not cut off the connection but it was the result of the operation of law that the Municipal Corporation cut the water connection off. The attention of the learned Single Judge was, however, invited to a decision of a learned Single Judge of this Court in *Sheo Narain Lal v. The District Magistrate, Allahabad*, (1956 All LJ 23) in which it has been held that if the water connection was cut off by the Municipal Board on account of non-payment of excess water charge, even then the landlord would be bound to restore the water connection under Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act. The learned Single Judge, therefore, referred the matter to a Division Bench. This is how this writ petition has come before us.

2. It has not been disputed before us that water connection was cut off by the Corporation authorities long before the petitioners became its owners by purchasing the accommodation in question. It has further not been disputed that ever since the petitioners became the owners they and as also their predecessor had always been paying to the Corporation

authorities all the municipal dues including the water tax. It is well known that under the scheme of our Municipal Laws water tax is charged for normal water supplied through the pipes and taps installed in any house or building within the municipal or corporation area. Any excess water consumed over and above the existing normal limit is also to be paid for and it is called excess water charges. It is not a regular tax. Very often houses and buildings are metered. The reading of the meter at regular intervals furnishes the volume of water consumed and then calculations are made by the authorities as to how much water in excess was consumed as compared to the normal prescribed limit. It cannot be denied that water is consumed by the occupant of the house or building.

In the instant case it is not disputed that the petitioners as landlord were not residing in any part of the accommodation in question. The whole of the accommodation was occupied by the tenants. It is the tenants, therefore, who actually consumed the excess water for their own benefit and enjoyment. The petitioners were, in no way, benefited by the excess water consumed by the tenants of the accommodation in question. Viewed in this light, we do not think it is necessary for us to finally determine the question of law that arises from the argument of the learned counsel for the petitioner. His argument was that there is nothing in the scheme of Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act 1947 and the corresponding Sections 26 and 27 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972, which make a landlord responsible for cutting off any amenity or depriving the tenants of any amenity which is caused as a result of any act of another person though actually the landlord does not himself cut off the amenity or deprives a tenant of any amenity.

3. The learned counsel placed before us the relevant provision of Sec. 34 of the Bombay Rents Hotel and Lodging House Rates Control Act which was the subject-matter of consideration by the Supreme Court in *Kanaiyalal v. Indumati* (AIR 1958 SC 444) and drew our attention to the Explanation II to Section 24 of the said Act which is as follows:

"For the purposes of this section, withholding of essential supply or service shall include acts or omissions attributable to the landlord on account of which

the essential supply or service is cut off by the local authority or any other competent authority."

4. Learned counsel further drew our attention to the observation of the Supreme Court made in para. 6 of the report at page 447 wherein the learned Judges of the Supreme Court observed that had the Explanation not been enacted by the Legislature, it would have been difficult to compel a landlord by law to restore an essential supply or service the deprivation of which or cutting off of which was not directly done by the landlord himself. It is this observation, in paragraph 6 of the Supreme Court, which influenced the learned Single Judge in doubting the correctness of the decision in *S. N. Lal v. The District Magistrate, Allahabad* (1956 All LJ 23). As observed earlier, we do not think it is necessary to afford relief to the petitioners in the instant case to examine the question whether the provisions of Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act 1947, would be attracted to an act of omission of a landlord, the consequence of which is cutting off of water supply by the Corporation authorities. We assume for the purpose of this case that a landlord may come within the mischief of Section 7-D of the said Act, if as a result of omission to pay the dues of the local authorities, water connection is cut off from an accommodation.

5. It would be noticed that Section 7-D of the U. P. (Temporary) Control of Rent and Eviction Act 1947, opens in its first sub-section with the sentence—"No landlord shall without just or sufficient cause cut off or withhold any of the amenities enjoyed by the tenants (underlining ours)." In the instant case even if we hold a landlord responsible for cutting off of the water connection, he can yet escape the rigours of penal provisions of Section 7-D by showing that it was for just or sufficient cause that he did it. As we have noticed above, it is not the case that the water connection was cut off for want of payment of water tax. It was cut off for non-payment of excess water charges. It were the respondents who consumed the excess water. In equity, they were responsible to pay for it as they enjoyed, in excess, the water which normally could be available to them under the contract of tenancy. It is nobody's case that the contract of tenancy included, as one of its terms, that the landlord will pay

for the excess water consumed by the tenants for their own benefit.

The landlord would be perfectly justified in asking the tenants to pay the excess water charges, no matter under the law the responsibility of payment of all the municipal dues relating to house or building situate in the municipal area or corporation area, also lies on the landlord. But there is nothing in law to prevent the tenant himself depositing the dues to escape from the rigours of law, for his own advantage and benefit. We think that non-payment of water tax and non-payment of extra water charges stand on different footing. Water tax includes normal supply of water and a landlord cannot just sit quiet, not pay the tax and bring about a situation that water connection is cut off by the municipal authorities. But the same would not be the case if excess water charge is not paid by him as a tenant himself or themselves can prevent the mischief of non-supply of water to them by depositing the excess water charge which, seen from equitable point of view, he or they should pay for they are the direct beneficiary.

A landlord cannot be expected to regulate and control any water supply through taps fitted or installed in the accommodation leased out by him to a tenant or tenants. A tenant cannot be permitted to consume as much water as he liked even to the extent of wasting it thus increasing the burden of the landlord and then turning upon him to pay for all what they have enjoyed on the threat of taking recourse to the machinery of law regulating control and letting out of accommodation. We think that the learned Single Judge in the case of *S. N. Lal v. The District Magistrate, Allahabad* (1956 All LJ 23) (supra) was not right in laying down the law that even if water connection is cut off on account of non-payment of excess water charge, the case would be covered by Section 7-D of the Act. In fact, we do not find any discussion in the judgment of the learned Single Judge on the aspect that for just and sufficient cause an amenity can be cut off, such consideration was not at all in the mind of the learned Judge.

In the view, we have taken, we hold that even if we assume that the omission on the part of the petitioner to deposit the excess water charges was the direct cause of cutting off water connection, it would be deemed that there was sufficient and just cause for it. Therefore, the peti-

tioner cannot be ordered or directed under Section 7-D of the Act, to restore the water connection to the accommodation in question.

6. The other point raised by the learned counsel that supply of water by itself would not be an amenity within the meaning of Section 7-D need not be considered inasmuch as what we have held above is conclusive of the matter for affording necessary relief to the petitioners.

7. The result is that this petition is allowed, the impugned order of the Rent Control and Eviction Officer dated 22nd December 1970 and all other consequential directions in pursuance thereof, are quashed. The petitioners are entitled to costs.

Petition allowed.

AIR 1976 ALLAHABAD 441

M. P. SAXENA, J.

Hari Narain, Applicant v. Williams and others, Opposite Parties.

Civil Revn. No. 1305 of 1972, D/- 2-2-1976.*

(A) Civil P. C. (1908), S. 115 — Order relating to adequacy of court-fee — No revision lies at the instance of defendant unless it also involves question of jurisdiction.

The defendant has no right of revision against the decision on adequacy of court-fees by the trial court unless it affects jurisdiction of the Court. He can do so only against an order passed in appeal under Section 3-A or in revision under Section 6-B of the Court-fees Act. AIR 1957 Pat. 450 and AIR 1960 All 590, Rel. on. (Para 6)

Further even if there is an erroneous decision on the question of court-fees which does not affect jurisdiction of court to try the suit, no revision lies at the instance of the defendant. AIR 1962 Ker 84, Rel. on. (Para 7)

Cases Referred: Chronological Paras

AIR 1973 SC 2384 = (1973) 3 SCR 897	9
AIR 1962 Ker 84 = 1961 Ker LT 325	7
AIR 1961 SC 1299 = (1961) 3 SCR 1015	8
AIR 1960 All 590 = 1960 All LJ 514	5
AIR 1957 All 337 = 1957 All LJ 105	4
AIR 1957 Pat 450 = 1957 BLJR 173	5

K. C. Saxena, for Applicant; H. P. Gupta, for Opposite Parties.

*(Against order of K. C. Rastogi, 1st Addl. Civil J., Dehradun, D/- 8-7-1972.)

ET/FT/B551/76/RSK

ORDER:— This is a revision application under Section 115 of the Code of Civil Procedure against the finding dated 8-7-1972 given by the learned First Additional Civil Judge, Dehradun on issue No. 9 relating to payment of court-fee.

2. Briefly stated, the facts giving rise to this revision application are that the plaintiffs opposite parties Nos. 1 and 2 are the owners of property bearing municipal No. 194, Rajpur Road, Dehradun. The defendant No. 1 agreed to purchase this property for a sum of Rs. one lac. Out of the said amount, a sum of Rs. 41,000 remained unpaid. Therefore, the plaintiffs filed a suit for the recovery of Rs. 41,800 with interest pendente lite and future. The suit was valued at Rs. 41,800 and a sum of Rs. 3,557.50. was paid as court-fee thereon. Later on the plaintiffs got their plaint amended and in the alternative claimed possession over the property in suit. The defendant contested the suit inter alia on the ground that the court-fee paid was insufficient. Issues were framed on 24-3-1971 and issue No. 9 read as follows:—

"Whether court-fee paid is sufficient?"

The issue of court-fee was taken up first and for its disposal the learned lower court held on 12-7-1971 that the suit is to be valued according to the market value of the property and this will have to be determined in accordance with the provisions of Section 7 (v) 1 (c) and subsection II of Section 7 of the Court-fees Act. The plaintiffs moved an application 66-C/2 for issue of commission under Section 9 of the Court-fees Act for determining the value of the property. The application was allowed and a Commissioner was appointed for this purpose. The Commissioner valued the property at Rs. 14,608. The defendant filed objections. By means of his order dated 11-3-1972, the learned Civil Judge held the value of the property to be Rs. 14,608. The plaintiffs were directed to amend the plaint in the light of the said finding within the time allowed. Accordingly the plaintiffs got the plaint amended. The valuation of the suit still remained Rs. 41,800 but it included Rs. 14,608 the value of the property. Thereafter on 8-7-1972, issue No. 9 was disposed of with the following finding:—

"The valuation has been amended as directed. The Munsarim reports that no court-fee is payable. Issue No. 9 is, therefore, decided in the negative. Fix 28-8-72 for final hearing."

It is against this finding that the defendant No. 1 has come up in revision.

3. The learned counsel for the plaintiffs opposite parties has argued that the revision application is legally not maintainable because the question of payment of court-fees is a matter between the State and the plaintiffs and the defendant is not affected or prejudiced by any order that may be passed in that connection. The learned counsel for the revisionist has repelled this contention on the ground that the property in suit has to be valued according to the allegations made in the plaint. In the instant case, the allegations made in the plaint show that the property was worth Rs. one lac. Therefore, there was no question of appointing a Commissioner. This was done in contravention of Section 9 of the Suits Valuation Act and was illegal. There was also a material irregularity in inviting a report from the Commissioner about the value of the property.

4. I have examined the whole position and there can be no manner of doubt that the valuation is to be made on the basis of the allegations made in the plaint and not on the basis of assertions made in the written statement. The question however, for consideration is whether in a case of this nature, the defendant is entitled to file a revision, if so when? This question at first came up for consideration in the case of 'Abdul Ghani v. Vishunath', 1957 All LJ 105 = (AIR 1957 Pat 337) in which a Division Bench of this Court observed:—

"The question what was the valuation of the property in suit and what was the court-fee payable on the valuation was a question that arose in the suit itself and was not a separate case. Any decision given on the question could not be said to be deciding a case separately from the suit itself and, therefore, would not be liable to be revised under Section 115, C.P.C.

5. In 'Tewari Singh v. Gaya Prasad' (AIR 1957 Pat 450), it was held that if the question of valuation and court-fees is decided against the plaintiff, the plaintiff can come up in revision against that order but if the valuation and court-fees matter is decided in favour of the plaintiff, then the defendant cannot come up in revision and the High Court will not interfere with the order of the court below inasmuch as the matter of court-fees is not between the plaintiff and the defendant

but is a matter between the State and the plaintiff.

6. This question again cropped up for consideration in the case of 'C. L. Basra v. Pyarey Lal Basra' (AIR 1960 All 590). In this case, a Division Bench observed:—

"To sum up, after the question of court-fees has been decided by the trial court there is no case decided which can entitle the parties to make an application in revision under Section 115, C.P.C. But on feeling aggrieved, the person called upon to make good the deficiency and no other person can prefer an appeal under Section 6-A of the Court-fees Act and the Chief Inspector of Stamps can in certain circumstances detailed above move a revision under Section 6-B."

They further observed:—

"After the appeal or revision has been decided by the higher Court that decision shall amount to a case decided and all the parties to that proceeding, namely, an appeal under Section 6-A or revision under Section 6-B can move an application under Section 115, C.P.C. considering that none of these orders are appealable provided the court deciding the appeal or revision had exercised the jurisdiction not vested in law or had failed to exercise jurisdiction so vested or acted illegally or with material irregularity in the exercise of jurisdiction."

The aforesaid observations make it clear that the defendant has no right of revision against the decision on adequacy of court-fees by the trial court unless it affects jurisdiction of the Court. He can do so only against an order passed in appeal under Section 6-A or in revision under Section 6-B of the Court-fees Act.

7. The contention of the learned counsel for the revisionist that the defendant will be entitled to prefer a revision, if the order of the trial court on the question of court-fees is manifestly erroneous, is also not tenable. He will be entitled to do so only if the order affects jurisdiction. I respectfully agree with the view expressed in *Vasu v. Chakki Mani*, (AIR 1962 Ker 84) that even if there is an erroneous decision on the question of court-fees which does not affect jurisdiction of court to try the suit, no revision lies at the instance of the defendant. In the present case whether the valuation of the suit is Rs. 41,800 or rupees one lac it will be triable by the learned Civil Judge, in whose court it is already pending. Therefore, the finding on issue No. 9 cannot be said to affect jurisdiction.

8. In 'Rathnavarmaraja v. Smt. Vimla' (AIR 1961 SC 1299), this question was considered in some detail. It will be of advantage to refer to the relevant observations:—

"The Court-fees Act was enacted to collect revenue for the benefit of the State and not to arm a contesting party with a weapon of defence to obstruct the trial of an action..... We fail to appreciate what grievance the defendant can make by seeking to invoke the revisional jurisdiction of the High Court on the question whether the plaintiff has paid adequate court-fee on his plaint. Whether proper court-fee is paid on a plaint is primarily a question between the plaintiff and the State. How by an order relating to the adequacy of the court-fee paid by the plaintiff, the defendant may feel aggrieved, it is difficult to appreciate. Again the jurisdiction in revision exercised by the High Court under Section 115 of the Code of Civil Procedure is strictly conditioned by clauses (a) to (c) thereof and may be invoked on the ground of refusal to exercise jurisdiction vested in the Subordinate Court or assumption of jurisdiction which the court does not possess or on the ground that the Court has acted illegally or with material irregularity in the exercise of its jurisdiction. The defendant who may believe and even honestly that proper court-fee has not been paid by the plaintiff has still no right to move the superior courts by appeal or revision against the order adjudging payment of court-fee payable on the plaint." It was a case to which Madras Court-fees and Suits Valuation Act, 1955 was applicable and it was held that Section 12 (2) of the said Act only enables the defendant to raise a contention as to the proper court-fee payable on a plaint and to assist the court in arriving at a just decision on that question. There is no provision in the Madras Court-fees Act or any other statute which enables the defendant to move the High Court in revision against the decision of the court-fee payable in a plaint. The provisions do not arm the defendant with a weapon of technicality to obstruct the progress of the suit by approaching the High Court in revision against an order determining the court-fee payable. In the U. P. Court-Fees Act also there is no provision entitling a defendant to come up in revision against such an order.

9. In *Shamsher Singh v. Rajendra Prasad* (AIR 1973 SC 2384) the observa-

tions made in *Rathnavarmaraja's* case were considered and it was held that the ratio of that decision was that no revision on a question of court-fee lay where no question of jurisdiction was involved and that this case was correctly interpreted by the Kerala High Court in *Vasu v. Chakki Mani* (supra) when it pointed out that no revision will lie against the decision on the question of adequacy of court-fee at the instance of the defendant unless it involves also the question of jurisdiction of the Court.

10. The result of this discussion is that in the instant case the defendant, who, is not at all affected by the order of the learned Civil Judge on the question of court-fee has no right to come up in revision. The State can be the aggrieved party but the Inspector of Stamps has not chosen to file any revision under Sec. 6-B of the Court-fees Act.

11. The learned counsel for the revisionist has also argued that there is no proper finding on issue No. 9 inasmuch as the learned Civil Judge has given no reasons for holding that the court-fee paid is sufficient. There is no speaking order and the finding is based on the report of the Munsarim. This contention has no force because after the relief for possession over the suit property was added in the plaint the necessity arose for determining the valuation of the suit and court-fee payable thereon. For this purpose the learned Civil Judge issued commission and got the valuation done. It might have been a wrong step but the Stamp Inspector alone could challenge it. The valuation clause of the plaint was accordingly amended and the Munsarim, as usual, gave his report about court-fee. According to him the court-fee paid was sufficient. The learned Civil Judge agreed with this report and disposed of issue No. 9 in its light. If this finding is read with previous orders there will be no scope for argument that the court did not apply its mind to the controversy.

12. For the aforesaid reasons the revision application is legally not maintainable and is dismissed with costs to the opposite party. The stay order, if any, is vacated. The record may be sent back to the learned lower court without delay.

Revision dismissed.

AIR 1976 ALLAHABAD 444

(LUCKNOW BENCH)

T. S. MISRA, J.

Smt. Prempiari and others, Appellants v. Dukhi and another, Respondents.

Second Appeal No. 254 of 1958, D/-19-2-1976.*

(A) Civil P. C. (1908), S. 96 and O. 22 (General) — Appeal against dead person — Application for substituting legal heirs — Maintainability of — Delay in filing application — Condonation of — (Limitation Act (1963), S. 5).

When the appeal is filed against a dead person, it is a still-born appeal and the provisions of O. 22 would not apply and if an application is made for substituting the legal heirs of the deceased who died prior to the institution of appeal, the appeal would be taken to have been filed on the date of the application and if the appeal is by that time, barred by time, the appellant can invoke the aid of S. 5 of Limitation Act to get the delay condoned. AIR 1946 FC 13; AIR 1953 All 97 and AIR 1965 Cal 459, Rel. on. (Para 8)

In the instant case, the appeal was filed against the respondent who was dead by that time. Application under O. 22, C.P.C., though made was rejected on the ground that the provisions of O. 22, C.P.C. did not apply to appeals against dead persons. Then the appellant resorted to Section 5 of Limitation Act and sought condonation of delay which was allowed by the Court on being satisfied about the sufficiency of cause. The appeal was treated to have been filed on the date the order of condonation of delay was made.

Held, that there was no illegality.

(Para 8)

(B) Civil P. C. (1908), S. 100 — Second appeal — Findings of facts by the lower appellate Court arrived at on close scrutiny of entire evidence on record — No interference. (Para 9)

Cases Referred: Chronological Paras
AIR 1965 Cal 459 = 68 Cal WN 189 6, 7, 8

AIR 1953 All 97 = 1952 All LJ 580 6, 8

AIR 1946 FC 13 = 1946 FCR 32 7, 8

AIR 1933 Oudh 523 = 10 Oudh WN 1154 (FB) 7

Sri H. D. Srivastava, for Appellants;

*(Against judgment and decree passed by Prem Narayan, 2nd Temporary Civil and S. J., in Civil Appeal No. 45 of 1967.)

ET/FT/B399/76/PNK/LGC

JUDGMENT :— This appeal by the plaintiff arises out of a suit for possession over the property in dispute. The plaintiff alleged that he had a grove of 18 bighas and was Bhumidhar thereof. Trees were planted in that grove with the permission of the zamindar before 30-6-1962. The house in dispute is located inside that grove as shown in the site plan by letters ABCD Cha Chha Ja Jha. The plaintiff gave this house to the defendants about ten years before the institution of the present suit for looking after the afore-said grove. After some time the defendants left the service of the plaintiff whereupon they were asked to vacate the said house, but they failed to do so, hence the suit for their ejectment.

2. The suit was contested by defendant No. 1 on the grounds inter alia that the house in dispute was constructed by his grandfather and he was the owner thereof, and that it did not lie in the plaintiff's grove.

3. The trial court found that the house in dispute did not lie in the plaintiff's grove. It also held that the house had been constructed by the defendants' grandfather. The plaintiff having no right, title or interest in the house in suit was not entitled to seek possession thereof. On these findings the suit was dismissed. Against that decision the plaintiff preferred an appeal. The appellate court below allowed that appeal and remanded the suit for retrial. The trial court after retrial of the suit decreed it and granted a month's time to the defendants to vacate the said house. The trial court on rehearing in the suit had found that the house in question did lie in the plaintiff's grove and that the same was built by the plaintiff. It further found that the defendants' possession over that house was that of licensees which stood revoked; hence they were liable to be ejected. Against that decision the defendants preferred an appeal before the District Judge. The appeal was heard and decided by Civil & Sessions Judge, Faizabad.

4. On an appraisal of the evidence the appellate court below found that the plaintiff had not led satisfactory evidence to show that he had got the house constructed, rather it was established that the house in dispute was got constructed by the grandfather of Dukhi, defendant. It also found that it was not given to the defendant in the year 1952 as alleged; that the defendants would be the owners of the said house even under Section 9,

U. P. Zamindari Abolition & Land Reforms Act; that the plaintiff was not in possession over the house in dispute for a long time and if he had any right in the said house that right had extinguished by lapse of time. On these findings the appeal was allowed and the suit of the plaintiff was dismissed. The plaintiff having died his legal heirs have preferred this appeal.

5. For the appellant it was urged that Reg. Civil Appeal No. 45 of 1967 out of which second appeal has arisen was filed against Dr. Narsingh Dayal, the plaintiff who was dead on that date. Dr. Narsingh Dayal died on 29-1-67 whereas Reg. Civil Appeal No. 45 of 1967 was filed on 6-2-67. The submission, therefore, was that appeal No. 45 of 1967 having been filed against a dead person was a nullity and the appellate court below had no jurisdiction to entertain and decide it.

6. It appears that an application was moved before the court below for substituting the legal representatives of deceased Dr. Narsingh Dayal as respondents in the appeal. That application was allowed by an order dated 13-11-67. A perusal of that order discloses that the appellate court below gave benefit of Section 5 of the Limitation Act to the appellants and treated the appeal to have been filed on the date the order was passed i.e., 13-11-67. Learned counsel for the appellants before me has urged that it was not open to the appellate Court below to give benefit of Section 5 of the Limitation Act to the defendant-appellants in that appeal and to entertain an application for substitution of the legal heirs of the deceased plaintiff. If the defendants wanted to file an appeal and to take benefit of Section 5, Limitation Act they should have, according to the learned counsel, filed a fresh memo of appeal against the legal representatives of the deceased Dr. Narsingh Dayal as well as an application under Section 5 of the Act. In support of his contention learned counsel for the appellants has placed reliance on *Bankey Bihari v. Mahadeo Prasad* (AIR 1953 All 97) and *State of West Bengal v. Manisha Maity* (AIR 1965 Cal 459).

7. In the case of *Bankey Bihari* (supra) one Smt. Brij Rani had died on 24th September, 1946, prior to the filing of the appeal by the appellants in the Court of the District Judge. Her legal representative Mahadeo Prasad was sought to be substituted under Order 22 of the

Code of Civil Procedure. It was held that since Brij Rani had died prior to the filing of the appeal, there could be no substitution of the name of Mahadeo in her place under Order 22, Code of Civil Procedure. Further it was observed that what was required was that the appellant should have impleaded Mahadeo Prasad as the respondent straightway in the appeal. His name was brought on the record on 17th July, 1947, on the basis of the application of the appellants dated 2nd January, 1947. It was, therefore, assumed that the appellants impleaded Mahadeo Prasad as the respondent on 2nd January, 1947 but even by that date the period of limitation for filing the appeal against Mahadeo had already expired. Consequently, it became necessary for the appellants to invoke Section 5, Limitation Act, for condonation of the delay. It appears that sufficient ground was not found to exist for condoning the delay and the application under Section 5, Limitation Act, was dismissed. It was asserted that if an appeal is filed against the dead person his legal representatives cannot be substituted by taking resort to the provisions of Order 22 of the Code of Civil Procedure. The appeal could be filed straightway by impleading the legal representatives of the deceased party. However, if an application was moved for bringing on record the legal representatives of the deceased, the appeal would be deemed to have been presented on the date of the application and the period of limitation would be computed on the basis that the appeal was filed on such date. In the case of *State of West Bengal v. Manisha Maity* (AIR 1965 Cal 459) the same principle was reiterated observing that if an appeal is preferred against a dead respondent the appeal is still-born and is no appeal in the eye of the law and that nothing in Order 22 of the Code of Civil Procedure will revive the appeal when the death of the respondent comes to light. Pointing out the remedy to such an appellant it was observed that he should file an application for presentation of the appeal against the heirs of the dead person afresh. If the time for filing the appeal is over, he is to present an application under Section 5, Limitation Act, therein explaining the delay in presenting the appeal afresh against the heirs of the dead person. If he makes out sufficient cause for making the belated prayer, the Court may allow to amend the memo of appeal by incorporation of the names of the heirs and legal representatives of the

dead person and treat the appeal as freshly presented appeal against the heirs. Similar situation arose in the case of Bank of Commerce Ltd., Khulna v. Protab Chandra Ghose (AIR 1946 FC 13) before the Federal Court. In that case it was found that one of the respondents had died prior to the institution of the appeal before the Federal Court. The appellant had moved an application for bringing on record the legal representatives of that respondent. That application was rejected on the ground that the respondent had died before the appeal was filed in that Court and not after the appeal was filed. The appellant then moved another application for substitution of the legal representatives of that deceased respondent. The Federal Court dealt with that application on the footing that so far as the heir of the deceased respondent was concerned, an appeal was for the first time being preferred then and it is only on that basis that the question of application under Section 5 of the Limitation Act arose. The Federal Court held that as the application could not come under either of the two categories specified in Rule 6 of Order 15 of the Federal Court Rules, namely, substitution of the representative of one who was a party to an appeal and in addition of a party, the application was treated on the footing that an appeal was for the first time being preferred as against the legal representatives of the deceased. It was further held that ignorance of death of a party in the absence of negligence or other act or omission for which the applicant could be held responsible would be a sufficient cause within Section 5, Limitation Act. It was found that the appellant had made out sufficient cause for the delay in making the application and the benefit of Section 5 of the Limitation Act was accordingly given to him. Referring to a decision of the Chief Court of Oudh. AIR 1933 Oudh 523 (FB) it was observed by the Federal Court that even in that case the learned Judges declined to lay down any hard and fast rule and recognised that the question must be determined by reference to all the circumstances of each particular case, with a view to securing the furtherance of justice. The legal representative was, therefore, added as a party to the appeal and the cause title of the petition of appeal was amended.

8. Having thus examined the legal concept as expounded in the decisions referred to hereinabove I may now proceed

to consider the facts and circumstances of this case in the light of the principles enunciated therein. Admittedly, Dr. Narsingh Dayal Gaur had died on 29th January, 1967. The first appeal out of which this second appeal has arisen was filed on 6th February, 1967 against Dr. Narsingh Dayal Gaur. The appeal was thus filed against a dead person and was, therefore, still-born. The provisions of Order 22 of the Code of Civil Procedure would, therefore, not apply. An application was, however, moved by the appellant in that appeal on 16th May, 1967 stating that Dr. Narsingh Dayal Gaur had died on 20th February, 1967. His name was, therefore, sought to be deleted and his son Dr. Saheb Saran Gaur was sought to be substituted. This application was opposed by the respondent in that appeal who stated that Dr. Narsingh Dayal Gaur had died on 29th January, 1967 and not on 20th February, 1967 and that the appellant had full knowledge of the death of Dr. Narsingh Dayal Gaur. Thereafter, the appellant in that appeal filed another application on 16th September, 1967 explaining the circumstance in which he got the information that Dr. Narsingh Dayal Gaur had died on 20th February, 1967. He further stated that even if he had died on 29th January, 1967 his appeal may be treated within time and Saheb Saran Gaur be substituted in place of the deceased Dr. Narsingh Dayal Gaur. On 28th October, 1967 the learned counsel for the appellant in that appeal stated before the Court that the date of the death of Dr. Narsingh Dayal Gaur be accepted as 29th January, 1967. After hearing the parties the appellate Court below allowed the application of the appellant substituting Dr. Saheb Saran Gaur granted the benefit of Section 5 of the Limitation Act to the appellant, treated the appeal to have been filed on the date when the order was passed and condoned the delay in filing the appeal. These facts make it quite manifest that the appellate Court below was satisfied that sufficient ground had been made out by the appellant before it for seeking benefit of Section 5 of the Limitation Act. The delay in filing the appeal was condoned. The appeal was treated to have been filed on the date of the order and as the delay had been condoned, it was treated to be within time. This order of the appellate Court below was in my view in conformity with the principles laid down by the Federal Court in AIR 1946 FC 13 (supra). It seems that it is also not contrary to the law laid down

in AIR 1953 All 97 and AIR 1965 Cal 459. In both these cases as also in AIR 1946 FC 13 (supra) it was laid down that the provisions of Order 22 of the Code of Civil Procedure would not apply in a case where the appeal was filed against a person who had died prior to the filing of the appeal but in all the three cases referred to hereinabove it was also laid down that if an application is moved for substituting the legal heirs of the deceased who died prior to the institution of the appeal the appeal would be taken to have been filed on the date of the application and if the appeal had by that time become barred by time the appellant could seek condonation of delay under Section 5 of the Limitation Act. In the case on hand the appellate Court below has not passed the order under Order 22 of the Code of Civil Procedure. It had treated the appeal as having been filed on the date of the order and then granted the benefit of Section 5 of the Limitation Act to the appellant. The delay in filing the appeal was condoned and the appeal was then treated to be within limitation. I find no illegality in its order.

9. It was then contended that the appellate Court below had misread the evidence of Dr. Saheb Saran Gaur and had wrongly held that the house in dispute was not constructed by the plaintiff. I was taken through the statement of Dr. Saheb Saran Gaur. I have also perused the statement of Dr. Narsingh Dayal Gaur. The appellate Court below had found that the statements of these two persons were contradictory to each other. Dr. Saheb Saran Gaur stated that the house in question was given to Dukhi and other members of his family whereas Dr. Narsingh Dayal Gaur stated that Dukhi was permitted to live in that house. There may not be material contradictions between these two statements but at the same time the appellants had failed to prove that the house in question was constructed by the plaintiff. The finding of the appellate Court below was arrived at by a close scrutiny of the entire evidence on record. The appellate Court below had found that the house in dispute was not constructed by the plaintiff but was constructed by the grandfather of the defendant No. 1. It is a finding of fact and I find no reason to interfere with the same.

10. No other point was raised.

11. In the result, the appeal fails and is dismissed. Since none appeared on

behalf of the respondents, I make no order as to costs.

Appeal dismissed.

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(LUCKNOW BENCH)

T. S. MISRA AND PREM PRAKASH, JJ.

The Allahabad Bank Ltd., Appellant
v. Rana Sheo Ambar Singh and others,
Respondents.

F. A. F. O. No. 17 of 1964, D/- 11-3-1976.*

(A) Limitation Act (1963), Art. 137 — Applicability to an application under Section 4 (2) of U. P. Zamindars' Debt Reduction Act (15 of 1953) — 1971 All LJ 1126, Overruled.

The words of Article 137 do not indicate that it would apply as a residuary Article to applications made under all laws for which no period of limitation is specifically provided in the new Limitation Act. The corresponding words in Article 181 were "elsewhere in this schedule or by Section 48 of the Code of the Civil Procedure, 1908" and the expression 'elsewhere in this Division' cannot have a wider connotation, more so when the words 'or by any other law for the time being in force' are not found there. Hence an application under Section 4 of the U. P. Zamindars' Debt Reduction Act 1953, would not be governed by Article 137 of the Limitation Act. There is no period of limitation prescribed by the new limitation Act for an application to reduce the decretal debt under Section 4 of the U. P. Act. AIR 1969 SC 1335, Rel. on; 1971 All LJ 1126, Overruled. (Paras 17, 20)

(B) Limitation Act (1963), S. 30 (b) — Limitation Act of 1908 providing no period of limitation for an application but Act of 1963 providing such period—Effect.

Ex facie, Section 30 applies to a suit or an application for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Limitation Act, 1908. If the Limitation Act, 1908 did not prescribe any period of limitation for an application then it was an unlimited period and if the Act of 1963 prescribed any period of limitation for such application, then

*(Against judgment and order passed by J. P. Sinha, Civil J., Rae Bareilly, D/- 7-3-1964.)

GT/GT/C149/76/DHZ

it will be a case where the period of limitation is shorter than the period of limitation prescribed by the Limitation Act of 1908 and the application in that case would be required to be made within a period of ninety days next after the commencement of the Limitation Act, 1963. AIR 1967 SC 1318, Rel. on. (Para 12)

(C) U. P. Zamindars' Debt Reduction Act (15 of 1953), S. 4 (2) and (3) — Applicability — Mortgaged property consisting exclusively of estate and consisting partly of estate and partly of property other than estate — Reduction of debt — Considerations — (U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Sections 4, 6, 9).

An application under Section 4 of the Act to reduce debt after the passing of the decree can be made by the decree-holder or by the judgment-debtor, but different considerations will guide the court to which the application is made where the mortgaged property consists exclusively of the estate and such estate has been acquired and where the mortgaged property consists partly of an estate and partly of property other than an estate in reducing the decretal debt. Although all lands, whether cultivable or barren, or grove, vested in the State on the Notification under Section 4 of the U. P. Zamindari Abolition and Land Reforms Act, that Act has left from acquisition such rights of the intermediary as Sections 6 (a) (1) and 9 specify, and the mortgagee can put such interests to sale if they are covered by the mortgage. Consequently, if, despite the vesting under Section 4, there are rights and property which continue to belong to the intermediary and in which the interest of the intermediary has not ceased, and if they are held covered by the mortgagee, it would be a case falling under Section 4 (3) and not under Section 4 (2).

(Paras 11, 24, 25)

(D) Civil P. C. (1908), S. 11 — General principle of res judicata — Applicability — General rule of res judicata can be invoked in a proceeding under S. 4 of U. P. Zamindars' Debt Reduction Act (15 of 1953). AIR 1961 SC 1457, Rel. on.

(Para 32)

(E) Civil P. C. (1908), S. 11 — Court of competent jurisdiction — Court deciding application under S. 4 of U. P. Zamindars' Debt Reduction Act is not court exercising jurisdiction concurrent with court executing decree.

The amount due under a decree is, no doubt, a matter relating to its discharge or satisfaction and if the judgment-debtor omits at one stage of the execution proceeding to dispute it he cannot, on the principle of constructive res judicata, in generality of cases, re-agitate it at the subsequent stage of the same proceeding. But where the judgment-debtor claims relief under a remedial legislation, such claim can only be entertained and adjudged by a tribunal or a court of competent jurisdiction under the statute. Here the Act of 1953 sets out a complete procedure for the scaling down of the secured debts due against the zamindars whose estate had been vested in the State under Section 4 of the Act I of 1951. The decree passed against the judgment-debtors was required by law to be reopened and no provision of the Code of Civil Procedure or of equity could bar such a remedy. The order made under Section 4 of the Act of 1953 unlike an order made in the course of execution proceedings, is not subject to an appeal under the Code. Hence the court, while deciding an application under Section 4 of the Act of 1953 is not a court exercising jurisdiction concurrent with that of the court executing the decree. An application under Section 4 of the Act of 1953 is not in the nature of an execution proceeding nor it is a step-in-aid of execution. The executing court was not competent to entertain the application and grant relief to the judgment-debtors under the Act of 1953. (Para 36)

(F) Civil P. C. (1908), O. 34, R. 6 — Application against legal representatives of deceased mortgagor.

A personal decree under Order 34, Rule 6 can be granted only after the mortgagee has exhausted his remedies against the security; it can be granted only after the same had been carried out and the deficiency ascertained. Although Rule 6 does use the word 'defendant', that does not mean that the decree-holder cannot apply under the Rule against those who are the 'legal representatives' of the deceased. The decree-holder can make an application under Order 34, Rule 6 to enforce the personal liability of the deceased judgment-debtor qua his estate in the hands of the legal representatives. (Paras 39, 40, 43)

(G) Civil P. C. (1908), S. 52 — Rents and profits received from property of deceased whether can be dealt with under S. 52.

The heirs of the deceased judgment-debtor became entitled upon his death to the rents and profits which might accrue from the immovable property. Those rents and profits if received by them could not be treated in law as the assets of their deceased father. They were their assets and they were entitled to them not as representatives of their predecessor but in their own right. Moreover, a proceeding under Section 52 can be taken by the decree-holder in course of the execution.

(Para 44)

(H) Civil P. C. (1908), O. 38, R. 5 — Non-compliance with the provisions of R. 5 — Effect.

Rule 5, Order 38 clearly lays down that before an order of attachment can be made it is incumbent on the court to direct the defendant to furnish security or to show cause why he should not furnish security. An attachment which does not comply with the provisions of Rule 5 is illegal and ultra vires and, therefore, the decree-holder cannot claim any benefit under it. AIR 1967 All 136, Rel. on.

(Para 47)

(I) Civil P. C. (1908), Ss. 94, 151, O. 38, Rr. 5, 6, O. 39, R. 1 — Hypothecated property insufficient to discharge mortgage debt — Order under O. 38, R. 5 if can be passed.

Until the mortgaged properties are brought to sale no personal decree can be obtained against the defendants but if a decree-holder makes out a case under Order 38, Rule 5 or under Order 39 Rule 1 and if the court is satisfied amongst other things before making an order under that rule that the hypothecated property would be insufficient to discharge the mortgaged debt, the Court can proceed to attach or to restrain the alienation of the non-hypothecated property in a suit for sale under the mortgage. (1894) ILR 16 All 186; AIR 1919 Cal 258 (2), Rel. on.

(Para 50)

(J) Civil P. C. (1908), S. 151, O. 39, R. 1 — Issue of temporary injunction under inherent powers.

The courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39, C.P.C. if the Court is of opinion that the interests of justice require the issue of such interim injunction. The mere fact that there are certain provisions as regards the issue of injunction in Order 39, C.P.C. does not debar the court from passing orders of temporary injunction for doing justice in the ex-

ercise of its inherent power under S. 151 of the Code, though the discretion has to be exercised with the extreme caution and applied only in very clear cases.

Held that as the judgment-debtors had been avoiding the payment of the decretal money and preventing the decree-holder on one excuse or the other to reap the fruits of the decree, a case had been made out for the preservation of non-mortgaged assets of the deceased debtor in the meantime in status quo to protect the rights and interest of the decree-holder by an action in the nature of quia timet. AIR 1962 SC 527, Rel. on.

(Paras 51, 55, 57)

Cases Referred: Chronological Paras

1971 All LJ 1126 = 1971 All WR (HC)	20
560	20
AIR 1970 SC 209 = 1970 Lab IC 269	19
AIR 1969 SC 474 = (1969) 2 SCR 232	16
AIR 1969 SC 1335 = 1969 Lab IC 1538	18, 19, 20
AIR 1968 All 322 = 1967 All LJ 749 (FB)	11
AIR 1967 SC 1318 = (1967) 2 SCR 318	12
AIR 1967 All 136 = 1966 All LJ 990	47
AIR 1962 SC 214 = (1962) 3 SCR 483	33
AIR 1962 SC 527 = 1962 Supp (1) SCR	5, 51
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AIR 1961 SC 1457 = (1962) 1 SCR 574	31
AIR 1958 SC 398 = 1958 SCR 1240	41
AIR 1953 SC 98 = 1953 SCR 351	15
AIR 1951 SC 155 = 1951 SCR 138	35
AIR 1949 Mad 1 = 1948-2 Mad LJ 283 (FB)	42
AIR 1940 FC 1 = 1940 FCR 1	35
AIR 1940 All 185 = 1940 All LJ 81	51
AIR 1935 Lah 940 = 37 Pun LR 214	42
AIR 1927 All 691 = 103 Ind Cas 264	42
(1924) 1 KB 655 = 93 LKJB 237	3
AIR 1919 Cal 258 (2) = ILR 46 Cal 245	50
(1911) 1 KB 455 = 80 LKJB 155	3
(1902) 29 Ind App 196 = ILR 29 Cal 707 (PC)	34
(1894) ILR 16 All 186 = 1894 All WN 20	50
(1885) 28 Ch D 688 = 54 LJ Ch 424	54
(1884) 27 Ch D 497 = 33 WR 317	3

Sheo Gopal, for Appellant; S. C. Mathur, for Respondents.

T. S. MISRA, J.:— I have had the advantage of reading the judgment prepared by my learned brother Prem Prakash, I agree with the conclusions reached by him but I would like to add something on the question of interlocutory injunction.

2. The grant of an interlocutory injunction is a remedy which is both tem-

porary and discretionary. When an application for interlocutory injunction is made upon contested facts the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it or both is uncertain and will remain uncertain until final judgment is given in the action. It is with a view to mitigate the risk of injunction to the plaintiff during the period before that uncertainty could be resolved that a practice has arisen to grant him relief by way of temporary injunction. The object seems to be to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal right for which he could not be adequately compensated. The Court must weigh one need against another and determine where the 'balance of convenience lies'.

3. It is however to be remembered that the purpose sought to be achieved by giving to the court discretion to grant interlocutory injunction would be frustrated if the discretion were clogged by a technical rule forbidding its exercise if the Court evaluated the chances of the plaintiff's ultimate success at the trial at 50 per cent or less but permitting its exercise if his chances were of more than 50%. No such mathematical formula can be evolved for this purpose. The discretion has to be exercised not arbitrarily and capriciously but judiciously and fairly on reasonable grounds depending upon the facts and circumstances of the case and the evidence available to the Court at the hearing of the application. The plaintiff should show 'a probability that he is entitled to relief' (*Preston v. Luck*, (1884) 27 Ch D 497) or, to put it differently 'strong *prima facie* case that the right which he seeks to protect in fact exists' (*Smith v. Grigg Ltd.*, (1924) 1 KB 655). A less onerous criterion was indicated in *Junes v. Pacaya Rubber and Produce Co. Ltd.*, (1911) 1 KB 455 requiring the plaintiff to show that there is 'certainly a case to be tried'. In my view, the court must be satisfied before granting interlocutory injunction that the claim is not frivolous or vexatious but is well founded. The applicant must show that there is a serious question to be tried and there are fair chances of its being decided in his favour.

Of course, at this stage of the litigation the court need not adjudicate upon the facts on which the claims of either party may ultimately depend nor decide difficult questions of law which need detailed arguments and mature consideration because they are matters to be dealt with at the trial. The court has to abstain at this stage of the case from expressing any opinion upon the merits of the case because that can be done only after the final hearing.

4. If in a suit for permanent injunction the court finds that the material available at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding at the final trial, it should proceed to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

5. In this connection the court should consider whether, if the plaintiff were to succeed at the trial in establishing his right to permanent injunction, he would be adequately compensated by an award of damages. If the damages would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, interlocutory injunction may be granted. The question of balance of convenience would arise where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both. If the factors are evenly balanced the rule of prudence would demand preservation of the status quo. The Court would, however, not embark upon anything resembling a trial of action upon conflicting affidavit in order to evaluate the strength of either party's case. It would be unwise to attempt here

to list all the various matters which may need to be taken into consideration in deciding the application for interlocutory injunction. These would vary from case to case. In addition to these criteria there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. As laid down by the Supreme Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* (AIR 1962 SC 527) the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by Order 39 of the Code of Civil Procedure if the Court is of opinion that the interests of justice require the issue of such interim injunction. However, by an interlocutory order the court will not stay the operation of an impugned order which had already been given effect to and had exhausted itself.

6. Judged in the light of these principles, I am of the view that interlocutory injunction should be issued in the instant case. The facts and circumstances warranting such an injunction have been set forth in detail by brother Prem Prakash J., in the judgment and it is not necessary to repeat the same.

PREM PRAKASH, J.:— 7. The Rule in revision to assail an order of the Civil Judge, Rae Bareilly, made under Section 4 (2) of the U. P. Zamindars' Debt Reduction Act, 1952 (to be hereinafter referred to as the Act) and the First Appeals from the First Orders rejecting various applications made by the Allahabad Bank under Order 38, Rule 5 read with Sec. 151 of the Code of Civil Procedure have arisen in the course of the execution of the decree under Order 34, Rule 5 of the Code of Civil Procedure, obtained by the Bank against Raja Uma Nath Bux Singh, the predecessor-in-interest of the judgment-debtors, on 16th July, 1926, in the result of a preliminary decree under Order 34, Rule 4 of the Code passed on 31st January, 1925, for a sum of Rs. 4,80,000 on the basis of a simple mortgage executed by Uma Nath Bux Singh on 13th July, 1914 in favour of the Bank hypothecating proprietary interest in the 67 villages comprising the erstwhile Taluqa of Khajoor-gaon.

8. The first application for execution was filed by the Bank on 23rd September, 1926; the parties entered into a compromise on 15th March, 1928 whereby the decree was made payable in certain instalments and the rate of future interest was enhanced. The instalments

were not paid and on 20th April, 1931, the decree-holder Bank filed a second application for execution. On 4th February, 1932 execution proceedings were transferred to the revenue court and on 19th April, 1932, a second compromise was arrived at between the parties. Fresh instalments were allowed to the judgment-debtors, but since they were again not paid, the third application for execution was made on 14th September, 1933. The execution proceedings were again transferred to the Collector on 8th January, 1934.

The U. P. Agriculturists Relief Act, 1934, came into force soon after and the judgment-debtor applied for amendment of the decree under that Act. On 19th October, 1936, an order was passed under the said Act permitting payment of the decretal amount in six monthly instalments of Rs. 20,000 each and the rate of interest was also reduced. Information of the amendment of the decree was sent to the revenue court and the revenue court returned the papers to the civil court on 12th January, 1937. On 16th January, 1937, the civil court consigned the papers to the record room and upon an application filed by the judgment-debtor an order was passed on 29th April, 1938, granting three years' time to the judgment-debtor for the payment of the decretal amount. The amount, as usual, was not paid and the fourth application for execution was filed on 25th May, 1940. The judgment-debtor filed objections to the execution and one of the objections was that the last application for execution was made more than twelve years after the date of the decree and was, therefore, barred by time. The executing court dismissed the objection and in appeal the Chief Court of Oudh held that the execution application was within limitation as the limitation would commence to run from the date of the amendment of the decree. The decision of the Oudh Chief Court that the application for execution filed on 25th May, 1940, was within limitation thus became final between the parties.

Proceedings continued for a number of years till 1st July, 1952, when the U. P. Zamindari Abolition and Land Reforms Act came into force. As a consequence of this enactment the zamindari rights of the judgment-debtor were abolished and it was no longer possible to sell the zamindari rights in the 67 villages which had been ordered to be sold. It may be stated here that Rana Uma Nath Bux Singh had

executed a registered will on 3rd February, 1946; he died on 27th July, 1946. After his death differences arose between his heirs. Under the will Rana Sheo Ambar Singh, his eldest son, got the Taluqa by a destbardari he gave 21 villages to Rai Bahadur Sheo Pratap Singh and also the kothi in Rae Bareilly. In view of the altered situation by the U. P. Zamindari Abolition and Land Reforms Act, an application was made by the Bank for the amendment of the execution application (Execution Case No. 18 of 1940) together with an application under Section 70 of the said Act. Rana Sheo Ambar Singh filed objections to the application for amendment. The execution court heard the objections and dismissed them by the order dated 15th April, 1953. It held that the houses, trees and wells situate in the abadi could be sold in execution of the decree and the decree-holder was further entitled to compensation bonds granted by the Government to the appellant in view of his zamindari rights as substituted security. It also held that the bhumidhari rights acquired by the judgment-debtors under Section 18 of the U. P. Zamindari Abolition and Land Reforms Act could be sold in execution of the decree. In appeal preferred by Rana Sheo Ambar Singh the High Court took a similar view, but the Supreme Court by their judgment dated 27th April, 1961, declared that bhumidhari land was not saleable in execution of the mortgage decree.

9. While the appeal was pending in the Supreme Court, the Bank made application under Order 38, Rule 5 of the Code of Civil Procedure for attachment of 1/4th compensation of 90 villages (not mortgaged with the Bank) under attachment in execution of the decree of Babu Vaidya Nath Singh against the judgment-debtors; another application for attachment of full compensation of 33 villages not mortgaged with the Bank was made on 17th December, 1955. Rai Bahadur Sheo Pratap Singh died on 22nd January, 1956 and his heirs were substituted in Misc. Case No. 31 of 1956. The Bank applied on 2nd April, 1957 for attachment of the Kothi of Rai Bahadur Sheo Pratap Singh as also for attachment of the kothi belonging to Rana Sheo Ambar Singh in the occupation of the District Judge, Rae Bareilly. In the alternative invoking the aid of Section 151 C. P. C., interim injunction was also sought to restrain the judgment-debtors from disposing of or withdrawing the same. Ex parte ad interim injunction was issued with respect to the compensation

payable to the judgment-debtors ex parte orders making attachment of the property were also issued. Likewise, the Bank applied for attachment of Rs. 25,000 payable to the Rana by way of refund of security deposit in the Supreme Court appeal and the court issued an interim order.

10. After the decision of the Supreme Court the Bank filed an application for attachment of trees standing upon intermediary's groves. The Rana filed objections, but they were dismissed on 12th May, 1962. The Rana went in appeal to the High Court which was dismissed on 2nd February, 1966. Thereafter, he filed an appeal to the Supreme Court which is pending there for decision. On 16th March, 1963, the Bank filed another application for attachment of compensation payable to the judgment-debtors for the surplus area which may be determined under the U. P. Imposition of Ceiling on Land Holdings Act. This application and other applications made under Order 38, Rule 5 were dismissed by the Civil Judge, Rae Bareilly by his order dated 6th March, 1964 giving rise to the First Appeals.

11. On 3rd June, 1965, Rana Sheo Ambar Singh claiming sole ownership of 67 villages filed an application for reduction of the decretal amount under Section 4 of the Act stating therein that the cause of action for making the application arose on 2nd June, 1965 when the Allahabad High Court in *Smt. Brij Rajkumari v. Raja Mohammad Mustafa Ali Khan* (AIR 1968 All 322) (FB) declared sub-clause (vi) of Clause (f) of Section 2 of the Act as invalid being in conflict with Article 14 of the Constitution. The Bank contested the application upon a variety of grounds, but the Civil Judge reduced the decretal debt under Section 4 (2) of the Act specifying the reduced amount due from Rana Sheo Ambar Singh and the heirs of Sheo Pratap Singh. Against that order the Bank has come in revision to this Court, reiterating the grounds to which we shall turn at the appropriate stage. At the outset, and before we advert to the arguments canvassed by the counsel in that behalf, it would be useful to have a look at the Act which was enacted as a consequence of the U. P. Zamindari Abolition and Land Reforms Act. The object of the Act, as its preamble indicates, is "to provide for scaling down debts of zamindars whose estates have been acquired under the provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1950."

The Act consists of eleven sections. Section 3 of the Act invests the court with the power to reduce the debts at the time of passing the decree. Section 4 empowers the court to reduce the debts after passing the decree. Sub-section (2) provides that where the mortgaged property consists exclusively of an 'estate' and such 'estate' has been acquired under the provisions of the U. P. Zamindari Abolition and Land Reforms Act, the court shall, if there is only one judgment-debtor entitled as owner to the estate, calculate the amount due on the first day of July, 1952, and then reduce it in accordance with the formula given in the Schedule B. If there are two or more judgment-debtors and all or more than one out of them were on the thirtieth day of June, 1952, entitled as owners to the mortgaged estate (i) calculate the amount due on the first day of July, 1952, and after apportioning the amount between the judgment-debtors reduce the amount in case of each of the judgment-debtors in accordance with the formula given in Schedule 1. Sub-section (3) makes a provision where the mortgaged property consists partly of estate and partly of property other than estate, and prescribes the manner in which the amount has to be determined as on 1st July, 1952 and distributed on the two properties separately in accordance with the principles in Section 82 of the Transfer of Property Act; it also lays down the manner in which the liability between the various judgment-debtors has to be apportioned and the amount reduced in accordance with the formula given in Schedule 1.

It would thus appear that an application under Section 4 of the Act to reduce debt after the passing of the decree can be made by the decree-holder or by the judgment-debtor, but different considerations will guide the court to which the application is made where the mortgaged property consists exclusively of the estate and such estate has been acquired and where the mortgaged property consists partly of an estate and partly of property other than an estate in reducing the decretal debt. Section 7 provides that after the amount due has been reduced the decree shall to the extent of the reduction so effected be deemed for all purposes and on all occasions to have been duly satisfied. Section 8 provides that notwithstanding anything contained in any agreement, document or law for the time being in force, a decree relating to

a secured debt shall, in so far as the compensation for the mortgaged estate is concerned, be executed to the extent of 3/4th amount only against the compensation and rehabilitation grant payable to such mortgagor in respect of his estate. Section 11 confers powers upon the State Government to make rules for the purpose of carrying into effect the provisions of the Act. We may note that the Act does not prescribe any period of limitation for making an application under Section 4 and this has enabled the Bank to contend on the basis of the provision contained in Clause (b) of Section 30 of the Limitation Act, 1963, which came into force on 1st January, 1964, that since the application under Section 4 was not made within a period of ninety days after the commencement of the Limitation Act, the application was barred by time.

12. Section 30, in so far as it is relevant for our purposes, is in these terms :

"30. Provision for suits, etc. for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908. Notwithstanding anything contained in this Act,—

(a)

(b) any appeal or application for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908 (9 of 1908), may be preferred or made within a period of ninety days next after the commencement of this Act or within the period prescribed for such appeal or application by the Indian Limitation Act, 1908, whichever period expires earlier."

Section 2 (of the Limitation Act 1963) defines for the first time an 'application' as including 'a petition'. The expression 'period of limitation' is defined by Section 2 (J) as meaning the period of limitation prescribed for any suit, appeal or application by the Schedule 'and' prescribed period 'means' the period of limitation computed in accordance with the provisions of this Act. Ex facie, Sec. 30 applies to a suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908. Now, if the Limitation Act, 1908 did not prescribe any period of limitation for an application under Section 4 of the Act, then it was an unlimited period and if the present Act prescribed any period of limitation for such application, then it will be a case where the period of limita-

tion is shorter than the period of limitation prescribed by the Indian Limitation Act and the application under Section 4 in that case would then be required to be made within a period of ninety days next after the commencement of the Limitation Act, 1963. We may derive support for this view from the observations, though made in a different context, by the Supreme Court in *Syed Yousuf v. Syed Mohammed* (AIR 1967 SC 1318 at p. 1320).

13. Counsel for the Bank has strenuously urged that the Limitation Act, 1963 is applicable to an application made under Section 4 of the Act and therefore, the application made by the judgment-

(Contd. on Col. 2)

- | Description of Application | Period of Limitation | Time from which period begins to run |
|---|----------------------|--------------------------------------|
| 181. Application for which no period of limitation is provided elsewhere in the Schedule or by section 48 of the Code of Civil Procedure, 1908. | Three years | When the right to apply accrues. |
| 137. Any other application for which no period of limitation is provided elsewhere in this Division. | Three years | When the right to apply accrues. |

15. In *Sha Mulchand and Co. Ltd. v. Jawahar Mills Ltd., Salem* (AIR 1953 SC 98) the Supreme Court while determining the scope of Article 181 of the Limitation Act of 1908, observed:

"The Article has in a long series of decisions of most, if not all, of the High Courts been held to govern only application under the Code of Civil Procedure. It may be that there may be divergence of opinion even within the same High Court, but the preponderating view undoubtedly is that that Article applies only to applications under the Code."

16. The same rule was reiterated by the Supreme Court in a later decision in *Mohammad Usman v. Union of India* (AIR 1969 SC 474) and the Supreme Court gave the following reasons for adhering to the earlier view:

"In amending Articles 158 and 178 the Legislature acted upon the view that the references to the Code of Civil Procedure, 1908 in the second schedule to the Limitation Act could not in the absence of the amendment be construed as references to the Arbitration Act, 1940. At the same time the Legislature refrained from amending Article 181 and to providing that the Articles will apply to other applications under the Arbitration Act, 1940. It is manifest that the Legislature intended that save as provided in Articles 158 and 178 there would not be any limitation for other applications under the Act."

debtors in the instant case on 3rd June, 1965 was barred under Article 137 of the Limitation Act, conceding, however, that no period of limitation was provided for such applications by the Limitation Act, 1908 and that Article 181 of the said Limitation Act was not applicable to all such applications and petitions. Sri S. C. Mathur has, on the contrary, urged on behalf of the judgment-debtors that the application mentioned in Article 137 can only refer to an application filed under the Code of Civil Procedure.

14. It may be relevant to read Article 181 of the old Limitation Act of 1908 and Article 137 of the new Act (36 of 1963)

- | Period of Limitation | Time from which period begins to run |
|----------------------|--------------------------------------|
| Three years | When the right to apply accrues. |
| Three years | When the right to apply accrues. |

17. All the above decisions were under the Limitation Act, 1908. The Limitation Act, 1963 has repealed that Act and Article 137 has taken the place of the old Article 181. Substantially the language of Article 181 of the old Limitation Act is in pari materia with the language of Article 137 of the new Limitation Act. It may be that Article 137 alone appears under Part II in the Third Division of the Schedule to the Limitation Act and that has led the learned counsel to urge that Article 137 is intended to be applicable not only to applications under the Code of Civil Procedure which have not been otherwise provided for in the Third Division but also to applications under the special Acts. But the words of Article 137 do not indicate that it would apply as a residuary Article to applications made under all laws for which no period of limitation is specifically provided in the new Limitation Act. The corresponding words in Article 181 were 'elsewhere in this schedule or by Section 48 of the Code of Civil Procedure, 1908' and it is difficult to conclude that the expression 'elsewhere in this Division' can have a wider connotation, more so when the words 'or by any other law for the time being in force' are not found there.

18. In *Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli* (AIR 1969 SC 1335), which was a case under the Limitation Act, 1963, the

Supreme Court again examined the scope of Article 137 in relation to Article 181 of the old Limitation Act. After reference to the cases under Article 181 of the old Limitation Act, the Supreme Court held that the scope of Article 137 of the new Limitation Act was not materially different from that of Article 181 of the old Limitation Act. At page 1342 the following observations occur:—

"In fact, the addition of the word 'other' between the words 'any' and 'application' would indicate that the Legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of *eiusdem generis* should be applied when interpreting the new Article 137. This word 'other' implies a reference to earlier articles, and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other Articles in the third division to the schedule refer to application under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases application under the Code of Criminal Procedure... ..It is not possible to hold that the intention of the Legislature was to drastically alter the scope of this Article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure."

19. The correctness of the decision appears to have been doubted by the Supreme Court in their later decision in *Nityanand M. Joshi v. Life Insurance Corporation of India* (AIR 1970 SC 209) where Sikri, J., as he then was, observed:

"It is not necessary to express our view on the first ground given by this Court in Civil Appeals Nos. 170 to 173 of 1968 D/- 20-3-1969=(AIR 1969 SC 1335). It seems to us that it may require serious consideration whether applications to courts under other provisions, apart from Civil Procedure Code, are included within Article 137 of the Limitation Act, 1963, or not."

20. The rule laid down by the Supreme Court in *Athani Municipality's case* (AIR 1969 SC 1335) (*supra*) having not been modified or reconsidered so far, it will be binding on this Court and accordingly we hold that an application under Section 4 of the Zamindars' Debt Reduction Act, 1953, would not be governed by Article 137 of the Limitation Act. The result is that there is no period

of limitation prescribed by the new Limitation Act for an application to reduce the decretal debt under Section 4 of the Act, and, that being so, the application made by the judgment-debtors cannot be said to be barred by time. In these premises I respectfully dissent from the view taken by a learned Single Judge of this Court in *U. P. Sunni Central Board of Waqf v. Khurshed Haider* (1971 All LJ 1126).

21. Now, the next point that falls for determination is whether, on the facts of the present case and as held by the court below, Section 4 (2) of the Act is attracted or, as contended by the counsel for the Bank, sub-section (3) would apply. In disposing of this vexed question I have to consider in what the interests of the judgment-debtors ceased and became vested in the State by virtue of the Notification made under Section 4 of the U. P. Zamindari Abolition and Land Reforms Act (to be hereinafter referred as Act 1 of 1951).

22. It is not in dispute that the Taluqa of Khajoorgaon was an estate within the meaning of the Act. Section 4 of the said Act provides for vesting of an estate in the State on the making of a Notification thereunder and the Taluqa of Khajoorgaon was vested in the State by virtue of the Notification under Section 4. Section 4 declares that

"all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances".

Section 6 prescribes the consequences ensuing in the area to which the Notification relates from the beginning of the date of vesting, and we may refer to Section 6 (a) (1) as that will show what came to be acquired by the State in the estate as defined by Section 3 (8) of the said Act.

"(a) all rights, title and interest of all the intermediaries—

(1) in every estate in such area including land (cultivable or barren), grove-land, forests whether within or outside village boundaries, trees (other than trees in village abadi, holding or grove), fisheries tanks ponds water channels, ferries, pathways, abadi sites, hats, bazars and melas (other than hats, bazars and melas held upon land to which clauses (a) to (c) of sub-section (1) of Section 18 apply).....

shall cease and be vested in the State of

Uttar Pradesh free from all encumbrances."

23. Section 9 is another provision and it provides as follows:

"All wells, trees in abadi, and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

24. It would thus appear that although all lands, whether cultivable or barren, or grove, vested in the State on the Notification under Section 4, but the Act has left from acquisition such rights of the intermediary as Sections 6 (a) (1) and 9 specify, and the mortgagee can put such interests to sale if they are covered by the mortgage. Consequently, if, despite the vesting under Section 4, there are rights and property which continue to belong to the intermediary and in which the interest of the intermediary has not ceased, and if they are held covered by the mortgage, it would be a case falling under Section 4 (3) and not under Section 4 (2) of the Act.

25. Counsel for the judgment-debtors has in his endeavour to take the case out of the ambit of sub-section (3) of Section 4 contended that the estate, which came to be vested in the State, was only an area of land not comprising the rights or interests of the intermediary therein. The term 'estate', as urged by him, as defined in Sec. 3 (b) of Act 1 of 1951, refers to the area and not to different items of properties belonging to the erstwhile intermediary. We are unable to accept the submission. The word 'estate' has been defined for the purpose of identification of the specific area of territory; some demarcation was necessary for the purposes of vesting in the State under Section 4. But in such area the intermediary had certain rights, title and interest and all such rights, title and interest, except those provided otherwise in Sections 6 and 9 ceased in the consequence of vesting. The scheme underlying the Act fortifies our opinion.

26. The object of the Legislature, as set out in the Preamble of the Act, was to abolish the zamindari system and

to acquire the rights of the intermediaries and to pay compensation for acquisition of those rights. The land of the mahals recorded in any of the registers described in Clauses (a), (b), (c) or (d) of Section 32 of the U. P. Land Revenue Act, 1901, was 'state' within the meaning of Section 3 (8) and by Section 4 the right of the intermediary in that estate vested in and stood transferred to the State. The rights, title and interest of the intermediary in such estate were not outside it. They were appurtenant to his ownership of the land. A right without an object, in respect of which it exists, is as impossible as a right without a subject to whom it belongs. Clauses (a), (c) to (f) and (h) of Section 6 expressly deal with the rights and obligations of intermediaries and the inter-action thereon of the notification of vesting. The key words of Clause (a) are 'all rights, title and interest of all the intermediaries and they indicate a nexus between a right and the land in the 'estate'. Sub-clauses (i) and (ii) of Clause (a) and Clause (b) enumerate what in the consequence of vesting was acquired by the State and what remained intact with the intermediary. Even proprietary rights of the intermediary in sir, khudkasht and grove-land vested in the State and what was conferred on the intermediary by Section 18 was the right of a bhumidhar, a new right altogether. The right of the proprietor of an estate to hold mela on his own land was a right in the estate being appurtenant to his ownership of the land and the Legislature recognising such a right did not acquire the right to hold the melas or bazars over the land to which clauses (a) to (c) of sub-section (1) of Section 18 apply. Analysed in that manner, although the rights and interests of the intermediary cannot be called 'an area included under one entry in any of the registers', but there are rights and interests of the recorded proprietors in the land comprising the mehal and the Legislature in Section 6 expressly gave recognition to such rights.

27. The mortgaged security, as it would appear from the recitals of the deed of mortgage, consisted of the Taluqa comprising 67 entire villages together with all the existing and future rights and interests appurtenant thereto. The words 'mai tamami huquq wa marafiq mutalliq haqieyat mazkur maaujuda hal wa ayenda' are wide enough to take in the rights appurtenant to the Taluqdari without any reservation or exception.

The point should not detain us long because in the First Execution Decree Appeal No. 8 of 1953 (filed before the High Court, Lucknow Bench) the judgment-debtor had not challenged the correctness of the decision of the executing court that the houses, trees and the wells could be sold in execution of the decree.

28. For the considerations in the foregoing, the present is a case where the mortgaged property consists partly of 'estate' and partly of property other than 'estate' bringing it within the purview of sub-section (3) of Section 4 of the Act.

29. The decision on the question of res judicata lies within a short ambit. The relevant facts necessary to decide that point are not in dispute. The Bank put the decree into execution in the year 1940 (it being Execution Case No. 80 of 1940). An application was made by the decree-holder on 16th April, 1958 that the compensation bonds of judgment-debtors in respect of the mortgaged property be sold and transferred to the decree-holder and the proceeds received therefor be ordered to be paid to the decree-holder. Rana Sheo Ambar Singh filed an objection that the bonds should be transferred to the decree-holder on their face value; the heirs of Sheo Pratap Singh took, amongst others, the plea that Section 2 (f) (iii) of the Act was unconstitutional, but the contention was repelled for want of any precedent to substantiate it. Counsel for the Bank has on these facts contended that the judgment-debtors having raised the plea available to them under the Act and it was rejected by the court, the claim for a similar relief by a subsequent application under Section 4 of the Act was barred upon the general doctrine of res judicata.

30. Counsel for the judgment-debtors has met the contention in two ways: First, placing reliance upon the non obstante provision in sub-section (1) of Section 4, he has urged that Section 11 of the Act is not applicable to a proceeding under Section 4 of the Act; secondly, the executing court was not competent to reduce the decretal debt in the manner provided by the Act which could alone be done by means of an application under Section 4.

31. The answer to the first contention is furnished by the decision of the Supreme Court in *Daryao v. State of U. P.* (AIR 1961 SC 1457) where the

Supreme Court extended the rule of res judicata to petitions under Articles 32 and 226 of the Constitution. Gajendragadkar, J. speaking for the court and following with approval a passage in Halsbury's Laws of England, 3rd Edition, Volume 22, p. 780, that

"subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies, and is conclusive evidence against all the world of its existence, date and legal consequences."

observed at page 1462:

"..... but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata, they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

32. In view of the above, the plea that the general rule of res judicata should not be allowed to be invoked in a proceeding under Section 4 of the Act cannot be sustained.

33. The rule, however, is subject to various limitations, namely, that the judgment in the former action must have been rendered by a court or a tribunal of competent jurisdiction and secondly there should have been a judicial determination of rights in controversy with a final decision thereon. The earlier question at issue must be relevant in determining the question of res judicata in the subsequent proceeding. The core of the matter will always be: What was the substantial question that came up for decision in the earlier proceedings? And as ruled by the Supreme Court (at page 218) in *Gulab Bai v. Manphool Bai* (AIR 1962 SC 214),

"it is the whole of the suit which should be within the competence of the Court at the earlier time and not a part of it..... the word 'suit' in the context must be construed literally and it denotes the whole of the suit and not a part of it or a material issue arising in it."

34. The Supreme Court cited with approval the decision of the Privy Council in *Gokul Mandar v. Pudmanund Singh*

((1902) 29 Ind App 196) (PC) the ratio of which may be relevant here. There the respondent brought a suit for possession against the appellants alleging that they were the tenure-holders under their lease and that they were precluded from assessing any ryot right in the said land, because they had failed to get their lease right recorded in the settlement proceedings under the Bengal Tenancy Act. In the course of those proceedings a question arose about the status of the appellants and the Assistant Settlement Officer directed the appellants to be entered as tenure-holders and his decision was affirmed in appeal by the District Judge and again by the High Court. Construing the effect of Section 13 of the Code of 1882, it was said

"..... a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised".

35. In a similar strain we find the opinion delivered by the Supreme Court in *Ram Nandan v. Kapildeo* (AIR 1951 SC 155). Repelling the plea of constructive *res judicata* raised by the judgment-debtors, it was said that

"when the decree-holder contended that Section 11 of Bihar Money Lenders' Act was declared void and *ultra vires* and that, therefore, Section 11 of the new Act, which corresponded to Section 11, was also inapplicable, the judgment-debtors pleaded that they were entitled to the benefit of Section 7 of the new Act. The Federal Court held in *Ramnandan Pd. v. Goshwami Madhwanand* (AIR 1940 FC 1) that the judgment-debtors were entitled to claim the benefit of the provisions of the new Act when the executing court proceeded under Section 13 to determine the value of the properties to be sold. The correct interpretation of Section 7 was not in question between the parties. To say that the appellants were entitled to take advantage of the provisions of Section 7 is entirely different from the contention that the interpretation sought to be put by them on Section 7 was the right one. The Federal Court was not dealing with any question of interpretation at all."

36. Applying the above principles, the contention of the counsel of the judg-

ment-debtors seems to be unacceptable. The amount due under the decree is, no doubt, a matter relating to its discharge or satisfaction and if the judgment-debtor omits at one stage of the execution proceeding to dispute it, he cannot on the principle of constructive *res judicata*, in generality of cases, reagitate it at the subsequent stage of the same proceeding. But where the judgment-debtor claims relief under a remedial legislation, such claim can only be entertained and adjudged by a tribunal or a court of competent jurisdiction under the statute. Here the Act sets out a complete procedure for the scaling down of the secured debts due against the zamindars whose estate had been vested in the State under Section 4 of the Act 1 of 1951; notwithstanding any law or anything contained in the Code of Civil Procedure, even decrees passed before the commencement of the Act are liable to be reopened under Section 4 upon an application made by the decree-holder or the judgment-debtor to the court which passed the decree. Sub-sections (2) and (3) prescribe the conditions for the exercise of jurisdiction by the court to which such application is made. Under Section 7, after the amount has been reduced, the decree, to the extent of the reduction so effected, is deemed for all purposes and on all occasions to have been duly satisfied. Thus the decree passed against the judgment-debtors was required by law to be reopened and no provision of the Code of Civil Procedure or of equity could bar such a remedy. The intention of the law is fair and manifest that those, whose estates had been acquired, should be given a relief. The order made under Section 4, unlike an order made in the course of execution proceedings, is not subject to an appeal under the Code. Such being the provisions of the Act, there is no escape from the conclusion that the court, while deciding an application under Section 4, is not a court exercising jurisdiction concurrent with that of the court executing the decree. An application under Section 4 is not in the nature of an execution proceeding nor it is a step in the aid of execution. The executing court was not competent to entertain the application and grant relief to the judgment-debtors under the Act. Nor the correct interpretation of Section 2 (f) and whether the judgment-debtors were entitled to the benefit under the Act was materially and directly in issue in the execution proceedings. The prin-

ciple of constructive res judicata cannot, therefore, apply.

37. For the discussion in the foregoing, we are of the opinion that the court below committed illegality in the exercise of its jurisdiction by applying sub-section (2) of Section 4, although the mortgaged security consists partly of 'estate' and partly of property other than 'estate', attracting the application of sub-section (3). In the consequence, the case will have to be remanded to the Civil Judge, Rae Bareilly, to proceed afresh under sub-section (3) of Section 4 and determine the amount in the manner prescribed therein.

F. A. F. Os. Nos. 17, 18, 19, 20, 21 and 22 of 1964 and First Execution Decree Appeal 9 of 1964.

38. Briefly stated, these First Appeals arise from various applications made by the Bank to restrain the judgment-debtors from alienating or otherwise disposing of their property with the object to ensure the fruition of the decree under Order 34, Rule 6 of the Code which the Bank might be compelled to obtain from the court, the mortgaged security and the sale proceeds thereof being manifestly insufficient to satisfy the final decree passed as far back as the year 1926. The execution proceeding, and which continues to be pending, was taken in the year 1940.

39. Before we advert to the averments made in the applications and the grounds of challenge by the judgment-debtors, it would be necessary to clear the legal ground in which the rival contentions have to be determined. We agree with the counsel for the judgment-debtors that a personal decree under Order 34, Rule 6 can be granted only after the mortgagee has exhausted his remedies against the security; it can be granted only after the same had been carried out and the deficiency ascertained. We also agree with the learned counsel that a personal decree cannot be passed in every suit for sale upon a mortgage; such a decree can be passed only where the defendant by his contract or otherwise is under an obligation to pay the mortgaged debt and the plaintiff has right to enforce the personal obligation not barred by limitation at the date of the suit for sale and, this being so, we would have been relieved of the necessity of determining the questions likely to arise on the making of an application for personal decree under Order 34, Rule 6. But the counsel

for the Bank has invited our attention to the terms of the deed of mortgage which, inter alia, by an express stipulation bind the executant, his heirs and successors for the recovery of the debt not only from the mortgaged and hypothecated Taluqa but also from other movable and immovable property of the mortgagor and he has strenuously contended that the trial court has by negating the very right of the mortgagee to make an application under Order 34, Rule 6 against the legal representatives of Raja Uma Nath Bux Singh for the balance of the money erred in law which might cause material prejudice to the Bank in subsequent proceedings. Accepting the submission of the learned counsel and leaving the question whether or not a personal decree and, if so, in what amount, can be granted to the Bank under Order 34, Rule 6 of the Code to be decided at that stage, we consider it necessary to determine the correctness or otherwise of the view that the decree-holder cannot invoke Order 34, Rule 6 against the legal representatives of the original judgment-debtor, not being parties to the suit.

40. Order 34, Rule 6 provides that the mortgagee may by way of application, if the balance is legally recoverable from the defendant otherwise than out of the property sold, obtain a decree for such balance. The submission of the counsel for the judgment-debtors, which prevailed with the court below, was that the application under Order 34, Rule 6 can be made against the defendant in the mortgage action and the decree-holder therefore, cannot avail of this remedy even against the heirs of the deceased judgment-debtor. We are of the opinion that although Rule 6 does use the word 'defendant', but that does not mean that the decree-holder cannot apply under the Rule against those who are the 'legal representatives' of the deceased as defined by Section 2 (11) of the Code of Civil Procedure, to have the balance money paid out of the assets of the deceased in the hands of such legal representatives which had not been duly disposed of.

41. The different parts of the Code, if read as a whole, warrant a similar conclusion. 'Legal representative' means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person, on whom the estate

devolves on the death of the party so suing or sued: see Section 2 (11) of the Code. Under Section 50, where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased and he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. We have then general provision in Section 146, which, as observed by the Supreme Court in *Nagendra Nath v. Commr. of Hills Division* (AIR 1958 SC 398), should be construed liberally so as to advance justice and not in a restricted or technical sense. In cases of assignment, creation or devolution of any interest during the pendency of a suit, we have Order 22, Rule 10 which enables the person, in whose favour the assignment, creation or devolution of interest has taken place, to be arrayed on the same side in the suit as the person, from whom it has passed, and likewise against a person upon whom such interest from the defendant has come or devolved. If, therefore, a pending suit may be continued by or against the person upon whom the interest has come or devolved and if a legal representative, who intermeddles with the estate of the deceased can be sued in a representative character and if on the death of the defendant judgment-debtor the execution of the decree can be obtained against the legal representative to the extent of the property of the deceased in his hands, we fail to see why the decree-holder cannot make an application under Order 34, R. 6 of the Code to enforce the personal liability of the deceased judgment-debtor qua his estate in the hands of the legal representatives.

42. Reliance was placed by the counsel for the judgment-debtors upon a number of decisions in support of his contention that the court has no jurisdiction to pass a decree against persons who were not parties to the original suit. The case reported in *Mt. Faiyazi Begum v. Sabir Hosain* (AIR 1927 All 691) enunciates no principle that can assist the judgment-debtors; nor does it bear any parallel to the facts of the case before us. All that was decided in that case was that subsequent mortgagee, who had paid off the prior mortgage, and then brought a suit on both the mortgagees without impleading the daughters, who were also the heirs of the deceased mortgagor, could

not have in law obtained a personal decree against the daughters under Order 34, Rule 6. Obviously that was not a case in which the decree was obtained against the mortgagor and after his death the application under Order 34, Rule 6 was made. There is another case also cited by the learned Advocate, namely, *Shanker Bhatta v. Shanker Upadhyaya* (AIR 1949 Mad 1) (FB). The observation in the judgment, which is relied upon, is at page 2 and runs in these terms:

"So far as the appellant is concerned he has a further objection. He was not a party to the mortgage deed and is not under any obligation regarding the personal covenant contained in it and, consequently, in addition to the matters already pointed out, there cannot be any recourse against him".

The irrelevancy of the citation is too obvious to need any elaboration. The third case, to which reference was made, is *Balak Ram v. Inayat Begum* (AIR 1935 Lah 940) where it was held:

"There is no law under which a personal decree embodied in an ordinary mortgage decree, whether preliminary or final, can be enforced against persons who were not parties to that suit."

But that principle can have no application to case where the personal decree would be enforced only against the assets of the deceased in the hand of the legal representatives.

43. For the reasons mentioned in the above, we are of the view that an application under Order 34, Rule 6 can be made by the decree-holder against the judgment-debtors who are the legal representatives of the deceased mortgagor.

44. Section 52 of the Code of Civil Procedure had been invoked by the decree-holder to make the legal representatives of the deceased judgment-debtor liable to account for the profits received by them from out of the properties of the deceased in their hands and to make them available for satisfaction of the decree to be obtained under Order 34, Rule 6 of the Code. The court below has rejected the application, and rightly. There can be no doubt that the heirs of the deceased judgment-debtor became entitled upon his death to the rents and profits which might accrue from the immovable property. Those rents and profits if received by them could not be treated in law as the assets of their deceased father. They were their assets and they were entitled to them not as representatives of their

predecessor but in their own right. Moreover, a proceeding under Section 52 can be taken by the decree-holder in course of the execution and not in the manner sought for. In that view of the matter, the application under Section 52 of the Code was misconceived and that disposes of First Execution Appeal No. 9 of 1964.

45. We may now turn to other appeals arising from the applications made by the decree-holder under Order 38, Rule 5 of the Code of Civil Procedure together with a prayer for interim injunction to restrain the judgment-debtors from disposing of the non-mortgaged property on the ground that there being a greater possibility of the sale of the mortgaged property not sufficing to meet the decree and the judgment-debtors were about to dispose of such property with the object to delay the execution of decree under Order 34, Rule 6, C.P.C. that may be passed against them, the corpus required being preserved from legal waste. In two of these applications the properties involved are the two houses situate in Rae Bareilly, owned by the deceased judgment-debtor. In another application Zamindari Abolition Compensation Bonds payable to Rana Sheo Ambar Singh and Sheo Pratap Singh with respect to 33 villages (which were not mortgaged) and in the fourth application similar bonds payable to the said judgment-debtors with respect to 1/4th of the compensation money of villages (which had not been mortgaged) with the Bank were sought to be attached and, in the alternative a prayer for temporary injunction was also made. Yet another application was made to restrain the judgment-debtors from withdrawing Rupees 25,000 deposited by them as security in the High Court of Allahabad in the Supreme Court Appeal No. 68 of 1956. Thereafter, the Bank also moved an application to restrain the judgment-debtors from realising the compensation under the U. P. Imposition of Ceiling on Land Holdings Act, until the final disposal of the application under Order 34, Rule 6 of the Code. The learned Civil Judge issued interim attachment and notices to the judgment-debtors who filed objections not only contending with the legality of the notices but they also challenged the right of the decree-holder in making such an application before the decree under Order 34, Rule 6 of the Code had been passed against them.

46. The learned Civil Judge rejected all these applications holding that

the applications did not make out a case in which either an attachment before judgment or injunction should be allowed. The affidavits sworn on behalf of the Bank were either inadequate or were defective. The allegation in the affidavit was sworn on information received and believed to be true but they did not state the grounds of belief or the source of information with sufficient clarity. In absence of a complete affidavit by persons having personal knowledge of the alleged removal or intention to remove the property with a view to obstruct or delay the execution of the decree and in absence of any proved overt act by the judgment-debtors, to instance, negotiation or offer for sale, or that there was danger of alienation of the property, the trial court did not feel satisfied in maintaining the rule under Order 38, Rule 5, Code of Civil Procedure. Yet another objection taken by the judgment-debtors and which prevailed with the learned Civil Judge was that the provisions of Order 38, Rule 5 of the Code were not complied with by the court, making the order of attachment itself invalid.

47. We agree with the submission of the learned counsel for the judgment-debtors that the provisions of Rule 5, Order 38 were not complied with at all. The Court instead of issuing a notice in Form No. 5 (Appendix F) issued a notice in the general form, though making the attachment simultaneously. Rule 5, Order 38 clearly lays down that before an order of attachment can be made it is incumbent on the court to direct the defendant to furnish security or to show cause why he should not furnish security. Rule 6 provides that if the defendant fails to give security or to show cause, then the court may order the attachment of the property specified in the application of the plaintiff. The court under Rule 5, sub-clause (3) has the power to direct conditional attachment of the property specified in the application but no such order of conditional attachment could be passed without an order under clause (1) of the same rule. The judgment-debtors were not called upon to furnish the security or to show cause as provided for under the provisions of Rule 5, Order 38 of the Code. An attachment which does not comply with the provisions of Rule 5, Order 38 is illegal and ultra vires and, therefore, the decree-holder cannot claim any benefit under it. We derive support for this view from a decision of this

court in *Sri Krishna Gupta v. Ram Babu*, AIR 1967 All 136.

48. We also agree with the learned counsel for the judgment-debtors that the application of the Bank to put restraint upon the payment of compensation bonds under the U. P. Imposition of Ceiling Act was premature, because by then compensation payable to the judgment-debtors had not been determined by the authorities under that Act.

49. Counsel for the Bank has, in the alternative, strenuously urged that in the circumstances of the present case the court could in the exercise of inherent powers under Section 151 of the Code restrain the judgment-debtors from disposing of other assets of the deceased judgment-debtor in their hands in order to ensure the satisfaction of the decree under Order 34, Rule 6 which the Bank may have to obtain since the mortgaged security was manifestly insufficient to satisfy the decretal debt. Counsel for the judgment-debtors reiterating the stand they had taken in the trial court has contended that in absence of any evidence to show waste or damage of the property by the judgment-debtors, an interim injunction under Order 39, Rules 1 and 2 of the Code cannot be made. Further, it has been urged by the learned counsel that the suit having ended in a final decree and no personal decree having yet been passed, the aid of Order 39 cannot be extended to the decree-holder.

50. Now, it is well settled that until the mortgaged properties are brought to sale no personal decree can be obtained against the defendants but if a decree-holder makes out a case under Order 38, Rule 5 or under Order 39, Rule 1 of the Code and when the court is satisfied amongst other things before making an order under that rule, that the hypothecated property would be insufficient to discharge the mortgaged debt the court can proceed to attach or to restrain the alienation of the non-hypothecated property in a suit for sale under the mortgage: See *Bishambar Sahai v. Sukhdevi*, ((1894) ILR 16 All 186) and *Jogemaya Dassi v. Baidyanath Pramanick* (ILR 46 Cal 245 = (AIR 1919 Cal 258 (2))).

51. As regards the scope of Order 39, Rule 1 of the Code it has been held by the Supreme Court in *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hira Lal* (AIR 1962 SC 527) that there being no such expression in Section 94 which expressly prohibits the issue of a

temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39, C.P.C. if the Court is of opinion that the interests of justice require the issue of such interim injunction. In many cases where the circumstances require it, the courts have thus proceeded upon the assumption of possession of inherent power to set *ex debito justitiae* and to do that real and substantial justice for the administration of which alone they exist, (See *Dhaneshwar Nath v. Ghanshyam Dhar*, AIR 1940 All 185).

52. Story in Equity Jurisprudence states the basic principle in the following passage:

"It may be remarked in conclusion upon the subject of special injunctions that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunction shall be granted or withheld. And there is wisdom in this course; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress. The jurisdiction of these courts thus operating by way of special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases and, therefore, should be fostered and upheld by a steady confidence..... It ought to be guarded with extreme caution and applied only in very clear cases." (page 625).

53. Accordingly the courts of equity in order to prevent waste or destruction or deterioration of property *pendente lite* or to prevent irreparable mischief applied precautionary justice in the nature of bills known as *Quia timet Bill*; the party seeks the aid of the court of equity because he fears (*Quia timet*) some future probable injury to his right or interests, and not because an injury has already occurred which requires any relief.

54. "There are two necessary ingredients to support a *Quia timet* action: there must if no actual damage is proved be proof of imminent danger and there must also be proved that the apprehended damage will, if it comes, be very substantial and irreparable; i.e. it must be shown that if the damage does occur at

any time it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action" per Pearson, J. in *Fletcher v. Baaley*, ((1885) 28 Ch D 688 at p. 698). In balancing the comparative convenience or balancing inconvenience from granting or withholding such relief the court may take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. A person seeking for a *quia timet* action has to show, no doubt, a *prima facie* case but he is not required to make out clear legal title but he must satisfy the court that he has a fair question to raise as to the existence of the legal right which he sets up: (Kerr on Injunctions, 6th Edition pages 25-26 and 15-16).

55. Applying these principles we are clearly of the opinion that the mere fact that there are certain provisions as regards the issue of injunction in Order 39, C.P.C. does not debar the court from passing orders of temporary injunction for doing justice in the exercise of its inherent power under Section 151 of the Code, though the discretion has to be exercised with extreme caution and applied only in very clear cases.

56. This brings us to the next question whether in the circumstances of the present case the learned Civil Judge acted legally or irregularly in the exercise of his jurisdiction in refusing an order of interim injunction. The main contention on which the relief, in the alternative, by way of interim injunction was sought was that the mortgaged property was obviously insufficient to satisfy the decretal debt and by the time a decree under Order 34, Rule 6 happened to be passed, the assets of the deceased judgment-debtors in the hands of the respondents would be beyond the reach of the decree-holder on account of the apprehended alienation or disposal of such property by them, in the interval. In support of his contention the Bank has brought to their use the conduct of the judgment-debtors and of their predecessor in not making the payments of the decretal debt despite various compromises having been entered into the course of the earlier execution proceedings. The preliminary decree was passed, as far back as the year 1925. The *bhumidhari* rights were held non-saleable by the

Supreme Court but as regards the trees belonging to the erstwhile intermediary there appears a concession was made by the judgment-debtors that the walls, buildings and trees were saleable in execution of the decree. But in spite of that concession the judgment-debtors have resisted the sale of the trees as well and the matter is now pending before the Supreme Court. The decree as amended under the U. P. Agricultural Relief Act on 14th March, 1937 stood reduced in an amount of Rs. 4,38,605 with interest at 5½% and the amount due as on 23rd October, 1965 was Rs. 8,23,000 and odd. By the sale of compensation bonds and the negotiation of cash vouchers a sum of Rupees 1,39,000 and odd has been realised from the judgment-debtors. The application of the Bank dated 7th January, 1967 would show that the value of the properties as estimated by the judgment-debtors which had not vested in the State and which constitutes part of the mortgaged security does not exceed Rs. 1,77,802. On 2nd May, 1972 the compensation bonds of the value of Rs. 2 lacs were released in favour of Rama Sheo Ambar Singh to enable him to meet the expenses of the marriage of his daughter on the security of immovable property furnished to the satisfaction of the Civil Judge.

57. It has been further averred by the Bank in the affidavit (See F. A. F. O. No. 17 of 1964) that on 25th April, 1959 Rai Bahadur Sheo Pratap Singh had disposed of valuable house property situate in village Manoharganj and Jagatpur and farmland situate in Tahsil Dalmay District Rae Bareilly. In the objections which the legal representatives of Rai Bahadur Sheo Pratap Singh filed the allegation was not specifically controverted. Indeed, they took the plea that they were not liable to pay the decretal amount out of the non-mortgaged property and they having not been substituted as legal representatives no application under Order 34, Rule 6, C.P.C. could be entertained against them. From the aforesaid facts, it is, therefore, manifest that the judgment-debtors had been avoiding the payment of the decretal money and preventing the decree-holder on one excuse or the other to reap the fruits of the decree. Even after the scaling down of the decretal debt under Section 4 (3) of the Zamindars' Debt Reduction Act, the reduced decretal debt, as informed by the counsel for the Bank, may approximate to Rs. 5,00,000, and after making allow-

ance for what has been recovered and may be realised from the sale of non-vested mortgaged property, the balance sum of Rs. 1,50,000 may be found due from the judgment-debtors in terms of the decree under Order 34, Rule 6 which may be passed against them. In our opinion, a case has been made out for the preservation of non-mortgaged assets of the deceased debtor in the meantime in status quo to protect the rights and interest of the decree-holder by an action in the nature of quia timet. And in the ends of justice, I, therefore, consider it necessary and expedient to restrain the respondents from disposing of the assets of the mortgagor in their hands of a value of Rs. 2,00,000.

58. I may also state that learned counsel for the Bank has informed us in writing that the market price of the uncollected Zamindari Abolition Compensation Bonds of 40 years of the face value of Rs. 100 has increased to Rs. 125.

BY THE COURT

59. Civil Revision No. 33 of 1969 is allowed and, setting aside the impugned order, we send back the case to the Civil Judge, Rae Bareilly to proceed afresh under sub-section (3) of Section 4 of the Act, after affording opportunity of hearing to the parties, and determine the amount in the manner prescribed therein. In the circumstances, costs shall be borne by the parties.

60. We further direct that until the liability determined under Order 34, Rule 6, C.P.C. is satisfied, the judgment-debtors shall not dispose of or cause to be disposed of in any manner or receive from the Compensation Officer the Compensation Bonds specified in the applications which have given rise to F. A. F. Os. Nos. 20 and 21 of 1964 (leaving Bonds which were released by the Court's order dated 2nd May, 1972) of a face value of Rs. 1,50,000.

61. In the result, F. A. F. Os. Nos. 20 of 1964 and 21 of 1964 are allowed, but since no further relief is being granted to the decree-holder, the remaining F. A. F. Os. including the First Execution Decree Appeal No. 9 of 1964 are dismissed. In the circumstances, costs shall be borne by the parties.

Order accordingly.

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K. N. SINGH, J.

M/s. Uttarakhand Forest Co., Niranjanpur, Dehradun, Petitioner v. State of U. P. and others, Respondents.

Civil Misc. Writ No. 11598 of 1975,
D/- 12-4-1976.

(A) Constitution of India, Art. 299 — U. P. Forest Manual, R. 149-A — Scope of — Auction of forest lots — R and others making highest bids — Subsequent offer of P and others for making higher bid, if reauction is held — Acceptance of offer by Addl. Chief Conservator, if a concluded contract under Art. 299 — After discussion with State Government, Addl. Chief Conservator accepting bids of R and others, and cancelling reauction — Propriety of.

Auction of forest lots in certain divisions of U. P. were held on 8th, 9th and 11th September, 1975. Forest contractors R and others were highest bidders. P and others did not participate because the conditions for auction were too onerous. They made representations before Addl. Chief Conservator by making higher offers. P and others were directed to hand over fixed deposit receipts for certain sums pledged to Conservator of Forest with an undertaking that in case the reauction was held and no higher bids were offered and adequate money was not offered, the Forest Department would be free to confiscate the amount of money pledged with it under the fixed deposit receipts. P and others submitted the fixed deposit receipts along with their undertakings. Thereupon orders for reauction were issued and notices were published in ignorance of the fact that P and others were disqualified to make bid at the auction sale because Government dues were outstanding against them. Before the reauction could take place, the State Government discussed the matter with the Addl. Chief Conservator and explained its policy to maintain the sanctity of auction sale. The Addl. Chief Conservator issued telegraphic orders on 29-10-1975 to Divisional Forest Officer informing him that the highest bids of R and others in open auction sale were accepted and that the subsequent offers of P and others were not acceptable. P and others protested and insisted for re-auction but their objections were ignored. On writ petitions by P and others:

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CHINNAPPA REDDY AND JEEVAN
REDDY, JJ.

Emana Veeraraghavamma, Appellant
 v. Gudiseva Subbarao and another, Res-
 pondents.

Letters Patent Appeal No. 48 of 1974,
 D/- 24-12-1975.*

**(A) Hindu Succession Act (1956), Sec-
 tion 15 (2) (a) — Succession to property
 inherited by female from her parents —
 Such property sold and some other pro-
 perty purchased out of sale proceeds —
 Special rule of succession does not apply.**

The female inheriting property from her father or mother becomes the absolute owner of such property and she can deal with it in such manner as she likes. If she alienates the property inherited by her, it cannot then be said, on her death, that the property inherited by her, is still available for devolution. The expression 'property inherited by a female Hindu from her father or mother' occurring in S. 15 (2) (a) must be given a restricted meaning consistent with the absolute right of disposition of the female owner. The special rule of succession under the aforesaid clause applies only in case the very 'property' inherited by a female from her father or mother is still available at the time of her death, otherwise, the rule does not apply. If the identity of the property is changed or if the property is substantially altered or improved or if the property has been substituted, the said special rule can have no application. The theory of substitute property applicable in the case of widow's estate is clearly inapplicable for dealing with the succession to the property of an absolute owner. When the property which was inherited by the female is no longer available at the time of her death, it is not necessary to enquire any further.

(Paras 5, 6)

Cases Referred: Chronological Paras
 AIR 1941 Mad 345 = 1940 Mad WN 19 5

V. Parabrahma Sastry, for Appel-
 lant; T. H. B. Chalapathi, for Respondent
 No. 1.

JEEVAN REDDY, J.:— This Letters
 Patent Appeal is preferred with leave
 against the judgment of A. D. V. Reddy,
 J. allowing the Second Appeal with costs.

*(Against judgment of A. D. V. Reddy J.
 in S. A. No. 682 of 1972, D/- 28-8-1973.)

GT/GT/B895/76/AS/MVJ

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2. One Nanduri Nagayya owning an extent of Ac. 1-91 cents of land (mentioned in the plaint A schedule) died on 26-7-1961 leaving behind him his wife Veeramma and two daughters Emana Veeraraghavamma (plaintiff) and Gudiseva Subbamma whose husband Gudiseva Subbarao is impleaded as first defendant to the suit. On 22-3-1966, Nanduri Veeramma executed a gift deed Ex. B-4 giving the said extent of Ac. 1-91 cents to her two daughters in equal shares i.e. giving each 95½ cents. Obviously, she executed the said gift-deed on the assumption that she was the absolute owner of the said total extent and she purported to gift the same to her daughters equally. Gudiseva Subbamma was married in another village Kanchadam whereas her parents were the residents of Kanchakoduru. She sold the said 95½ cents under Ex. B-5 dated 2-4-1966 in favour of one Venkatappiah for a consideration of Rs. 3,000 and adding another sum of Rs. 1,000 and stamp and registration charges from her husband's estate, purchased the suit property of an extent of Ac. 2-50 cents in Kanchadam village under Ex. B-3 dated 25-3-1966. The said Gudiseva Subbamma died in 1967 whereupon the other daughter Emana Veeraraghavamma filed the present suit for a declaration that the plaintiff and second defendant (Nanduri Veeramma, the mother) are the heirs of the deceased Gudiseva Subbamma and are entitled to the joint possession of the suit property (mentioned in Schedule B appended to the plaint) and for recovery of future profits upon the same till the delivery of the said land to them. The basis of her claim was that on the death of the father, her mother, herself and the said Subbamma inherited his property equally and that they were in joint possession and enjoyment of the same and that the first defendant, taking advantage of the weak intellect of the plaintiff's husband and the ignorance of the second defendant, has managed to get a half share in the said A schedule properties sold by his wife and with that consideration purchased the B schedule property at his own village Kanchadam and that therefore the said B schedule property must be deemed to be the substitute property to which she and her mother are entitled to succeed on the death of Gudiseva Subbamma under S. 15 (2) (a) of the Hindu Succession Act (hereinafter referred to as the 'Act'). The first defendant i.e. the husband of the deceased Gudiseva Subbamma contested the suit and his de-

fence was that inasmuch as the plaintiff and the deceased Subbamma obtained equal shares under Ex. B-4, the plaintiff is precluded from questioning the competency of her mother to execute the said gift deed and that therefore the said 95½ cents was not 'inherited' by his wife from her father and mother, but was received under a gift and therefore in such a case, the Rule of Succession contained in Section 15 (2) (a) of the Act does not apply. He further submitted that the property received under the gift deed was sold by Subbamma herself and that adding some more funds from her husband's estate, she acquired the B schedule properties and therefore the property now sought to be recovered is not the same property which was obtained by Subbamma. For the said reasons, he contended that he succeeds to his wife's property and therefore the suit must be dismissed.

3. The learned Principal District Munsif, after framing the necessary issues, held that on the death of Nanduri Nagaiah, on 26-7-1961 his estate was inherited by his wife and two daughters and that the gift deed Ex. B-4 executed by the mother in respect of the entire property is ineffective and invalid. He further held that the B schedule property is the substitute property for the joint interest which the deceased Gudiseva Subbamma had in the A schedule property and that therefore under S. 15 (2) (a) the plaintiff and the second defendant succeeded to the said property. He accordingly decreed the suit with costs. The first defendant filed an appeal which was dismissed by the learned Additional District Judge, Machhlipatnam and then the matter was carried in second appeal to this Court. A. D. V. Reddy J. allowed the second appeal holding that on Nagaiah's death, the wife and the two daughters each get a 1/3rd share and that Ex. B-4 was valid to the extent of 1/3rd share of the mother. It was further held that half the interest in the said 1/3rd property acquired by Subbamma under Ex. B-4 i.e. 1/6th share in the total would not attract Section 15 (2) (a) and further because the monies from the husband's estate were also used for acquiring the B schedule property, it cannot be held to be the substituted property of the 1/3rd interest inherited by Subbamma from her father. He also held that inasmuch as the identity of the property has changed, the said special Rule of succession under Section 15 (2) (a) cannot apply. The learned Judge,

however, thought it fit to grant leave and accordingly the plaintiff has filed this Letters Patent Appeal.

4. Mr. Parabrahma Sastry, the learned counsel for the appellant, contended that the 1/3rd interest inherited by the deceased Subbamma, has to revert back along with any accretions to it on her death, to her father's heirs. The learned counsel contended that if the original interest/property inherited by the daughter is substituted by another property even then the said special Rule of succession applies and the father's heirs are entitled to follow the said interest/property and obtain the same. He therefore, contended that the B schedule property or, at any rate, so much portion of it as can be said to be the substitute of the interest inherited by Subbamma from her father, must go back to her father's heirs namely to herself and her mother. Both the learned counsel for the parties stated that there is no decided case of any High Court or the Supreme Court in support of or negating the appellant's contentions. We shall therefore have to decide the question with reference to the provisions of the Hindu Succession Act. Section 15, relevant for our purposes, reads as follows:—

Section 15— General rules of succession in the case of female Hindus :

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16—

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father, and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)—

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from

her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

5. The above section in effect provides a general rule of succession to the property of a female Hindu dying intestate and also two special rules of succession contained in clauses (a) and (b) of sub-section (2). Under clause (a) of sub-section (2), the property inherited by a female from her parents shall devolve upon the heirs of her father, in the absence of any son or daughter to her, while clause (b) thereof provides the mode of succession to the property inherited from her husband or from her father-in-law. Those two clauses in sub-section (2) are in the nature of exceptions to the general rule of succession provided in sub-section (1). We are of course concerned only with clause (a) of sub-section (2) in this case. Now, while interpreting the said clause (a), it must be borne in mind that the female inheriting a property from her father or mother becomes the absolute owner of such property and that she can deal with it in such manner as she likes. If she alienates the property inherited by her, it cannot then be said, on her death, that the property inherited by her, is still available for devolution. We are of the opinion that the expression 'property inherited by a female Hindu from her father or mother' occurring in this sub-clause must be given a restricted meaning consistent with the absolute right of disposition of the female owner. The special rule of succession applies only in case the very 'property' inherited by a female from her father or mother is still available at the time of her death, otherwise, the rule does not apply. For example, if the identity of the property is changed or if the property is substantially altered or improved or if the property has been substituted, the said special rule can have no application. We are of the opinion that placing a broader meaning upon the said expression 'property inherited by a female Hindu from her father or mother' would lead to much mischief not contemplated by the Parliament. If the property were to be followed by the father's heirs irrespective of the change in the identity and/or character of the property it would give scope for unsavoury litigation and complications. This case itself in a small

measure indicates the same. If the broader interpretation is placed upon the said expression and the plaintiff and the second defendant are allowed to pursue the said property in whosoever's hands and in whatever shape, then we would be obliged to pass a decree for partition to the extent of the original 1/3rd share of late Gudiseva Subbamma. The question of interest accruing on the consideration for the original share, its accretions and separation of the said interest from the 1/6th interest acquired by the said Subbamma under her mother's gift deed as well as the determination and separation of the interest in the said property attributable to the funds provided by her husband will all have to be gone into. The learned counsel for the appellant however relied upon *Surayya v. Mangayya*, AIR 1941 Mad 345. That was a case where the widow blended funds from several sources including from her husband's estate and invested the same in reacquiring the property which previously formed part of her husband's estate but has been alienated by him. It was held that having regard to the surrounding circumstances and facts of the case, the acquired property must be taken to be part of the husband's estate and available for reversioners. But that was a case of a widow's estate while we are dealing here with an estate of a female who was the absolute owner of the property with unfettered right of disposition over the same and, therefore, we are not prepared to import the principle applicable in the case of widow's estate to the present case.

6. Applying the above principle, it would be seen in this case that the deceased Subbamma sold the 95½ cents of land situate in the village of her parents and with the said consideration and other funds provided by her husband, she purchased the property in her husband's village. The original property inherited by her is no longer available on the date of her death. We do not see any justification or principle behind the theory of substitute property applied by the trial court, and the lower appellate court. In fact, the said theory applicable in the case of widow's estate is clearly inapplicable when we are dealing with the succession to the property of an absolute owner. When the property which was inherited by the female is no longer available at the time of her death, it is not necessary to enquire any further. The original property may have been exchanged with another property or the consideration of the

same may be used for acquiring another property or may be partly frittered away and partly invested or may have been used in any other manner.

7. For the above reasons, we are of the opinion that the suit has to fail and accordingly this letters patent appeal is dismissed with costs.

Appeal dismissed.

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FULL BENCH

RAMCHANDRA RAJU, LAKSHMAIAH AND JAYACHANDRA REDDY JJ.

Kaamareddy Suryanarayana and another, Appellants v. The District Co-operative Officer-cum-Election Officer, The West Godavari Co-operative Sugars Ltd. Surappagudem, West Godavari Dist. and others, Respondents.

Writ Appeal No. 483 of 1975, D/- 31-12-1975*

(A) Andhra Pradesh (Andhra Area) Co-operative Societies Act (7 of 1964), Section 31 — Nomination of Committee by Registrar under old Act — Validity.

There is a provision in the bye-laws of the Society made under the Old Act authorising the Registrar to nominate all the members of the Committee in the first instance. It is under this provision the Registrar nominated the Committee in question of which the petitioner was a member. Though there is no provision in the Old Act itself, as in the New Act, for the Registrar to nominate any or all members of the Committee, that provision was made in the bye-laws made by the Society in accordance with the Act and the Rules framed thereunder.

(Para 14)

Even under the New Act there is no power granted to the Registrar by the Act itself to nominate a Committee. Even as per the third proviso to Section 31 (1) of the New Act, that power has to be granted only by the bye-laws. Specific provision is only made in the New Act for the society to make bye-laws, if it so desires, authorising the Registrar to nominate any or all members of the committee.

(Para 14)

(B) Andhra Pradesh (Andhra Area) Co-operative Societies Act (7 of 1964)

*(On order of reference made by Kuppaswami and Jayachandra Reddy JJ.)

GT/GT/B889/76/MVJ

Section 21-C — Bar of holding office as member of committee for third time in succession — Term "Committee" takes in both nominated and elected committee — It also includes committee constituted prior to enactment of S. 21-C.

It is provided under Section 21-C that a person who holds or has held office as a member of the Committee for two consecutive terms shall not be eligible for being chosen as a member of the Committee for a third term in continuation. The expression "committee" will take in both an elected committee and a nominated committee. If the legislature intended by the expression "committee" used there as meaning only an elected committee, they would have said so clearly. (Para 16)

The intention of the Legislature in enacting the restriction in Section 21-C of the New Act is to prevent the growth of vested interests in co-operative societies by imposing a break in continuity in office for more than two terms. The Legislature would not have intended the holding of office as a member of the Committee only with regard to an elected Committee and not a nominated Committee and that too for the two consecutive terms to take place only subsequent to the introduction of Section 21-C without any reference to the holding of office as a member of the Committee prior to the enactment of that section. For the restriction to operate that the Legislature intended both the subsequent and the previous holding of office as a member of the Committee is clear from the language used in the Section when it said "a person who holds or has held office." This expression used in the section clearly indicates that though the restriction is only for being chosen as a member of the Committee for a third term after coming into force of Section 21-C the holding of office as a member of the Committee both at the time the section came into force and also the office held earlier have to be taken into account for the purpose of the two consecutive terms mentioned therein.

(Para 16)

Whether a particular provision of law is retrospective or prospective in its operation has to be gathered from the language used in the enactment and the object and the intent of the Legislature in enacting it. When the language used is capable of only one interpretation giving only one meaning, that meaning should be given irrespective of other considerations.

But, if the language used is capable of more than one interpretation without doing any violence to the language used in the enactment it ought to be construed, to be consistent with the other provisions of the enactment and to be in accordance with the objects and the Legislative intent in enacting the provision. Thus on a fair reading of Section 21-C it is capable of only one interpretation viz. that it takes in the committees appointed both subsequent and earlier to the coming into force of that section. AIR 1975 SC 2260 Followed.

(Para 17)

Per Lakshmaiah, J:— The Statement of Objects and Reasons for the introduction of the bill furnishes the court with reliable extrinsic evidence as regards the purpose or object or reason for an act.

(Para 50)

Held, that the State has been utilising the devise and framework of co-operative societies for ushering in some of the welfare functions. Even without the assistance of "objects and reasons" it could be said that the intention of the Legislature in this amendatory legislation underlying Section 21-C of the Act is only to curb the growth of vested interests in co-operative societies. That intention of the Legislature can be given effect to by the judiciary only by construing the expression "Committee" in Section 21-C of the Act as referring to not only an elected committee but also to a nominated committee of the co-operative society.

(Para 70)

(C) Andhra Pradesh (Andhra Area) Co-operative Societies Act (7 of 1964), Section 21-C — Bar of holding office as member of committee for third time in succession — Provision not ultra vires Art. 19 (1) (c) of Constitution — (Constitution of India, Art. 19 (1) (c)).

The right to form a Society under the Co-operative Societies Act has nothing to do with the fundamental right guaranteed under Art. 19 (1) (c) of the Constitution. Apart from the Committee being a committee of the Co-operative Society registered under the Act the restriction under section imposed on becoming a member of the Committee for more than two consecutive terms does not violate the fundamental right to form associations guaranteed under Art. 19 (1) (c) of the Constitution. There is no restriction from forming a co-operative society under the Act, or there is any compulsion to form a society under the Act or to become members of a society registe-

red under the Act. Simply for the reason that some restrictions are imposed in connection with the working of the society that does not amount to curtailing the freedom of forming a society unless the restriction goes to the very root of the matter, which amounts to taking away the freedom to form an association. In the case in question the restriction is only to become a member of the Committee for a consecutive third term. There is no restriction on becoming member of the Committee once again thereafter for two more terms. With an interval of one term in between one can become a member of the Committee consecutively for two terms any number of times. This restriction the Legislature in their wisdom thought to be necessary in order to prevent vested rights being established in the Societies which is not very healthy for proper working of the Societies. Therefore, this is not a matter which touches the very right to form a Society. Thus the section is not ultra vires Art. 19 (1) (c) of the Constitution.

(Paras 26 and 34)

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P. A. Chowdary, for Appellants;
Govt. Pleader for Revenue (for Nos. 1 and

2) N. Baskara Rao (for Nos. 3, 5, 7 and 13) and G. R. Subbarayan (for Nos. 4, 6, 8 to 12), for Respondents.

RAMACHANDRA RAJU J. (For himself and on behalf of K. Jayachandra Reddy J.): Writ Petition No. 3308/75 was dismissed in limine at the admission stage. The present writ appeal is filed against it. When the writ appeal came up for final hearing before our learned brothers, Justice Alladi Kuppaswami and Justice K. Jayachandra Reddy, one of us, the Bench referred the matter to a Full Bench. This is how the Writ Appeal is before us.

2. The writ petition is directed against the order dated 19-6-1975 passed by the District Co-operative Officer, the 1st respondent herein, in his capacity as the Election Officer of the West Godavari Co-operative Sugars Limited, Surapagudem (Bhimadole), West Godavari District (hereinafter referred to as 'the Society'). The Society was registered in the year 1957 under the Andhra Pradesh (Andhra Area) Co-operative Societies Act, 1932 (hereinafter referred to as the 'Old Act'), which was subsequently repealed and re-enacted by the Andhra Pradesh Co-operative Societies Act, 1964 (hereinafter referred to as the 'New Act') which came into force on 25th February 1964. Sri Kommareddy Suryanarayana, the 1st petitioner in the writ petition (the parties will be referred to as per their description in the writ petition) was appointed by the Registrar of Co-operative Societies as one of the members of the nominated committee of the Society which is to manage the affairs of the Society and was continued upto 30-12-1962. It appears that the Society was not functioning from 31-12-1962 to 2-11-1968 without there being any Committee or persons-in-charge to manage its affairs. Thereafter persons-in-charge were being appointed from time to time upto 1-7-1972 on which date the committee elected for a term of three years to manage the affairs of the Society came into being. During most of the period, from 2-11-1968 upto the date of the election of the Committee, the 1st petitioner was also being appointed as person-in-charge either singly or along with others. The 1st petitioner was also one of the members of the elected committee which came into being on 1-7-1972 for a term of three years. According to the provisions of the Act, the executive management of the affairs of the Society shall

vest in a Board of Directors which shall consist of 19 directors as mentioned in bye-law No. 19 of the Bye-laws of the Society and as mentioned in by-law No. 20 the members of the Board shall elect from among themselves a President and a Vice-President. The 1st petitioner was also elected as President of the Board of Directors of the elected Committee which functioned during the period from 1-7-1972 to 30-6-1975.

3. As the term of the elected Committee was to expire by 30-6-1975 and a new Committee had to be elected by the General Body of the Society, the 1st respondent was appointed as Election Officer to conduct the elections of the members of the Committee of the Society. The 1st respondent called for nominations, the last date for filing the same being 18-6-1975. The date 19-6-1975 was fixed for scrutiny of the nominations. The last date for withdrawal of the nominations was 20-6-1975. The election was fixed to take place, if necessary, on 26-6-1975. The 1st petitioner filed his nomination for the election of a member of the Committee. On 19-6-1975, during the scrutiny of the nominations, the 3rd respondent raised objections to the 1st petitioner's nomination alleging that he was appointed by the Registrar of Co-operative Societies as one of the members of the nominated Committee which continued till 30-12-1962. Subsequently he was also nominated by the Registrar as person-in-charge of the Society in October, 1968 and continued in that capacity till 30-6-1971 either singly or along with others. He was thereafter elected as one of the members of the first elected Committee and held office from 1-7-72 to 30-6-1975 and he became the President of that Committee also. Section 21-C of the Act prescribes a condition that a person who has held office as a member of the Committee for two consecutive terms shall not be eligible for being chosen as a member of the Committee for a third term in continuation. Therefore, the 1st petitioner is not eligible to be elected as it would be a third consecutive term for him.

4. To these objections filed by the 3rd respondent, the 2nd petitioner, who was proposer of the 1st petitioner, filed counter objections. On considering the objections and counter objections, the 1st respondent the Election Officer, passed the impugned order by holding that the 1st petitioner was a member of the Com-

mittee for two terms, viz., as a member of the nominated Committee from 5-1-1958 to 24-11-1961 and as a member of the elected committee from 1-7-1972 to 30-6-1975 and as provided under Section 21-C of the New Act the two terms should be considered as consecutive to each other as there was no elected committee during the intervening period of those two terms and therefore as provided under that section the 1st petitioner is not eligible for being chosen as a member of the Committee for a third term in continuation and therefore he is not eligible to stand for the election. It is this view taken by the Election Officer which is assailed in the writ petition.

5. Taking that view, the Election Officer rejected the nomination of the 1st petitioner. The Writ Petition is filed to quash the order of the 1st respondent in rejecting the nomination of the 1st petitioner and to direct him to include his name in the list of valid nominations filed for the election and allow him to contest the election to the committee. Along with the writ petition a petition was also filed to stay the elections of the committee pending disposal of the writ petition. A similar petition for stay was filed along with the Writ Appeal. In the orders passed on the stay petition filed in the Writ Appeal, this Court did not grant stay of the election but allowed the election to take place on 26-6-1975, the date given by the Election Officer for the holding of the elections to elect the members of the Committee, on the condition that the election would be subject to the result in the writ appeal. It appears that the elections to the committee were thereafter held on 26-6-1975.

6. The term "committee" is defined under Section 2 (b) of the New Act as meaning the governing body of a society by whatever name called, to which the management of the affairs of the Society is entrusted. The restriction on consecutive membership of the Committee for a third time is, for the first time, introduced by enacting Section 21-C in the year 1970 by the Amendment Act, 10 of 1970. Prior to the introduction of that provision in the New Act, there does not appear to be any restriction on the eligibility for being chosen as a member of the Committee consecutively for any number of terms. It is convenient now to read Section 21-C in full:

"Section 21-C. Restriction on consecutive membership in committee: A person

who holds or who has held office as a member of the committee for two consecutive terms shall not be eligible for being chosen as a member of the committee for a third term in continuation.

Explanation: For purposes of this section:

(i) Where a period, during which there is no elected committee, intervenes between two terms of office of the committee or of any of its members, those two terms shall be regarded as being consecutive to each other:

(ii) a member shall be deemed to hold office for a term, notwithstanding that he has not held the office for a full term."

7. The main controversy between the parties is with regard to the interpretation to be given to this section and the applicability of it to the 1st petitioner to make him ineligible for the election in question. Admittedly the 1st petitioner was a member of the Committee which was nominated by the Registrar in the year 1957 for two years and extended from time to time upto 31-12-1962 and also of the Committee elected on 1-7-1972 for a term of three years upto 30-6-1975, on the expiry of which the present election was sought to be held and nominations were called for, and in between these two committees there was no committee functioning much less an elected Committee and only person or persons-in-charge were functioning appointed by the Registrar. If the Committee mentioned in the main body of the section can either be an elected or a nominated one, the two terms of the 1st petitioner, one of the nominated and the other of the elected committee, would be consecutive as clarified in the Explanation because in between the terms of the two committees there was no elected committee.

8. But it is the case of the petitioners appellants, as revealed in the Writ Petition, that for the application of Section 21-C one must have been a member of the elected committee twice, whose terms are consecutive and as the 1st petitioner was a member of only one elected committee, the ineligibility mentioned in Section 21-C has no application to him. It is their further case that apart from it, the terms mentioned in Section 21-C must be those which have come into existence subsequent to the introduction of Section 21-C which means subsequent to the year 70 or at least under the present New Act. The 1st peti-

tioner became a member of the committee only once after Section 21-C came into force. Also Section 21-C is unconstitutional and therefore invalid as it offends the fundamental right of freedom of association guaranteed under Art. 19 (1) (c) of the Constitution of India.

9. During the course of the arguments, Sri P. A. Chowdary, learned counsel for the petitioners-appellants, has also argued that in the old Act there was no provision of law authorising the Registrar of Co-operative Societies as now provided under the third proviso to Section 31 (1) of the New Act enabling him, to nominate a committee and therefore the first committee to which the 1st petitioner was nominated was not a validly nominated committee. Therefore, being an invalid Committee, that Committee cannot be taken into consideration for purposes of Section 21-C of the New Act in which case the 1st petitioner must be deemed to have been a member of the Committee for only one term for the purposes of the Section 21-C.

10. Therefore, the following points arise for consideration:

1. Whether the Committee in which the 1st petitioner was a member during the period from the year 1957 to 1962 was validly nominated by the Registrar?

2. Whether the term "committee" mentioned in the main body of Section 21-C and in the second part of the Explanation (i) means only an elected committee and it does not mean a nominated committee?

3. Whether it means only a committee coming into existence subsequent to the introduction of Section 21-C or at least under the present New Act.

4. Whether Section 21-C is opposed to Article 19 (1) (c) of the Constitution and therefore invalid?

11. Point No. 1:— Though this point was, for the first time, raised during the course of the arguments by Sri P. A. Chowdary we allowed it to be argued. It is the argument of Sri P. A. Chowdary that while in the New Act there is a provision empowering the Registrar to nominate a committee, there is no such provision in the Old Act and therefore the committee which was nominated by the Registrar before the New Act came into force was not a validly nominated one and therefore it cannot be taken into account. Another argument of Sri Chowdary is that it is not known whether the General Body of the Society constituted

any Committee at all before the Registrar nominated its members and from this point of view also it must be held that the committee nominated by the Registrar was not a properly constituted one. It is true that there is no provision in the Act itself of the Old Act for the Registrar of Co-operative Societies to nominate a Committee. Under the New Act there is provision in the Act itself with regard to it under the third proviso to Section 31 (1). Section 31 (1) so far as it is relevant for our purposes may be extracted thus:

"Section 31. Constitution of Committees.

(1) The General Body of a society shall constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the society to such committee.

Provided.....

Provided further that in the case of a society registered after the commencement of this Act the persons who have signed the application for the registration of the society may appoint a committee to conduct the affairs of the society for a period of three months from the date of registration or for such further period ordinarily not exceeding six months as the Registrar may consider necessary; but the committee appointed under this proviso shall cease to function as soon as a committee has been constituted in accordance with bye-laws.

Provided also that where the bye-laws so provide, the Government or the Registrar may nominate all or any of the members of the committee for such period as may be specified therein.

(2) (a) The term of office of the committee or of any of its members, shall be for such period, not exceeding three years, as may be specified in the bye-laws.

(b) Notwithstanding anything in clause (a) if for any reason the election of the members of the committee is not held by the time of the expiration of the existing committee the Registrar may, for reasons to be recorded in writing, direct that the term of office of that committee shall extend up to such time as such election is held, which extension shall not ordinarily exceed one year?

(3).....

(4) For the purpose of electing members to a committee, the general body:

(i) shall divide the number of members into constituencies and allot seats therefor, where the bye-laws so provide;

(ii) may, in the absence of such bye-laws elect from among all the members of the society."

12. According to the third proviso to Section 31 (1) as extracted above; it is clear that the Government or the Registrar may nominate all or any of the members of the Committee where the bye-laws of the Society so provide. Therefore, even under the New Act the source of power of the Registrar to nominate a committee with regard to a society is the bye-laws of the society. Bye-laws of a co-operative society are regulations governing the functioning of the Society. Of course they have to be made subject to the provisions of the Co-operative Societies Act under which it is formed and the rules made thereunder. Both under the Old Act and the New Act, rules were framed under the rule-making power given in the Acts, Section 65 of the old Act and Section 130 of the New Act. Some of the subjects on which rules can be made were mentioned in particular in Section 65 of the Old Act. It is provided under Section 65 (2) (d) of the Old Act that the State Government may make rules prescribing the matters in respect of which a society shall make bye-laws and for the procedure to be followed in making, altering and abrogating the bye-laws. It was provided under rule 1 of the Rules framed as provided under Section 65 of the Old Act that any body of persons desiring to apply for registration as a co-operative society under the Act shall apply to the Registrar of Co-operative Societies in the form prescribed in the schedule. It is further provided under rule II that with every application for registration, the applicant shall submit a draft of the bye-laws agreed upon by them. The bye-laws shall be consistent with the Act and the Rules made by the Government thereunder and they shall deal with matters specified in clauses (a) to (z) mentioned therein and may deal with such matters incidental to the organisation of the society and the management of its business as may be deemed necessary. The subject matters on which bye-laws may be made are mentioned in clauses (a) to (z) of rule II. The subject matter (u) relates to mode of appointment and removal of the committee and of other officers and the duties and powers of the committee and of such officers. Therefore, a society registered under the Old Act was entitled to make bye-laws for the appointment

and removal of the committee. There is a similar provision made in rule 5 of the Rules framed under the New Act. Some of the matters on which bye-laws of a society may be made have been enumerated in rule 5 of the Rules. Matter No. 23 deals with the constitution of the Committee.

13. In accordance with the provisions of the Old Act and the Rules framed thereunder, bye-laws were framed by the Society. These bye-laws are made available to the court at the time of arguments. It is provided under bye-law No. 18 that subject to such resolutions as the General Body may from time to time pass, the executive management of the affairs of the Society shall vest in a Board of Directors which shall consist of not more than 17 members of whom not more than one shall be from among non-cane grower members. There shall be the nominees of the State Government and two shall be the nominees of the Industrial Finance Corporation. Bye-law No. 19 provides as to how the members of the Board of Directors other than the nominees of the State Government and the Industrial Finance Corporation shall be elected by the General Body for a period of three years from among the members holding not less than 30 shares. A transitory provision was made under bye-law No. 19 which is as follows:

"Notwithstanding anything contained in bye-law Nos. 18 and 19, the Registrar shall in the first instance nominate a Board of Directors not exceeding nine members. They shall hold office for a period of one year or any such further period as the Registrar may consider necessary. The quorum for a meeting of this Board of Directors shall be five. It shall be competent to the Registrar to terminate the nomination of any of the members of the Board and nominate another in his place. Any vacancy on the Board of Directors shall be filled by the Registrar by nomination for the unexpired period."

14. These bye-laws were approved by the Registrar as provided under the Old Act in the year 1957. Therefore, it is clear from the above that there is a provision in the bye-laws of the Society made under the Old Act authorising the Registrar to nominate all the members of the Committee in the first instance. It is under this provision the Registrar nominated the Committee in question of

which the 1st petitioner was a member. Though there is no provision in the Old Act itself, as in the New Act, for the Registrar to nominate any or all members of the Committee, that provision was made in the bye-laws made by the Society in accordance with the Act and the Rules framed thereunder. Sri Chowdary has argued that the source of power of the Registrar to nominate a committee must find a place in the Act itself and without that he could not have validly exercised that power. We are unable to appreciate this argument of the learned counsel. Even under the New Act there is no power granted to the Registrar by the Act itself to nominate a committee. Even as per the third proviso to Section 31 (1) of the New Act, that power has to be granted only by the bye-laws. Specific provision is only made in the New Act for the society to make bye-laws, if it so desires, authorising the Registrar to nominate any or all members of the committee. Even without any specific provision like that in the Old Act, as provided under the Old Act and the Rules framed thereunder power was given to the society to make bye-laws on matters incidental to the organisation and the management of its business on subject matters specifically enumerated for making bye-laws. The subject relating to mode of appointment and removal of the committee was also mentioned. It is under the power given under this rule, the Society framed bye-laws for its organisation and management of its business and in so framing the bye-laws authorised the Registrar to nominate the managing committee in the first instance. If such a bye-law was passed by the Society, it is understandable how a Committee nominated in accordance with the bye-laws would not be a valid one. From bye-laws Nos. 18 and 19 and the transitory provision made under bye-law No. 19 it is clear that the General Body of the Society both constituted the Committee and also authorised the Registrar to nominate the members of the Committee in the first instance fixing its strength as nine members. Under these circumstances, we do not find any substance in the contention of the learned counsel that the nominated Committee of which the 1st petitioner was a member was not a properly constituted or nominated committee.

15. Sri P. A. Chowdary has also argued that the bye-laws of the Society have no statutory force and therefore

the power given to the Registrar under the statutory provision to bye-law No. 19 to nominate the members of the first Committee could not clothe him with the power to nominate the Committee validly. It is true that the bye-laws of a society have no statutory force. That means they cannot override any provision of law. It only means that a co-operative society cannot make bye-laws contrary to the provisions of the Act or the Rules framed thereunder or any law. So long as the transitory provision to bye-law No. 19 under which provision the Registrar of Co-operative Societies nominated the Committee was not against any law, that would clothe the Registrar with the power, being the one conferred on him by the General Body of the Society, to nominate the Committee validly. In this connection, Sri Chowdary has also placed reliance on the decision Co-operative Central Bank Ltd. v. Addl. Industrial Tribunal, A. P. AIR 1970 SC 245. There, the question arose whether the Industrial Tribunal has jurisdiction to give a direction amounting to altering the conditions of service contained in the bye-laws dealing with the conditions of service of the employees of the Banks. In that connection, the Supreme Court said that the bye-laws of the Banks have no statutory force and therefore they cannot override the provisions of the Industrial Disputes Act. Therefore, there is no substance in this argument of the learned counsel also.

16. Points 2 and 3:— It is provided under Section 21-C that a person who holds or has held office as a member of the committee for two consecutive terms shall not be eligible for being chosen as a member of the Committee for a third term in continuation. The expression "committee" will take in both an elected committee and a nominated committee. If the legislature intended by the expression "committee" used there as meaning only an elected committee, they would have said so clearly. When they intended it to be an elected committee, in the Explanation they said so clearly by mentioning it as an elected committee, when they said that in between two terms of office of the committee if a period intervenes during which there was no elected committee those two terms should be regarded as being consecutive to each other with regard to the consecutive terms mentioned in the main section. Even in the Explanation when reference is made to the

two terms of office there also they said only 'committee' and not 'elected committee' as mentioned in the earlier portion of the explanation for the committee during the intervening period. Therefore, a plain reading of the main section and the explanation together makes it abundantly clear as to what the Legislature meant when they used only the expression 'committee' both in the main section and in the Explanation without using the expression 'elected committee.' They must have meant it to be both an elected committee and a nominated committee. The reason also is obvious when we go to the objects and reasons for enacting this provision to disqualify a person to hold office as a member of the committee continuously for three years (terms?). In the Statement of Objects and Reasons for the Amendment Act by which S. 21-C was introduced, it was mentioned that at the conference of the Chief Ministers and Ministers of the States in charge of Co-operation held at Madras on 12th June, 1968, certain recommendations were made for amending the Co-operative Societies Acts in force in the States so as to make a provision among other matters for curbing the growth of vested interests in co-operative societies and to impose a restriction on holding membership in the committee of co-operative societies consecutively for more than two terms. Therefore, the intention of the Legislature in enacting the restriction in Section 21-C of the New Act is to prevent the growth of vested interests in co-operative societies by imposing a break in continuity in office for more than two terms. If that was the object in enacting Section 21-C of the New Act, it is clear that the Legislature would not have intended the holding of office as a member of the committee only with regard to an elected committee and not a nominated committee and that too for the two consecutive terms to take place only subsequent to the introduction of Section 21-C without any reference to the holding of office as a member of the committee prior to the enactment of that section. For the restriction to operate, that the Legislature intended both the subsequent and the previous holding of office as a member of the committee is clear from the language used in the Section when it said "a person who holds or has held office." This expression used in the section clearly indicates that though the restriction is only for being chosen as a member of the committee for a third

term after coming into force of Section 21-C the holding of office as a member of the Committee both at the time the section came into force and also the office held earlier have to be taken into account for the purpose of the two consecutive terms mentioned therein.

17. Whether a particular provision of law is retrospective or prospective in its operation has to be gathered from language used in the enactment and the object and the intent of the Legislature in enacting it. When the language used is capable of only one interpretation giving only one meaning, that meaning should be given irrespective of other considerations. But, if the language used is capable of more than one interpretation without doing any violence to the language used in the enactment, it ought to be construed, to be consistent with the other provisions of the enactment and to be in accordance with the objects and the Legislative intent in enacting the provision. In the decision *Carew & Co. Ltd. v. Union of India* AIR 1975 SC 2260 the Supreme Court said that when two interpretations are feasible, that which advances the remedy and suppresses the evil, must find favour with the court. From this point of view also, having regard to the Legislative intent in enacting the provision, Section 21-C of the Act, it must be taken that for the purpose of consecutive membership of the Committee, the Committees appointed both before and subsequent to Section 21-C must be taken into consideration. As we have already discussed above, on a fair reading of Section 21-C it is capable of only one interpretation viz, that it takes in the committees appointed both subsequent and earlier to the coming into force of that section.

18. Sri Chowdary has also argued that the expression "the committee" used in Section 21-C can only denote an elected committee. According to the learned counsel, the expression "the committee" there means a committee constituted by the General Body of the society and to which the management of the affairs of the society was entrusted by the General Body as mentioned in Section 31 of the New Act wherein it is provided that the General Body of the Society shall constitute a committee and entrust the management of the Society to such committee and therefore when the expression "the committee" is used in Sec-

tion 21-C it means only a committee, to be elected by the General Body and it cannot be a nominated committee. It may be as provided under Section 31 of the New Act, the General Body of a society has to constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the society to such committee. But how the members of that committee are to be appointed, either by means of an election by the General Body or by means of nomination by the Registrar, is a different matter. According to the learned counsel, when it is mentioned in S. 31 (1) of the New Act that the General Body of a society shall entrust the management of the Society to the committee constituted by it, it only means the general body electing it. In the definition itself of the term 'committee' it is mentioned that it is the governing body to which the management of the affairs of the society is entrusted. That means once a committee comes into being even by means of nomination of its members by the Registrar, it gets the entrustment of the affairs of the society automatically. There need not be a separate overt act for entrustment as such either on the part of the general body or on the part of the Registrar, as the case may be. It is only as provided under Section 31 the committee has to be constituted by the General Body in accordance with the bye-laws. Provision has to be made in the bye-laws with regard to the composition and structure of the committee. If there is a provision in the bye-laws made by the General Body of the society about it, it amounts to constitution of the committee by the General Body. The appointment of its members, either by the General Body by means of election or by the Registrar by means of nomination as provided under the bye-laws of the society, is a different matter.

19. The records of the Society placed before us reveal that by means of old bye-law Nos. 18 and 19 and by the new bye-law No. 19, as amended after the New Act came into force, provision was made as to how the executive management of the affairs of the Society shall vest in a Board of Directors consisting of 17 members before and 19 members after the amendment of the bye-laws determining their composition and how they are to be appointed. Therefore by means of those bye-laws the General Body of the Society constituted the committee both under the Old Act and the New

Act. The General Body by means of a transitory provision to bye-law No. 19 provided that notwithstanding anything contained in bye-laws Nos. 18 and 19 the Registrar shall in the first instance nominate a Board of Directors not exceeding nine members. Therefore, there is nothing special about the General Body constituting the committee and entrusting to it the management of the affairs of the society to think that the 'committee' mentioned in Section 21-C of the New Act can only be a committee elected by the General Body and it cannot be nominated committee as argued by the learned counsel.

20. Another argument submitted by the learned counsel is that when the Old Act was repealed, any committee which functioned under the repealed Act (in the present case the nominated committee to which the 1st petitioner was appointed by the Registrar) cannot be taken into consideration under the New Act and when it is mentioned in Section 21-C that "where a person holds or who has held office as a member of the committee" it means only "holding or held" under the new Act and the office held under the Old Act cannot be taken into consideration. This contention goes against the express provision contained in Section 132 of the New Act containing the provision for repealing and savings. By means of that provision, (1) the Old Act, viz. the Andhra Pradesh (Andhra Area) Co-operative Societies Act 1932 and (2) the Andhra Pradesh (Andhra Area) Co-operative Land Mortgage Bank Act, 1934 and (3) the Andhra Pradesh (Telangana Area) Co-operative Societies Act, 1952 were repealed. In the first proviso to the Section it is mentioned that any society existing at the commencement of the New Act which has been registered or deemed to have been registered under the relevant repealed Act shall be deemed to have been registered under the New Act and the bye-laws of such society shall so far as they are not inconsistent with the provisions of the new Act or the Rules made thereunder continue to be in force until altered or rescinded in accordance with the provisions of the new Act and the rules made thereunder. Therefore under this provision the continuity of a society registered under the Old Act is maintained. In the second proviso to that section it is also said that Section 8 of the Andhra Pradesh General

Clauses Act, 1891, shall be applicable in respect of repeal of the said enactments and Sections 8 and 18 of the said Act shall be applicable as if the said enactments had been repealed and re-enacted by an Andhra Pradesh Act. Section 8 of the Andhra Pradesh General Clauses Act appears in Chapter II, the Provisions of which are made applicable to future Acts whereas Section 18 occurs in Chapter III, the provisions of which are made applicable to all the Acts. By means of the second proviso to Section 132, Sections 8 and 18 are specifically made applicable to the repealed Acts. It is provided under Section 18 of the Andhra Pradesh General Clauses Act that where an Act repeals and reenacts with or without modification all or any of the provisions of a former Act all offices established and appointments made shall be deemed to have been established and made under the provisions so reenacted. From this provision it is clear that the committee constituted under the Old Act and the appointment of the 1st petitioner to that Committee by means of nomination by the Registrar must be deemed to have been done under the provisions of the New Act as they are not inconsistent with those provisions. Therefore, holding of office by the 1st petitioner as a member of the nominated committee which was constituted under the Old Act has to be taken as holding of office under the provisions of the New Act. Therefore, that term of office of the 1st petitioner can also be counted for the purpose of Section 21-C of the New Act. If that is so, there is no substance in this argument of the learned counsel also. Therefore, we see no substance in Points 2 and 3 raised on behalf of the petitioner-appellants.

21. Coming to the fourth point, the argument of Sri Chowdary is that it is the fundamental right of the General Body to choose as to who should manage the affairs of the society and that right is being taken away by means of Section 21-C of the New Act by restricting the membership of the Committee for a person to two consecutive terms and that restriction enacted in Section 21-C would amount to an abridgment of the right to form an Association guaranteed under Article 19 (1) (c) of the Constitution, the only restriction to that right being the one mentioned in the relevant limitation clause (4) of Article 19 and the restriction imposed on a person from being a member of the Committee for a third

consecutive term, not having anything to do with any one of the limitations contained in clause (4) of Article 19, Section 21-C is unconstitutional. The limitation imposed under Clause (4) of Article 19 to otherwise complete freedom to form an association guaranteed under Article 19 (1) (c) is the right given to the State for making any laws imposing, in the interest of sovereignty and integrity of India or public order or morality, reasonable restrictions. If the restriction imposed under Section 21-C of the New Act attracts Article 19 (1) (c) it is true that that restriction is not one of those restrictions mentioned in clause (4) of Article 19 for imposing which the State can make a law. But the point is whether Article 19 (1) (c) of the Constitution has any application to the question before us and the restriction imposed under Section 21-C from becoming a member of the committee for a third consecutive term can be said to be violative of the fundamental right to form Associations guaranteed under it.

22. We do not think that the right to form a society under the Co-operative Societies Act has anything to do with the fundamental right guaranteed under Article 19 (1) (c) of the Constitution. The Society in question is a creature of the statute formed under the provisions of the Andhra Pradesh Co-operative Societies Act, which we are referring to in this judgment as the Act. It is under the provisions of the Act, the Rules framed thereunder and the bye-laws made in accordance with them by the Society, the Committee is constituted and the appointment of its members are made. According to those provisions the members of the Committee are to be appointed either by nomination or election. The right of the 1st petitioner to contest the election for membership of the committee emanated only out of the provisions of the Act, the rules and the bye-laws. That right he cannot claim otherwise than under those provisions. His right to become a member of the Society or a member of the committee is not the common law or a general right given to him to form an association and which is guaranteed under Art. 19 (1) (c) of the Constitution. The Act under which the Society is formed confers certain rights and privileges on the societies that is in effect on their members and also imposes certain obligations and restrictions on the societies and their members. A person claiming rights under those provisions is

also bound by any restrictions imposed thereunder. There is no compulsion to form or become a member of a society under the Act. One is free to form or become a member of a society under the Act or not. A society can also be formed as a right guaranteed under Article 19 (1) (c) without registering it under the Act. But the only disability for such a society which does not get itself registered under the Act is that it will not get the special benefits and the special privileges which have been granted by the provisions of the Act. The restriction on the consecutive membership in the committee in question applies only to societies registered under the Act. It has no application to societies formed and not registered under the provisions of the Act. If a Society is formed and is registered under the Act and its members claim special privileges and advantages conferred by the Act and the Rules framed thereunder, they cannot turn round and say that they are not bound by any restrictions imposed by some provision of the Act or the Rules in the interests of good and fair administration and working of the society on the ground that they are violative of the fundamental right to form Associations guaranteed under Art. 19 (1) (c) of the Constitution and the restrictions imposed are not those contemplated under clause (4) of Article 19 and therefore they are not bound by them.

23. Provision is made under Section 3 of the Act for the appointment of Registrar and other persons for the purposes of the Act. Under the Act and the Rules framed thereunder powers are given to the Registrar and other officers of general supervision over the societies and to hold enquiries into the constitution, working and financial condition of the societies. As provided under Section 4 of the Act a society which has as its main object, the promotion of economic interests of its members in accordance with the co-operative principles can be registered under the Act. As provided under Section 6, an application for the registration of a Society shall be made to the Registrar in such form and with such particulars as may, from time to time, be specified by the Registrar. The application shall be accompanied by four copies of the proposed bye-laws of the society. As provided under Section 7, the Registrar can register the society and its bye-laws if he is satisfied that the appli-

cation conforms to the requirements laid down by the Act and the Rules; the objects of the society seeking registration are in accordance with Section 4; such society is likely to be economically sound and that its registration may not have an adverse effect on the development of the co-operative movement and the proposed bye-laws are not contrary to the provisions of the Act and the Rules. As provided under Section 19 there are certain restrictions for eligibility for membership of a society. Section 21 deals with disqualification for membership of society for instance, a person shall not be qualified for being admitted as a member if he is an applicant to be adjudicated an insolvent or an undischarged insolvent or if he has been sentenced for any offence involving moral turpitude etc. Under Section 21-A some disqualifications are imposed for being chosen as and for being a member of the committee. Under Section 21-C as already noticed, restriction on consecutive membership in a committee for a third term is imposed. Section 26 of the Act also imposes some restrictions on holding of shares in the society. Under Section 43 provision is made for the Government to give loans or advance moneys to a society; subscribe to the share capital of the society; guarantee the repayment of principal and payment of interest on debentures issued by the society; guarantee repayment of share capital of the society and dividends thereon; guarantee the repayment of principal and payment of interest on loans and advance of moneys to a society; guarantee the repayment of deposits received by the society and give financial aid in any other form including subsidies to any society. It is provided under Section 33 that where the Government have subscribed to the share capital of a society or have assisted indirectly in the formation or augmentation of the share capital of the society or have guaranteed the repayment of principal and payment of interest on debentures issued by the society or have guaranteed repayment of principal and payment of interest on loans and advances to the society, the Government have the right to nominate to the committee not more than three persons as members or one-third of the total number of members of the committee, whichever is less. As per Section 129 of the Act, the societies formed under the Act are granted immunity from the provisions of the Companies Act, 1956, the Andhra Pradesh (Andhra

Area) Shops and Establishments Act 1948 and the Andhra Pradesh (Telangana Area) Shops and Establishments Act, 1951. Thus, under the Act while certain special privileges are granted to the societies formed under it, that is to their members, certain restrictions and obligations are also imposed by the Legislature regarding the formation and working of the societies for the purpose of advancing the proper working of the societies. Therefore, the right to form a co-operative society under a Co-operative Societies Act is not a fundamental right. It is a right given under the Act subject to its provisions and the Rules framed thereunder.

24. A similar view was expressed by a Bench of this Court in Writ Petn. Nos. 4066 of 1970 etc. D/- 18-11-1970 (Andh Pra)*. The Bench said that the right to vote and stand for election for the committee is entirely governed by the statute and a right which has been given by a statute can also be restricted or controlled by a statute. Sections 21-A (2) and 21-C do not go any farther than restricting the rights of members to be members of the committee of the society. These sections do not in any manner affect the fundamental right of a citizen to form an association guaranteed under Article 19 (1) (c) of the Constitution.

25. In the decision *Bidhu Bhusan v. State of West Bengal* AIR 1952 Cal 901 the Calcutta High Court has held that Art. 19 (1) (c) which speaks of the right of a citizen to form Associations or Unions refers to the ordinary right which is enjoyed by all citizens. It has no reference to a right which is conferred by a particular statute to act as members of a body which is the creation of the statute itself.

26. Apart from the Committee being a committee of the co-operative society registered under the Act, we do not think the restriction in question imposed on becoming a member of the Committee for more than two consecutive terms violates the fundamental right to form Associations guaranteed under Art. 19 (1) (c) of the Constitution. It is not the case of the petitioners that they are restricted from forming a co-operative society under the Act, or there was any compulsion on them to form a society under the Act or to become mem-

bers of a society registered under the Act. Simply for the reason that some restrictions are imposed in connection with the working of the Society, that does not amount to curtailing the freedom of forming a society unless the restriction goes to the very root of the matter, which amounts to taking away the freedom to form an Association. In the present case, the restriction is only to become a member of the Committee for a consecutive third term. That means one cannot become a member of the Committee for more than two terms continuously. There is no restriction on becoming member of the Committee once again there after for two more terms. With an interval of one term in between one can become a member of the Committee consecutively for two terms any number of times. This restriction the Legislature in their wisdom thought to be necessary in order to prevent vested rights being established in the Societies which is not very healthy for proper working of the Societies. Therefore, this is not a matter which touches the very right to form a society. We are unable to agree with the argument of Sri P. A. Chowdary that if such a restriction is imposed that would be abridging or taking away the right to form a society or an Association. In this connection, Sri Chowdary placed strong reliance on two decisions of the Supreme Court, *Smt. Damyanti Naranga v. Union of India* AIR 1971 SC 966 and *O. K. Ghosh v. E. X. Joseph* AIR 1963 SC 812. In the first decision referred to above, the validity of the Hindi Sahitya Sammelan Act (1962) was in question. Under Section 4 (4) of the Act apart from persons who are members of the Society, some more members have been added without any option being available to the existing members of the Society to elect or refuse to elect them as members which was the right they possessed under the construction of the Society itself. The Supreme Court said that the Act does not merely regulate the administration of the affairs of the society; what it does is to alter the composition of the Society itself. The result of this change in the composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alternation in the composition of the Association itself clearly interferes with

*reported in (1973-74) 9 Co-op. LJ 85 (Andh Pra)

the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an Association implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an Association. Therefore, the Supreme Court said, on the facts of that case, that the provision of law by which some members have been added to the Society without any option being available to the existing members of the Society to elect or refuse to elect them as members is violative of Art. 19 (1) (c) of the Constitution. Thus, the facts of that case are clearly distinguishable from the facts before us. In the present case, the only restriction imposed under Section 21-C of the Act is to be a member of the Committee continuously for a third term. This is not a provision which restricts the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association. In this case, the Supreme Court referred to their earlier case, which is the second case mentioned above.

27. In the decision *O. K. Ghosh v. E. X. Joseph* AIR 1963 SC 812 rule 4 of the Central Civil Services (Conduct) Rules 1955 prohibiting any form of demonstration by Government servants was considered. The Supreme Court said that it is violative of the Government Servants' rights under Article 19 (1) (a) and (b) of the Constitution. But at the same time the Supreme Court said that in so far as the said rule prohibits a strike, it cannot be struck down for the reason that there is no fundamental right to resort to a strike. The Supreme Court said that though the Government servants can be subjected to rules which are intended to maintain discipline amongst their ranks and to lead to an efficient discharge of their duties, there is no direct or proximate or reasonable connection between the recognition by the Government of the Association and the discipline amongst, and the efficiency of, the members of the said association. Rule 4-A provides that no Government ser-

vant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his condition of service, whereas rule 4-B lays down that no Government servant shall join or continue to be a member of any service association of Govt. servants: (a) which has not, within a period of six months from its formation, obtained the recognition of the Government under the rules prescribed in that behalf, or (b) recognition in respect of which has been refused or withdrawn by the Government under the said Rules. The Supreme Court said that it is not disputed that the fundamental rights guaranteed by Article 19 can be claimed by Government servants. The validity of the impugned rule has to be judged on the basis that the employees are entitled to form Associations or Unions. It is clear that Rule 4-B imposes a restriction on this right. It virtually compels a Government servant to withdraw the membership of the Service Association of Government servants as soon as recognition accorded to the said Association is withdrawn or if, after the Association is formed, no recognition is accorded to it within six months. In other words, the right to form an Association is conditioned by the existence of the recognition of the said Association by the Government. If the Association obtains the recognition and continues to enjoy it, Government servants can become members of the said Association; if the Association does not secure the recognition from the Government or recognition granted to it is withdrawn, Government servants must cease to be the members of the said Association. That is the plain effect of the impugned rule. This restriction cannot be said to be in the interest of Public Order or can it be said to be a reasonable restriction. That is how the Supreme Court has observed. Here also it is a case where the impugned rule in effect amounts to taking away the right guaranteed under Art. 19 (1) (c) of the Constitution to form association.

28. These two cases are clear cases of restricting the right to form an Association guaranteed under Art. 19 (1) (c) of the Constitution. These cases do not help the petitioners to contend that the restriction with which we are concerned in the present case amounts to restricting the right to form an Association guaranteed under Article 19 (1) (c) of the Constitution.

29. Now, we will refer to some of the cases relied upon by the respondents to show that a restriction, like the one imposed under Section 21-C of the Act, by itself would not amount to imposing any restriction on the fundamental right guaranteed under Article 19 (1) (c) of the Constitution to form an Association.

30. In the decision *Tika Ramji v. State of Uttar Pradesh*, AIR 1956 SC 676 under the U. P. Sugarcane (Regulation of Supply and Purchase) Act power was given to the Cane Commissioner under Section 15 for declaring reserved and assigned areas. In pursuance of that power, the Cane Commissioner issued a notification ordering that where not less than 3/4ths of the cane growers of the area of operation of a Cane Growers' Co-operative Society are members of the Society the occupier of the sugar factory for which the area is assigned shall not purchase or enter into agreement to purchase cane grown by a cane grower except through such Cane Growers' Co-operative Society. In that case, the provisions of the Act and the notification issued under it were questioned by a cane grower, who did not join the Cane Growers' Co-operative Society, as infringing his fundamental right guaranteed under Article 19 (1) (c) of the Constitution. The Supreme Court said that there is no compulsion at all on any cane grower to become a member of the Cane Grower's Co-op. Society. Similarly no cane grower is prevented from resigning his membership of a Cane Growers' Co-operative Society. These are voluntary organisations which a cane grower is entitled to join or not at his choice. The cane grower, moreover, is not prevented absolutely from selling his sugarcane. The only person to whom he cannot sell the sugarcane is the owner of the factory, but that does not prevent him from selling his sugarcane to any other person or for any other purpose, viz., the manufacture or production of gur etc., other than sugar. Therefore, it cannot be urged that the provisions of the U. P. Sugarcane (Regulation of Supply and Purchase) Act and the notification are violative of Article 19 (1) (c) of the Constitution.

31. In the decision, *All India Bank Employees' Association v. National Industrial Tribunal*, AIR 1962 SC 171 the question arose whether Section 34-A of the Banking Companies Act, according to which a banking company cannot be compelled to disclose either the quantum of

its secret reserves or their nature, or the provision made for "bad and doubtful debts and for other reasonable and necessary provision" in the proceedings under the Industrial Disputes Act, 1947, when the banking company claims that such information is of confidential nature, contravenes Article 19 (1) (c) of the Constitution. The argument advanced on behalf of the employees in the industrial dispute is that when Art. 19 (1) (c) guarantees the right to form an Association, the guarantee also implies the fulfilment of every object of an Association so formed and therefore there is a constitutional guarantee for every association for effectively achieving the purpose for which it is formed without interference by law except on grounds relevant to the preservation of public order or morality set out in clause (4) of Article 19. The Supreme Court said that they are clearly of opinion that this has to be answered in the negative. An affirmative answer would be contradictory of the scheme underlying the text and the frame of the several fundamental rights which are guaranteed by Part III and particularly by the scheme of seven freedoms guaranteed by sub-clause (a) to (g) of clause (1) of Article 19. With regard to the right guaranteed under Article 19 (1) (c) the Supreme Court said that if an association was formed for the purpose of carrying on business, the right to form it would be governed by sub-clause (c) of clause (1) of Article 19 subject to any law restricting that right conforming to clause (4) of Article 19. As regards its business activities, however, and the achievement of the objects for which it was brought into existence, its rights would be those guaranteed by sub-clause (g) of clause (1) of Article 19; while the property which the association acquires or possesses would be protected by sub-clause (f) of clause (1) of Article 19 subject to legislation within the limits laid down by clause (5) of Article 19. The Supreme Court has also further said that the right guaranteed under Article 19 (1) (c) does not extend to concomitant right to effective collective bargaining or to strike. Therefore, the provision exempting the banking company from disclosing secret reserves or the provision made for bad and doubtful debts in proceedings under the Industrial Disputes Act cannot be said to be a contravention of Article 19 (1) (c) of the Constitution.

32. In the decision *D. A. V. College v. State of Punjab*, (AIR 1971 SC

1737) by a notification issued under Section 5 (1) of the Guru Nanak University, Amritsar Act certain colleges were compulsorily affiliated to the Guru Nanak University. It was contended that the compulsory affiliation of the colleges to the University affects their fundamental right of freedom of association as guaranteed under Article 19 (1) (c) and therefore the notification issued under Section 5 (1) compulsorily affiliating them to the University is bad. The Supreme Court observed like this:

"The right to form an association implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interest. It was sought to be suggested that the compulsory affiliation with the University affects the aims and objects of the Association, as such its freedom is infringed. There is in our view a fallacy in this argument which on earlier occasions had also been repelled. In the *All India Bank Employees' Association v. National Industrial Tribunal*, (AIR 1962 SC 171) it was observed that the right guaranteed under Article 19 (1) (c) does not carry with it a concomitant right that the Associations shall achieve their object such that any interference in such achievement by any law would be unconstitutional unless it could be justified under Article 19 (4) as being in the interests of public order or morality. The right under Article 19 (1) (c) extends inter alia to the formation of an Association or Union."

33. In the decision, *H. Bhagat v. Asst. Registrar, Co-operative Societies, Barh*, AIR 1968 Pat 211 under the rule-making power conferred by Section 66 of the Bihar and Orissa Co-operative Societies Act (6 of 1935) the Government of Bihar made Rules 37, 38 and 39. Rule 37 provided for division of a Co-operative Society if the members of the Registered Co-operative Society resolve to divide themselves into two or more registered Societies. Rule 38 provided for voluntary amalgamation of Societies. Rule 39 however, conferred power on the Registrar of Co-operative Societies to compulsorily amalgamate registered Societies under the Act if he is satisfied that it would be in the interest of those Societies. On the question whether Rule 39 infringes, the fundamental right guaranteed under Article 19 (1) (c) of the Constitution, the Patna High Court said:

"The power of individual members to form association and unions as provided in Article 19 (1) (c) is not taken away. No one is compelled to become a member of the Co-operative Society or to continue as a member of the amalgamated Society if he wishes to resign from such a new Society. Rule 39 deals with the power of the Registrar over the incorporated body, namely, the registered co-operative society, which has a separate legal existence from that of its members as provided in Chapter III of the Act. If a legal corporation is brought into existence by virtue of an Act, any provision in the Act regulating the functions of the Corporation, including the power conferred on appropriate authorities to supervise the functions of the corporation, cannot be said to invade the fundamental right of the members of the corporation."

34. Therefore, so long as there is no impediment to form an Association or to become a member or having become a member to continue or not as a member of Association, no provision of law can be said to infringe the fundamental right guaranteed under Article 19 (1) (c) of the Constitution merely because such a provision seeks to regulate the functioning and administration of the Association in its day to day working and in the process imposes some restrictions, more so when they are conceived in the best interests of the Association. It is only in cases where a provision of law actually amounts to curtailing the right to form an association in the sense mentioned above, that can be said to be violative of the fundamental right guaranteed under Article 19 (1) (c) of the Constitution. As we have already discussed above, the restriction imposed under Section 21-C on any person from becoming a member of the Committee of the Society for more than two consecutive terms cannot be said to amount to curtailing the right or freedom of a person to form an Association. As mentioned above, the Legislature in their wisdom thought that such a restriction is necessary in order to prevent any person from acquiring any vested interest in the Society, which is not a healthy sign for proper and efficient working of the society in the best interests of all its members. Therefore, Section 21-C of the Act is not violative of the fundamental right guaranteed under Article 19 (1) (c) of the Constitution not only for the reason that the right to form a Co-operative Society under a Co-

operative Societies Act is not a fundamental right and it is only a right given under the Act subject to its provisions and the Rules framed thereunder, but also on the ground that the restriction like the one imposed under Section 21-C prohibiting a person from becoming a member of a Managing Committee of a Society consecutively for more than two terms cannot be said to be the one which either in reality or in substance amounts to restricting the right to form an Association guaranteed under it.

35-36. The appellants fail on all the points. Therefore, there are no merits in the writ petition. Accordingly the writ appeal is dismissed with costs. Advocate's fee Rs. 250/-.

LAKSHMAIAH, J.:— I agree with the conclusion of my learned brother, Ramachandra Raju, J., that there are no merits in the Writ Petition and that the Writ Appeal should be dismissed with costs.

37. In view of the representations made by the learned counsel appearing on either side that there is no direct authority on the question raised herein as regards the effect and validity of Section 21-C of the Andhra Pradesh Co-operative Societies Act, 1964, (hereinafter referred to merely as 'the Act'), I propose giving my own reasons with respect to that aspect of the matter.

38. The relevant facts are given in a succinct form in the judgment of my learned brother, as not to need a detailed reiteration.

39. The extraordinary jurisdiction of this court under Article 226 of the Constitution is invoked by the 1st petitioner seeking the issuance of a writ of certiorari for quashing the order dated June 19, 1975, of the District Co-operative Officer-cum-Election Officer. The West Godavari Co-operative Sugars Limited Surappagudem, West Godavari District the 1st respondent, rejecting his nomination.

40-41. The 1st respondent as the Election Officer issued a notice to all the members calling for a general body meeting of the West Godavari Co-operative Sugars Limited, Surappagudem, registered under the Co-operative Societies Act to elect the Managing Committee members on June 26, 1975. Pursuant to the said notice, the 1st petitioner filed his nomination to the post of the member of the committee to be elected from among the members. On an objection taken by

the 3rd respondent, the petitioner's nomination was rejected by the 1st respondent, the Election Officer on 19-3-1975. The Election Officer found that the petitioner held office as a member of the nominated committee of the Society from 5-1-1958 to 24-11-1961 and as a member of the elected committee of the said Society from 1-7-1972 to 30-6-1975 and considering those two terms as consecutive to each other held that the petitioner is ineligible for being chosen as a member of the Committee for a third term in continuation under Section 21C of the Act. Seeking the quashing of that decision, the petitioner filed W. P. No. 3308 of 1975 which was dismissed in limine by my learned brother, Chinnappa Reddi, J., on the ground that the 1st petitioner has another remedy to question the election including the rejection of the nomination paper by way of an election petition. Aggrieved by that decision the petitioner preferred an appeal W. A. No. 483/75 and a Division Bench before which the matter came up for disposal directed the appeal to be posted before a Full Bench. That is how this matter has come up before us.

42. Sri P. A. Chowdary, learned counsel appearing for the appellants contended before the Division Bench as well as before us that on a proper interpretation of Section 21-C of the Act, it is only the person who has held office as a member of the elected committee for two consecutive terms that is rendered ineligible for being chosen as a member of the Committee for the third term and the petitioner was not a member of an elected committee at any time prior to 1972. Therefore, the inhibition embodied in Section 21-C does not apply to a case where a person is a member of a nominated committee. The learned counsel appearing on the other side placing reliance upon a decision of the Division Bench of this court dated 18-11-1970 in W. P. No. 4066 of 1970 and batch contended that Section 21-C applies both to elected and nominated members of the Committee. The Division Bench seemed to have inclined to doubt the correctness of that decision and directed the matter to be posted before the Full Bench.

43. The point that arises for determination is whether the expression "committee" occurring in Section 21-C of the Andhra Pradesh Co-operative Societies Act, 1964 refers to an elected committee as contended by the appellants ;

or to a nominated committee also as contended for by the respondents.

44. As the controversy is centred around the effect and the meaning of the aforesaid section we shall read the same in so far as it is material:

"21-C. Restriction on consecutive membership in committee:

A person who holds or who has held office as a member of the committee for two consecutive terms shall not be eligible for being chosen as a member of the committee for a third term in continuation."

Explanation: For purposes of this section:

(i) Where a period, during which there is no elected committee, intervenes between two terms of office of the committee or of any of its members, those two terms shall be regarded as being consecutive to each other.

(ii) A member shall be deemed to hold office for a term, notwithstanding that he has not held the office for a full term."

45. The expression "committee" as occurring in Section 21-C and as defined in Section 2 (1) of the Act do not throw any light upon the question raised in this case viz., whether that expression in Section 21-C refers to an elected committee only or whether it refers to a nominated committee also. The expression therefore is susceptible of bearing more than one construction. The dubiety or ambiguity of that expression necessitates finding out the intention or the object or policy of the framers of the enactment or the reasons for the enactment.

46. Section 21-C was inserted by way of an amendment by Section 5 of Act 10 of 1970. The Statement of Objects and Reasons in so far as it is material for the bill which became law may be read now:

"At the Conference of the Chief Minister and Ministers of the States in charge of Co-operation held at Madras on 12th June, 1968, certain recommendations were made for amending the Co-operative Societies Act in force in the States so as to make provision for the following, among other matters, namely for curbing the growth of vested interest in co-operative Societies, imposing restriction on holding membership in the Committees of Co-operative Societies consecutively for more than two terms."

It is this that is reflected in Section 5 of Act 10 of 1970. Therefore, if the Objects

and Reasons for the introduction of this Bill which became law namely that a view to curb the growth of vested interests in co-operative societies, it is enough to impose restrictions on holding membership in the committee of Co-operative Societies consecutively for more than two terms, is to be borne in mind while interpreting Section 21-C as reflecting the intention of the Legislature, there is no difficulty in construing the expression "committee" as referring not merely to an elected committee but also to a nominated one as well.

47. Articles 245 and 246 read with Entry 32 in List II State List of the Seventh Schedule appended to the Constitution empower the State Legislature to make law with respect to the subject matter of "Co-operative Societies". The executive power of the State is vested in the Governor under Article 154 and rendered exercisable by him either directly or through officers subordinate to him in accordance with the Constitution. The executive power of the State under Article 162 extends to the matter with respect to which the Legislature of the State has power to make laws. The Council of Ministers with the Chief Minister at the head shall have to aid and advise the Governor in the exercise of his functions (Article 163). The same pattern obtains in the case of Union also. A parliamentary system of Government with a cabinet is thus introduced in India through the aforesaid provisions.

48. The crux of the cabinet Government was graphically described by Bagihot as early as in the year 1967 in his book "The English Constitution" thus:

"The efficient secret of the English Constitution may be described as the close upon, the nearly complete fusion of the executive and legislative powers. A cabinet is a combining committee a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the state. In its origin it belongs to the one, in its functions it belongs to the other."

49. Mukherjea, C. J., in *Ram Jawaya v. State of Punjab*, 1955-2 SCR 225 = (AIR 1955 SC 549) at page 236 of SCR) = (at p. 556 of AIR) observed thus:

"Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary res-

ponsibility for the formulation of governmental policy and its transmission into law (emphasis supplied) though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."

At page 237:

"..... The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

50. What is therefore manifest is that the responsibility for the formulation of governmental policy and its transmission into law including the initiation of legislation are squarely placed upon the executive under our Constitution and the Cabinet concentrates in itself the virtual control of both legislative and executive functions. The initiation of legislation takes in within its fold the introducing of bills into the legislature by the executive. Therefore, the Statement of Objects and Reasons for the introduction of the bill furnishes the court with reliable extrinsic evidence as regards the purpose or object or reason for an Act.

51. In *Kochuni v. States of Madras and Kerala*, (AIR 1960 SC 1080) Justice Subba Rao (as he then was) resorted to the Objects and Reasons of the Constitution (Fourth Amendment) Bill to conclude that the object of the insertion of Article 21-A was to secure agrarian reform and that expression used in that Article should be interpreted with this object in view. The learned Judge, after referring to the holding of the Supreme Court in *Aswani Kumar Ghose v. Arbinda Bose*, 1953 SCR 1 = (AIR 1952 SC 369) held:

"That the Statement of Objects and Reasons is not admissible as an aid to the construction of a statute. But we are referring to it only for the limited purpose of ascertaining the conditions prevailing at the time the bill was introduced and

the purpose for which the amendment was made."

Therefore, the Objects and Reasons of a bill can be looked into for the purpose of ascertaining the purpose for which an amendment was made.

51-A. In *Express Newspaper Ltd. v. Union of India*, AIR 1958 SC 578 it was observed by Justice Bhagwati with regard to the Statement of Objects and Reasons attached to a bill thus:

"It is only when the terms of the statute are ambiguous or vague that resort may be had to them for the purpose of arriving at the true intention of the Legislature."

52. In *Shiv Narayan v. State of Madras*, (AIR 1967 SC 986) Justice Ramaswami speaking for the Supreme Court observed with respect to a rule of interpretation thus:—

"It is a sound rule of interpretation that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute. In construing therefore, Section 2 (c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the statute, the reason which led to its being passed, the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief. That was the rule laid down in *Heydon's case* (1584) 3 WR 16 = (76 ER 637), which was accepted by this court in *Bengal Immunity Co. Ltd. v. State of Bihar*, (1955) 2 SCR 603 = (AIR 1955 SC 661)."

53. In *Commr. of Income-tax v. Sodra Devi*, AIR 1957 SC 832, Justice Bhagwati referring to the ambiguity of the term 'individual' in Section 16 (3) (a) of the Income-tax Act, 1922 observed thus:

"In order to resolve this ambiguity therefore we must by necessity have resort to the state of the law before the enactment of the provisions; the mischief and defect for which the law did not provide the remedy which the legislature resolved and appointed to cure the defect and the true reason of the remedy within the meaning of the authorities referred to above."

54. Referring to the recommendations of the Enquiry Committee His Lordship proceeded to observe at page 839:

"These recommendations were duly considered by the Government and

as a result thereof. Act IV of 1937 was enacted introducing Section 16 (3) in the Act. What was intended to be done by the Legislature in enacting this amendment may be gleaned to a certain extent from the Statement of Objects and Reasons appended to the Bill which eventually became the amending Act. Though it is not legitimate to refer to the Statements of Objects and Reasons as an aid to the construction or for ascertaining the meaning of any particular word used in the Act or Statute (See *Aswani Kumar Ghose v. Arabinda Bose*, 1953 SCR 1 = (AIR 1952 SC 369)); nevertheless this Court in *State of West Bengal v. Subodh Gopal Bose*, 1954 SCR 587 at p. 628 = (AIR 1954 SC 92 at p. 104) referred to the same for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of evil which he sought to remedy."

55. Chief Justice Gajendragadkar, observed in *Sheikh Gulfan v. Sant Kumar*, AIR 1965 SC 1839 thus:

"If two constructions are reasonably possible, the Court would be justified in preferring that construction which helps to carry out the beneficent purpose of the Act."

56. Blackstone in his *Commentaries on the Laws of England* in Volume I at page 61 had thus to say:

"The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it."

57. Francis J. Mc. Caffray in his "Statutory Construction" said at page 13:

"There is little difference, if any between spirit and reason and the purpose of the law."

58. Maxwell on "The Interpretation of Statutes" (Twelfth (1969) Edition) at page 86 is of the view that the object or policy of the legislation often affords the answer to problems arising from ambiguities which it contains.

59. In *American Jurisprudence* (Volume 50) at page 279 Paragraph 298 deals with the subject-matter of 'Policy' thus:

"In construing a law of doubtful meaning or application, the policy which induced its enactment, or which was designed to be promoted thereby, is a proper subject for consideration where such policy is clearly apparent or can be le-

gitimately ascertained. Indeed, the proper course in all cases is to adopt that sense of the words which promotes in the fullest manner the policy of the legislature in the enactment of the law, and to avoid a construction which would alter or defeat that policy, where the construction in harmony with the policy is reasonably consistent with the language used. Even the literal meaning of the terms employed should not be suffered to defeat the manifest policy intended to be promoted."

60. When the intention of the framers of the Act is not discernible through the ascertainment of the meaning of the words employed by them through interpretative process, resort is to be had to the process of construction. The distinction between the construction and interpretation is explained by Earl T. Crawford in the book "Construction of Statutes" at page 240 thus:—

"Strictly speaking, construction and interpretation are not the same, although the two terms are often used interchangeably. Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used. Thus the Court will resort to interpretation when it endeavours to ascertain the meaning of a word found in a statute, which when considered with the other words in the Statute, may reveal a meaning different from that apparent when the word is considered abstractly or when given its usual meaning. But when the court goes beyond the language of the statute and seeks the assistance of extrinsic aids in order to determine whether a given case falls within the statute, it resorts to construction. The process to be used in any given case will depend upon the nature of the problem presented. And, as is apparent, both processes may be used in seeking the legislative intent in a given statute.

If the legislative intent is not clear after the completion of interpretation, then the court will proceed to subject the statute to construction." At page 291 of the same volume under the heading "The spirit and reason of the law" the learned author observed thus:

"Closely related to the rule which permits the court to consider the effect of the statute, is the rule which allows consideration of the spirit and reason of the

law. The effect of a suggested construction indicates, as we shall see later, whether it is in accord with the actual intent of the legislature. Actually, there seems to be but little distinction between the spirit and reason of the law and the law's purpose, or scope. While the purpose of a statute is the reason for its enactment, the spirit or reason of the law is, perhaps strictly speaking more closely connected to the legislative intention.

Since the intention of the legislature constitutes the law of its enactments, it is the intention rather than the literal meaning of the statute which controls or as is generally said the spirit of the statute will prevail over strict letter. Consequently, cases which do not come within the strict letter of the statute, if within the spirit, will fall within the scope of the statute, and cases within the letter of the statute, if without its spirit, will not come within its operation. But this principle is not applicable if the statute is clear and unambiguous, so that there is no doubt concerning the legislative intent."

Travaux Préparatoires — The Preparatory Material of an Act.

61-62. The rigor of an exclusively literal interpretation of a statute is sought to be mellowed down by having resort to the objects of a statute in the light of the surrounding circumstances in which it was enacted through the application of what has come to be known as the "Mischief Rule" propounded in 1584 in Heydon's case, (3 Co. Rep. 7-A) in the following words:

"..... That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered.

(1st) What was the common law before the making of the Act.

(2nd) What was the mischief and defect for which the common law did not provide.

(3rd) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth, and;

(4th) The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy according to the true intent of the makers, pro bono publico." This approach clearly contemplates "a wide enquiry into the policy and purpose behind the statute.

63. Lord Denning, M. R., in Engineering Industry Training Board v. Samuel Talbot (Engineers) Ltd., (1969-1 All ER 480) said:

"We no longer construe acts of Parliament according to their literal meaning. We construe them according to their object and intent."

The propositions in Heydon's case might have been adequate to deal with the limited kind of legislation that then existed. They need to be broadened and adapted to meet the conditions of today as our Supreme Court did in cases mentioned above.

64. The judicial committee of the Privy Council referred to extraneous matter in British Coal Corporation v. R., 1935 AC 500 = (AIR 1935 PC 158) when they examined the resolution of the Commonwealth Conference in order to interpret the Statute of Westminster, 1931. In Edward v. A. G. for Canada, (1969) 2 AC 413 a report in Hansard of a Parliamentary debate was consulted. In Dullewe v. Dullewe, (1930 AC 123) a report of the Commission on the mischief to be remedied was consulted.

65. The observations of Lord Blackburn in Riverwear Commrs. v. Adamson, (1877) 2 AC 743 are very instructive:

"In all cases, the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used and what was the object appearing from those circumstances which the person using them had in view for the meaning of words varies, according to the circumstances with respect to which they were used."

66. Justice Venkatarama Iyer, said in R. M. D. C. v. Union of India, (AIR 1957 SC 628):

"Now, when a question arises as to the interpretation to be put on an enactment, what the court has to do so is to ascertain 'the intent of them that make it' and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. The literal construction has but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact

conception of the aim, scope and object of the whole Act to decide the true scope of the present Act, therefore, we must have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature such as the history of the legislation and the purposes thereof, the mischief which it intended to suppress."

67. The deep-rooted common law tradition of judicial hostility to legislative innovation resulting in literal interpretation of a statute has been admirably brought out by Dean Roscoe Pound in a brilliant article "Common Law and Legislation" published in XXI Harvard Law Review at page 383. The following passage at page 384 is very instructive:

"It may be well, however, for judges and lawyers to remember that there is coming to be a science of legislation and that modern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed upon all important details, and hearings before legislative committees. It may be well to remember also that while bench and bar are near weary of pointing out the deficiencies of legislation, to others the deficiencies of judge-made law are no less apparent. To economists and sociologists, judicial attempts to force Benthamite conceptions of freedom of contract and common law conceptions of individualism upon the public of today are no less amusing or even irritating than legislative attempts to do away with or get away from these conceptions are to bench and bar."

68. Julius Stone in his "Legal System and Lawyers" Reasonings at page 351 said:

"In principle, the court should be free to inform itself concerning the social context of the problems involved from all reliable sources. Such sources could be of various kinds; but whatever the limits of the range, it is difficult to see in principle why British Courts should exclude rigidly and at wholesale all reference whatsoever to the legislative travaux preparatoires. Moreover, this is the last thing that would be expected from a theory of interpretation which claims to be centred on the intention of the legislator. Yet we are confronted by the rigid British canon (not followed in the United States) or on the Continent, that

travaux preparatoires however clear and decisive on the point at issue, are never to be consulted in aid of interpretation, a canon which the Australian High Court has applied on constitutional issues of major importance."

The learned author in his classic work "The Province and Function of Law" at page 200 said:

"But the common lawyer, despite the growing importance of legislation, has not acquired the techniques of handling legislative materials in a similarly creative manner to that in which he handles case law. Our Judges do not yet argue by analogy from statutes as they do from cases."

The "Inarticulate Major Premise".

69. Holmes was of the view that social policy is the "Inarticulate Major Premise" for Judicial decision.

"Sociological jurisprudence insists, as a matter of value that the social advantage of the rule is its major test, since the welfare of society is the general aim of the law. The judge applying this test depends not only upon his impression of public opinion or the "felt necessities of the time", but also upon the widest possible fund of experience."

(From "The Judicial Process and Social Change" by Davis and Foster at page 129).

Sociological Briefs — Brandeis Brief:

"In the United States, the "Brandeis brief" has had great vogue coming into prominence after being used in Muller v. Oregon, (1908) 208 US 412. The Brandeis technique of marshalling social and economic data in the brief presented to the Court in argument to support the constitutionality of a statute was addressed to "Judicial notice" Brewster, J., who spoke for the Court in that case, referring to the brief filed by Brandeis, stated that we take judicial cognizance of all matters of general knowledge."

This Brandeis brief compilation of data is designed to indicate the actual or probable social effects of legislation and it was recognised as a valid aid to judicial review of legislation. The principle underlying in that though propounded in the context of interpretation of a constitution can as well be extended to the interpretation of a statute.

70. The propositions deducible from the foregoing discussion may now be recapitulated.

(1) The Common Law canons of interpretation in the back-ground of tra-

ditional judicial hostility towards legislative innovations with their emphasis on individualism resulting in literal interpretation of statutes are hardly sufficient without a corresponding broadening of their basis to meet the needs and challenges of modern legislation which registers a shift in emphasis away from individualism especially when it is utilised as an instrument of social control.

(2) Despite the growing importance of legislation as an instrument of social control, the common lawyer has not acquired, (not to speak of not having perfected) the art and technique of handling legislative materials in the same creative manner as he does with case law. We have yet to learn to argue by analogy from statutes as we do from cases.

(3) It is the intention of the legislature that constitutes law of its enactment. When that intention is not capable of being ascertained through intrinsic evidence by the ascertainment of the meaning of the expressions employed in the statute, through the interpretative process, resort should necessarily be had to extrinsic evidence through the process of construction. That necessitates a reference to *Travaux Préparatoires* — the preparatory material of an Act, including "Objects and Reasons".

(4) The responsibility for the formulation of Governmental policy and its transmission into law including the initiation of legislation is squarely placed upon the executive in our Constitution and that initiation of Legislation consists in introducing bills in the Legislature by the Executive, with a statement of objects and reasons. No source is more authentic or authoritative for the ascertainment of the intention of the Legislature than that.

(5) The State has been utilising the device and framework of Co-operative Societies for ushering in some of the welfare functions. Even without the assistance of "objects and reasons" I could have come to the conclusion that the intention of the Legislature in this amendatory legislation underlying Section 21-C of the Act is only to curb the growth of vested interests in Co-operative Societies. That intention of the Legislature can be given effect to by the judiciary only by construing the expression "Committee" in Section 21-C of the Act as referring to not only an elected committee but also to a nominated committee of the Co-opera-

tive Society. Sociological approach towards legislative problems emphasises the need to secure the implementation of the social policy through this type of construction of statutes.

71. I may at this stage dispose of a point raised by Sri P. A. Chowdary that the committee of which the 1st petitioner was a member during the period from the year 1957 to 1962 was not a validly nominated one by the Registrar.

72. The Election Officer by the impugned order found under point No. 1 after perusal of the minute book of the Society that the petitioner was one of the members of the nominated committee of the society from 5-1-1958 to 24-11-1961. There is a remedy by way of an election petition available to the petitioner as against the impugned order rejecting his nomination. That is the proper forum to canvas about the existence or the non-existence of the Committee during that period. There is no material before me to express any opinion on that aspect and the Election Officer based his conclusion on the basis of the contents of the minutes book of the society. Moreover the question of interpreting and applying Section 21-C for which purpose this Full Bench was constituted is predicated on the assumption that there was a nominated committee of the Society in existence between 5-1-1958 to 24-11-1961 as found by the Election Officer and, as such, I do not consider it to be proper to go behind that finding of the Election Officer.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 361

MADHAVA RAO, J.

S. Rajyalakshmi, Appellant v. Smt. S. Sitamahalakshmi, Respondent.

A. A. O. No. 273 of 1975, D/- 1-4-1976.*

(A) Succession Act (1925), Section 214 — Applicability — Execution application by Legal Representative — Succession Certificate necessary if "debt" is to be recovered — Execution for recovery of cost alone — Succession certificate is not necessary.

*(Against order of Chief Judge, City Civil Court, Hyderabad, in E. P. No. 5 of 1975, D/- 22-4-1975.)

GT/HT/C235/76/GGM

If the representative is not a person on whom the interest has devolved by survivorship, it will be necessary for him to obtain a succession certificate to recover a debt in execution proceedings under Section 214 (1) (b) if the execution petition itself is filed by him. Therefore in a case where an execution application is filed by the legal representative of the deceased decree-holder, succession certificate would be necessary when a "debt" is sought to be recovered. But when the execution is only for recovery of costs no succession certificate is essential. Section 214 (1) (b) does not apply in such a case. AIR 1973 Andh Pra 38 and AIR 1964 Cal 42, Foll.; AIR 1961 Punj 164 and AIR 1961 Mad 438, Dist.; (1969) 2 Andh WR 479 and AIR 1963 Andh Pra 438 and AIR 1963 Andh Pra 69, Ref. (Paras 6 & 5)

Cases Referred: Chronological Paras
 AIR 1973 Andh Pra 38 = (1973) 1 Andh WR 118 6
 (1969) 2 Andh WR 479 4
 AIR 1964 Cal 42 = 67 Cal WN 601 6
 AIR 1963 Andh Pra 69 = (1962) 2 Andh WR 199 4
 AIR 1963 Andh Pra 438 = (1963) 2 Andh WR 245 4
 AIR 1961 Mad 438 = 74 Mad LW 145 5
 AIR 1961 Punj 164 = ILR (1960) 1 Punj 412 5

G. Balaparneswarirao and A. Poor-nachandra Rao, for Appellant; T. H. B. Chalapathi, for Respondent.

JUDGMENT:— This appeal is directed against the order passed by the Chief Judge, City Civil Court, Hyderabad dated 22nd day of April, 1975, overruling the objections raised by the judgment-debtor and directing the decree-holders to take further proceedings in the execution petition.

2. It was contended by the learned Counsel for the appellant that without obtaining a succession certificate, the respondent could not proceed with the execution of the decree. To understand the above contention, it is necessary to state the brief facts which are as under:

3. The respondent filed O. S. No. 6/1973 before the Chief Judge, City Civil Court Hyderabad, for partition of the suit schedule properties. A preliminary decree was passed on 31-7-1973 and costs were awarded to the plaintiff against the 1st defendant. On 5-3-1974 the sole plaintiff died and his legal representatives were brought on record on 2-9-1974.

Thereafter, E. P. No. 5/1975 was filed on 9-3-1975. The judgment-debtor filed a counter-affidavit in E. P. No. 5/75 stating therein that the decree-holder died in 1974 after the passing of the preliminary decree. The legal representative, i.e., the present petitioner, cannot execute the decree unless he obtains a probate or a succession certificate from a competent Court. Therefore, the execution petition is not sustainable and is liable to be dismissed in limine. He also pleaded payment of some amounts, with which we are not now concerned.

4. The lower Court passed the following order which is very short.

"This E. P. is filed to execute a decree for costs passed against the J. D. originally in favour of Smt. Sitamahalaxmi her mother-in-law. Smt. Sithamahalaxmi is since dead, her second son was brought on record as the legal representative in I. A. No. 206/74 on the basis of the will executed in favour of her second son. There is therefore no force in the contention that any succession certificate is required. I do not consider (1969) 2 Andh WR 479 as applicable to the facts of this case. The payments pleaded are uncertified and they cannot answer the claim made in this E. P. in any manner when the payments are not got certified within time. Objections raised in the counter are overruled. Attach by pro-order and notice to garnishee 24-6-1975."

The learned counsel for the appellant contended that unless a succession certificate is produced the respondent cannot proceed with the execution petition. The lower court has not given any cogent reasons for overruling the objections raised by him. The order of the lower court already extracted only stated that as the second son was brought on record as a legal representative, it was held that no succession certificate is required. What is contended by the Counsel for the appellant is that if the second son is brought on record as a legal representative in O. S. Proceedings, that itself is not sufficient if the L. R. wants to file the execution petition against the appellant. It is necessary that he must obtain and file a succession certificate in I. C. P. He relied upon Kotipalli Apparao v. Jakkam Venkanna, (1969) 2 Andh WR 479 wherein it was held by a Bench of this Court that "Having regard to the aforesaid interpretation of the provisions of Section 214 (1) (b) of the Indian Succession Act

by a Bench of this Court, we have to agree with the Court below that it is not open to the petitioner to apply for execution of the decree obtained by his father without obtaining and producing a succession certificate as he claims by succession and not by survivorship." Their Lordships were pleased to hold that "unless a succession certificate is produced, the execution proceedings should not be taken by a person who succeeded to the property on the basis of the will executed by the deceased decree-holder". He further relied upon *K. Laxmi Narayan v. V. Gopalaswami*, (AIR 1963 Andh Pra 438) where Kumarayya, J. (as he then was) was pleased to hold that Section 214 would not apply to a case where the devolution of interest is by survivorship, i.e., if the devolution was not by survivorship, the provisions of Section 214 will be adopted and a succession certificate would be necessary. In the above case the learned Judge was pleased to hold that when the devolution of interest was not by survivorship, under Section 214 (1) (a), no decree could be passed unless a succession certificate was produced. He also further referred to *Akula Mabukhan v. Rajamma*, (AIR 1963 Andh Pra 69) for the proposition that if the execution petition is already filed by the decree-holder that execution petition could be continued by the legal representative without producing a succession certificate; but once the execution petition is filed by the legal representative himself, the succession certificate cannot be dispensed with. Therefore, the lower court erred in holding that no succession certificate is required. The learned counsel for the appellant further contended that the debt contemplated under Section 214 (1) (b) includes costs awarded also.

5. Section 214 (1) (b) reads as under:

"No court shall

(a) xx xx xx

(b) proceed upon an application of a person claiming to be so entitled to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming of—

(i) xx xx xx

(ii) xx xx xx

(iii) a succession certificate granted under Part X and having the debt mentioned therein."

Sub-section (2) defines the word 'debt' as except rent, revenue or profits payable in respect of land used for agricultural purposes. Thus the learned counsel for the petitioner contended that except the rent, revenue or profits payable in respect of the land used for agricultural purposes all the amounts due to be recovered under the decree would be included in the word 'debt' and, therefore, even the costs are included in the debt. Therefore, if the costs are sought to be recovered by execution of the decree, it is necessary that a succession certificate must be obtained if the interest is not devolved upon him as a survivor. He strongly relied for the meaning of 'debt' on *Muthupalaniapa Chettiar v. Alagamai Achi*, (AIR 1961 Mad 438) and *Gian Chand Tandon v. Pt. Bahadar Singh*, (AIR 1961 Punj 164). It can be straightway observed that there can be no dispute that if the legal representative is not a person on whom the interest has devolved by survivorship, it will be necessary for him to obtain a succession certificate to recover a debt in execution proceedings under Section 214 (1) (b) if the E. P. itself is filed by him. On the other hand, the counsel for the respondent contended that the debt mentioned in Section 214 (1) (b) is a debt prior to the obtaining of the decree or order but it will not include costs which are awarded by the decree itself. Therefore, the controversy is whether in the instant case, which is only meant for recovery of the costs awarded by the decree, the provisions of Section 214 of the Indian Succession Act would be attracted or not. The learned counsel, as pointed out, referring to sub-section (ii) of Section 214 of the Act, contended that except the rent, revenue or profits payable in respect of the land used for agricultural purposes, all other things were included in the debt including the costs payable under the decree. In *Muthupalaniapa Chettiar v. Alagamai Achi*, Rajamannar, Chief Justice, speaking for the Bench, was pleased to discuss whether the suit was filed for the recovery of the amount constituting an occupation debt as defined in the Malayan Ordinance 42 of 1948. After a careful consideration, their Lordships came to the conclusion that the amount recoverable there fell within the definition of a "Debt". In that case, the money was paid to the first defendant who was not entitled to it under the mistaken impression that the money was due to her. Thus there was an obligation on her part to refund the money. As the liability must

be deemed to have arisen on the date of the payment itself, this application to refund was certainly incorporated during the occupation period because the payment was between the two dates 15-3-1942 and 5-9-1943 as contemplated under the Ordinance. It was further held by their Lordships that "The term 'debt' no doubt, is commonly used to describe liabilities which have an origin in contract; but we see no reason why we should restrict the connotation of that term to such liabilities only. Anything due and payable is a debt. On this point, therefore, we agree with the learned trial Judge that no amount can be recovered by the plaintiff from the first defendant even assuming that the first defendant was liable to repay the amount paid to her agent". Therefore, their Lordships were pleased to hold that the amount paid under mistake is also debt, and the person receiving is under an obligation to refund the amount and, therefore, it becomes a debt. The decision does not answer the point raised in this case, viz., whether the costs decreed by the Court would amount to a debt under Section 214 of the Act. The learned counsel for the appellant further relied upon *Gian Chand Tandon v. Pt. Bahadar Singh*, AIR 1961 Punj 164. There also, the point for discussion was whether a displaced person could claim the benefit of Section 31 of the Displaced Persons (Debts Adjustment) Act and the debt which led to the decree must be a debt as defined in Section 2 (5) of the Act. In that case, the word "debt" is used in its restricted sense as defined in Section 2 (6). That is, where the debt was incurred by the displaced person since he came to India after the partition, the judgment-debtor there could not claim protection under Section 31 (3) of the Act. That is, if the debt were to be incurred before he came to India, that debt was prior and not the debt obtained after his coming to India. A restricted meaning of the word "debt" was given there. It also postulated that the decree obtained for the debt must be for the debt prior to coming to India. Thus this judgment is not helpful to the appellant.

6. The learned Counsel for the respondent on the other hand referred to *Sm. Tarak Dasi v. Batta Krishna Roy*, AIR 1964 Cal 42 and *V. T. V. Ramanuja Swamy (died) v. Sri Ram Gnaneswar*, 1973-1 Andh WR 118 = (AIR 1973 Andh Pra 38). In *Sm. Tarak Dasi v. Batta*

Krishna Roy, AIR 1964 Cal 42 a Bench of the Calcutta High Court was pleased to hold that the decree for costs is not a decree for debt. Therefore, no succession certificate is necessary to be obtained under Section 214 (1) (b) of the Act. A similar view was taken by *Chinnappa Reddy, J.* in *V. T. V. Ramanuja Swamy v. Sri Ram Gnaneswar*, (1973) 1 Andh WR 118 = (AIR 1973 Andh Pra 38). In that case, the point raised was that succession certificate was necessary only when a debt was sought to be recovered; but when the decree itself was only for costs, it was not a debt and no succession certificate was necessary. The learned Judge also referred to *Sm. Tarak Dasi v. Batta Krishna Roy*, and following the judgment in that case, was pleased to hold that no succession certificate is required for recovery of the costs awarded under the decree. In this case, also, as pointed out, the respondent has filed the execution petition to recover costs awarded under the decree. Therefore, Section 214 (1) (b) of the Act is not attracted and no succession certificate need be produced for the execution of the decree.

7. The learned counsel for the respondent further contended that the respondent was already brought on record as the legal representative after the preliminary decree was passed pending the final decree proceedings. Therefore, it is not necessary that he must obtain a succession certificate when he was already brought on record as a legal representative. This is altogether a different point. To be brought on record as a legal representative after the preliminary decree is passed and before passing of the final decree is not relevant. Whether a final decree could be passed without obtaining a succession certificate is not a point before me now. Here the execution petition is filed pending the passing of the final decree for the recovery of the costs awarded by the decree. If it were to be a debt for which a decree is passed, a succession certificate was necessary to be obtained and produced. In this case the execution petition is filed to recover the costs awarded under the decree. Therefore, the point raised has no substance and is not relevant for the purpose of this appeal. I see no reason to interfere with the order of the lower Court. In view of the fact that no succession certificate is necessary to be obtained under Section 214 (1) (b) of the Act to execute the decree for costs, this appeal is dismissed. No order as to costs.

8. The appellant is directed to pay Rs. 600/- within three months from to-day and the remaining amount within two months thereafter.

Appeal dismissed.

AIR 1976 ANDHRA PRADESH 365

VENKATRAMA SASTRY, J.

Alluri Bala Satya Krishna Kumari and another, Appellants v. Alluri Varalakshmi and others, Respondents.

Second Appeal No. 298 of 1974, D/- 21-11-1975.*

(A) Hindu Adoptions and Maintenance Act (1956), Sections 20, 28 — Illegitimate children — Claim for maintenance — Applicability of Section 39, T. P. Act. (Transfer of Property Act (1882), Section 39).

Under Section 20, a Hindu, be he a male or female, is bound to maintain his legitimate or illegitimate children, so long as they are minors. Thus under the new law also the liability of a father to maintain his children irrespective of possession of the property is still there, as it arises out of relationship. If the father has got property necessarily the maintenance has to come out of the property. The right of legitimate or illegitimate children of a person, who come within the purview of Section 20 of the Act, is a personal right vesting in them, with a corresponding legal obligation on the person bound to maintain them as a personal obligation. There is no provision in the Act that such a right can be enforced by a charge over the property of a Hindu, who is liable for the same. The reason seems to be obvious. Whenever such a person has a right to receive maintenance from a person, who is legally bound to maintain him and that person has immoveable property, the general law enacted in Section 39 of the T. P. Act applies to such cases. There is nothing in the Act excluding the applicability of Section 39 of the T. P. Act to such cases. Section 4 of the Act saves the applicability of Section 39, T. P. Act to such cases. Section 28 of the Act has operation only in regard to the dependants while Section 39 T. P. Act applies to others. Both of them operate in different fields and there is no conflict between those sec-

tions. As there is nothing in the Act excluding the application of Section 39 of the Transfer of Property Act to such cases, the Court cannot refuse to create a charge. (Paras 12, 14, 20)

Cases Referred: Chronological Paras
AIR 1969 Delhi 235 = 1969 Cri LJ 965 20
AIR 1968 Mys 270 = (1968) 1 Mys LJ 277 19

AIR 1968 Mys 288 = 12 Law Rep 580 19
(1963) 2 Mad LJ 555 = 76 Mad LW 755 19

AIR 1958 Andh Pra 396 = (1958) 1 Andh WR 46 16

AIR 1957 Andh Pra 710 = (1956) 2 Andh WR 1021 15

M. Jagannadharao, for Appellants;
T. H. B. Chalapathi Rao, for Respondents.

JUDGMENT:— Plaintiffs are the appellants in this second appeal, which arises out of their suit for maintenance instituted against the respondents herein and their putative father Alluri Ramachandra Venkata Krishna Rao, impleaded as the first defendant in the suit, in the following circumstances:

2. Plaintiffs claimed to be the illegitimate sons of the first defendant, having been born respectively on 10-6-1960 and 26-8-1963. Their mother was the permanent concubine of the first defendant. Second defendant is the wife of the first defendant while the other defendants are their children. After the birth of the first plaintiff, the second defendant and the father of the first defendant, made the first defendant to execute a settlement deed on 30-6-1961 (Ex. B-9) in favour of defendants 3 to 7 in respect of plaint A schedule properties and Item 1 of the B Schedule. The first defendant alone continued in possession of these properties. He executed an agreement on 4-3-1964 agreeing to give 80 cents of the land to the plaintiff's mother and also pay maintenance to the plaintiffs at the rate of Rs. 50/- each and to provide for their education. Since May, 1967, the first defendant stopped visiting the plaintiffs' mother. He executed again another nominal gift deed in favour of the 8th defendant on 5-7-1967 (Ex. B-8) in respect of plaint B Schedule property in order to defeat and delay the claims of the plaintiffs for maintenance. Plaintiffs claimed that the first defendant is bound to maintain them, who are his illegitimate children. The first defendant's family gets an annual income of Rs. 40,000/-. Hence each of the plaintiffs claims maintenance at the rate of Rs. 75/- per month

*(Against decree of Sub. J., Kovvur, in Appeal Suit No. 58 of 1971.)

and at least Rs. 200/- per annum towards residence.

3. Defendants 3 and 4 contested the suit stating that the settlement deeds are true and valid and are binding on the plaintiffs and that they (defendants) are not liable for the suit claim. They also denied that the plaintiffs' mother was the exclusive concubine of the first defendant and the plaintiffs were born to them. The income on the properties was not Rs. 40,000/- per year as alleged by the plaintiffs, but only Rs. 3,500/- to Rs. 4,000/- per year. The other defendants filed a separate written statement contending that the second defendant has a right to be maintained by the other defendants from out of the income of the family properties. In other respects they adopted the written statement of the defendants 3 and 4.

4. On the above pleadings the trial Court framed appropriate issues. On the first issue it was found that the plaintiffs' mother and the first defendant lived like wife and husband and the plaintiffs were born to them on account of the exclusive concubinage of their mother with the first defendant. On Issue No. 2 it was found that the agreement dated 4-3-1964 (Ex. A-11) executed by the first defendant to the mother of the plaintiffs was true, but it was not binding on the defendants 2 to 8. On Issue No. 3 it was found that the two settlement deeds Exs. B-8 and B-9 are only gratuitous transfers and they are not the result of the family arrangement as pleaded by the contesting defendants. On issue 4, it was found that the plaintiffs are entitled to maintenance at the rate of Rs. 40/- per month and Rupees 100/- per year towards provision for residence and that they are also entitled to a charge, but the second plaintiff, who was born subsequent to the document, Ex. B-9, cannot claim a charge over those properties. In the result the suit was decreed for the maintenance aforesaid against the first defendant with a charge against A Schedule properties and Items 2 and 3 of B Schedule properties, so far as the first plaintiff was concerned and against the B Schedule properties only so far as the second plaintiff is concerned.

5. Defendants 2 to 8 alone preferred the appeal A. S. No. 339 of 1971 before the learned Subordinate Judge, Tanuku, wherefrom it was transferred and numbered as A. S. 58 of 1971 on the file of the Subordinate Judge's Court, Kovvur. The learned Subordinate Judge, Kovvur also found that the plaintiffs are

the illegitimate children of the first defendant and the two gift deeds Exs. B-8 and B-9 are gratuitous transfers. The learned Subordinate Judge however held that though the two said gifts were hit by Section 39 of the Transfer of Property Act, as per Section 20 of Hindu Adoptions and Maintenance Act the plaintiffs are not entitled to a claim of charge over the suit properties. The appeal was therefore partly allowed and the charge created in favour of the plaintiffs by the trial Court's decree was deleted.

6. In this second appeal preferred by the plaintiffs we are only concerned with the question as to whether the plaintiffs are entitled to a charge over the properties covered by the two gratuitous transfers.

7. It is the contention of Mr. M. Jagannadha Rao, learned counsel appearing for the appellant that the right of an illegitimate son to get maintenance is recognised by Section 20 of Hindu Adoptions and Maintenance Act and that once that right is established a charge can be created against the properties covered by such gratuitous transfers. The learned counsel has taken me through the law before and after the Act 78 of 1956. According to him the liability to pay maintenance is not only a personal one, but also a property liability even under the new Act.

8. On the other hand Mr. T. H. B. Chalapati learned counsel appearing for the contesting defendants, argued that the right created by Section 20 is only a personal right, that the right of a wife to claim a charge is different from the right of an illegitimate son and that the new Act 78 of 1956 does not contemplate creating a charge on property. He has taken me through the Sections 27 and 28 in this respect. According to the learned counsel charge can be created only under Section 28 for the dependants. If a person is not a dependant, no charge can be provided by reason of Section 39 of the Transfer of Property Act. His contention is that Section 39 of the T. P. Act would apply only to cases arising under Hindu Law prior to 1956. By virtue of the Act 78 of 1956, the law was codified and we are only governed by the codified law, which does not speak of any charge being created in favour of a person, who is not a dependant. Both sides have relied upon a few decisions, which will also be presently referred to.

9. As the question has been thoroughly argued before me I would like to

deal with the claim for maintenance under the Hindu Law of a son, legitimate or illegitimate, and a wife as it stood prior to the Act 78 of 1956 and as it stands today under Act 78 of 1956.

10. According to the Hindu Law prior to Hindu Adoptions and Maintenance Act, Act 78 of 1956 (hereinafter referred to as the Act) the liability of a Hindu to maintain others arises in some cases from the mere relationship between the parties, independently of possession of the property. In other cases it depends altogether on the possession of property. A Hindu is under a legal obligation to maintain his wife, his minor sons, including his illegitimate sons, his unmarried daughters, and his aged parents, whether he possesses any property or not. The obligation to maintain them is personal in character and arises from the very existence of the relationship between the parties. In contradistinction to this liability, the liability of a Manager of a Joint Mitakshara family to maintain all male members of a family, their wives and children, is dependent upon the possession of coparcenary property. A heir is also legally bound to provide, out of the estate, which descends on him, maintenance to other persons, whom the late proprietor was legally or morally bound to maintain and the estate inherited by him or her is always subject to the obligation to provide for such maintenance. In the case of illegitimate children, the previous law provided four different types of right to claim maintenance from a Hindu father. Those four categories were (1) the illegitimate son of a Hindu belonging to one of the three higher classes by a *dasi*, (2) the illegitimate son of a *Sudra* by a *dasi*, (3) the illegitimate son of a Hindu by a Hindu woman, who is not a *dasi*, even though he be the result of a casual or adulterous intercourse and (4) the illegitimate son of a Hindu by a non-Hindu woman.

11. The claim to receive maintenance by the above heirs or even that of a widow was never considered to be a charge upon the estate whether joint or separate until it is fixed and charged upon the estate by a decree of the court or by an agreement between the parties or by will. Hence the right could be defeated in the case of a bona fide alienation; unless the alienee had notice of such claim or the alienation was gratuitous, in which event there can be a charge created over the properties covered by such alienations.

12. Act 78 of 1956 codified the law in this respect. Section 18 deals with the maintenance of a wife. It says that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. As under previous law, even now, this liability to maintain the wife arises irrespective of the possession of any property by the husband since it arises from the relationship of the parties. Section 20 of the Act, which refers to the maintenance due to children and aged parents, is as follows:

"(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or property."

Under this section a Hindu, be he a male or female, is bound to maintain his legitimate or illegitimate children, so long as they are minors, and his or her aged or infirm parents. The only qualifications to this law enacted in sub-section (3) is that the liability to maintain the aged parents or unmarried daughters would extend only in so far as they are unable to maintain themselves out of their own earnings or property. It is therefore to be seen that under the new law also the liability of a father to maintain his children irrespective of possession of the property is still there, as it arises out of relationship. The distinction drawn by the old law in regard to the extent of an illegitimate child's right has now been obliterated. The illegitimate child may be son or daughter. These two sections therefore postulate a personal liability and a legal obligation on the father to maintain the illegitimate children. If the father has got property necessarily the maintenance has to come out of the property. There is no distinction in this respect between the property of the father belonging to a joint family or his separate property.

13. Section 21 of the Act defines, who are the relatives of the deceased and who can be called his dependants. In this section also clause (viii) says that the

minor illegitimate son of a deceased person, male or female, shall be a dependant. Section 22 deals with the maintenance of the dependants and Section 23 with the principles for the determination of the quantum of maintenance under this Act. Section 27 runs as follows:

"A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of Court, by agreement between the dependant and the owner of the estate or portion, or otherwise."

14. This section also in terms restates the law as it stood before the Act; viz., that the claim to maintenance of a person against the estate of a deceased person could not be charge on the estate unless it was created by a decree of the court, etc., Section 28 of the Act is in the following terms:

"Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right."

This section is on par with Section 39 of the T. P. Act with only this difference, that this section applies only to a dependant, as defined under Section 21 and not to others, who are entitled to claim maintenance under this Act as envisaged by Sections 18 and 20. For a contrast to show that these provisions are almost similar to the provisions of Section 39 of the Transfer of Property Act, the said section is also extracted below:

"Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous, but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

From the above sections it is evident that the right of a wife or legitimate or illegitimate children or the aged or infirm parents of a person, who come within the purview of Sections 18 and 20 of this Act, is a personal right vesting in them, with a corresponding legal obligation on the

person bound to maintain them as a personal obligation. There is no provision in this Act, as enacted in Section 28, that such a right can be enforced by a charge over the property of a Hindu, who is liable for the same. The reason seems to be obvious. Whenever such a person has a right to receive maintenance from a person, who is legally bound to maintain him and that person has immovable property, the general law enacted in Section 39 of the T. P. Act should apply to such cases. There is nothing in the Act excluding the applicability of Section 39 of the T. P. Act to such cases. The Act no doubt made provision for a similar charge in the case of dependants. Section 4 of the Act saves the applicability of Section 39 to such cases.

15. It has been held in a number of cases that the liability to provide maintenance under a personal obligation would not exclude the right to receive maintenance from the profits of immovable property as contemplated by Section 39 of the T. P. Act. For instance Viswanatha Sastry, J., dealing with the same aspect has very succinctly explained the law in *Manikyam v. Venkayamma*, AIR 1957 Andh Pra 710 = (1956-2 Andh WR 1021) in the following manner:—

"It is true that the husband or father is under a personal obligation to maintain his wife or infant children. This does not mean that the obligation could be enforced only by sending him to jail in case of default and that the wife or infant children have no right to be maintained out of the property of the husband or the father as the case may be. The rule as to personal obligation only emphasises the legal and imperative duty of the husband to maintain his wife and minor children irrespective of the possession of any property.

Like a widow, the wife who has become entitled to demand separate maintenance from her husband, has no charge on his property. Therefore a bona fide purchaser for value without notice of the claim for separate maintenance is not affected thereby. But a transferee with notice of the right of maintenance or a gratuitous transferee takes the property subject to the claim for maintenance by virtue of Section 39 of the Transfer of Property Act.

Though the right of the wife to separate maintenance does not form a charge upon her husband's property, ancestral or self-acquired, yet, when it becomes necessary to enforce or preserve such a

by a common judgment. The few facts material for their disposal, stated briefly, are as follows:

2. Respondent No. 1 Dadamiya and other co-sharers brought three different suits in the Court of the Civil Judge, Junior Division, Ahmednagar, on 24-4-1968 against the present petitioner, a tenant, on three different premises forming part of the same property situate at Ahmednagar. Possession was claimed on the ground of reasonable and bona fide requirement, nuisance and default. The learned trial Judge rejected the claim for possession but made decrees for the arrears of rent claimed in the three respective suits. Against these decrees the landlord went in appeal to the District Court and the appeals were respectively numbered as 179, 181 and 184 of 1971. The learned District Judge, while maintaining the finding on the question of standard rent debated before the lower Court and the order for the arrears of rent, allowed the appeals and decreed possession in favour of the landlord, by his order dated 10-9-1971.

3. Before these three suits were instituted by the landlord for possession and arrears of rent, the tenant-petitioner had already preferred Miscellaneous Application No. 166 of 1966 on 7th November, 1966, for fixation of standard rent. On 2nd March, 1967, he moved the Court for fixation of interim rent and the lower Court by its order of even date fixed the interim rent for the three different premises at Rs. 4/-, 4/-, and 5/- respectively, as against the agreed rent of Rs. 10/-, 8/- and 10/-. This proceeding was heard as a companion proceeding to the three suits and evidence was recorded in the regular suits. The learned trial Judge concluded that the agreed rent would be the standard rent. This was the order made in Miscellaneous Application No. 166 of 1966 also. Against this order the tenant preferred Civil Revision Application No. 6 of 1969. The learned District Judge, on confirming the findings of the lower Court on the issue of standard rent, rejected the same. Against that decision in Civil Revision Application No. 6 of 1969. Special Civil Appln. No. 2792 of 1971 is filed. Thus it would be apparent that the tenant is impugning the order made by the learned District Judge in the application for fixation of standard rent and the three decrees obtained by the landlord in the different suits referred to above.

4. Before touching the various points urged, it would be quite necessary

to refer to few facts which are mostly undisputed or otherwise may be taken as duly proved by the affidavits filed in this Court. No doubt, the tenant, probably forestalling some action on the part of the landlord, rushed to the Court with an application for fixation of standard rent under Section 11 of the Bombay Rent Act on 7th November, 1966. After four months he filed an application (Ex. 9) for fixation of interim rent on 2nd March, 1967 and the interim rent came to be fixed at Rs. 13/- in aggregate for the three premises in the above-said suits. While making this order the lower Court gave clear-cut directions to the tenant in the following words:

"The interim standard rent is fixed at Rs. 5/- per month of the open space (premises in Suit No. 181 of 1968) and interim standard rent of five Khans (premises in the remaining two suits) is fixed at Rs. 8/- p. m., pending the decision of the application. The applicant to deposit all the arrears of rent as per above rate within 4 days from today and should pay regularly as and when it falls due every month."

After this order was passed, the tenant did deposit Rs. 169/-, the arrears due till then, on 3rd March, 1967, i.e., within four days of the order as directed by the Court.

5. What happened thereafter is worthy of note. The tenant, it is the grievance of the landlords, — and they are right in their submissions — observed this order in breach so far as the regularity in payment was concerned. The tenant did not care to make any deposit of the rent at this rate when it became due i.e., on 1st of every calendar month till 15th June, 1968. So, for nearly fifteen months he never cared to comply with this order. Even thereafter the subsequent deposits were made at irregular intervals. The deposits, as revealed by the record, were on 17-9-1968, 10-3-1969, 7-4-1969, 17-6-1969, 4-8-1969 and so on.

6. The trial Court delivered the judgments in all these proceedings on 30-10-1969 and just a month before that it appears, all the arrears at the interim rate were deposited but no steps were taken to clear the decretal dues with the costs forthwith.

7. After the appeals were filed by the landlords and the matter was taken in revision to the District Court by the tenant, and although the standard rent was fixed at the agreed rate, no steps were taken by the tenant to make any

deposits as decreed by the lower Court. Nor did he move the appellate Court for re-fixing the interim rent and giving him the same latitude which the lower Court had done while deciding the miscellaneous application for fixation of standard rent. No doubt in preferring the revision application the tenant was challenging the finding on the issue of standard rent, but it did not prevent him from either depositing the rent for the subsequent period or seeking suitable orders for fixing the interim rent as he did in March, 1967. He kept quiet till the appeals as well as the revision application were likely to come for hearing on board. The learned District Judge has disposed of these appeals and the revision application on 10-9-1971. A month prior to it, viz., 6-8-1971 he deposited all the arrears of rent. The costs were deposited on 12-8-1971. It would be evident that the payment was anything but regular, not only in the lower Court, but even in the first appellate Court.

8. After the learned District Judge decreed the claim for possession by allowing the three appeals and rejected the revision application confirming the order of the standard rent, the tenant preferred these civil applications in this Court on 13-12-1971. On the very day he obtained a rule and interim stay regarding delivery of possession on the usual terms. By clause (b) of these applications he gave a specific undertaking in the following terms:

"(b) That the petitioner shall deposit all the arrears if any and shall go on depositing the future rent as and when it becomes due and payable during the pendency of this petition."

When these petitions were admitted and stay was granted on usual terms, it is implicit that the petitioner was required to deposit the arrears or the dues of rent as and when they became payable to the landlord.

9. Despite this express undertaking and promise held out to the Court, the tenant, it seems, made the payment of rent upto May, 1974. This is what he has stated in his affidavit filed before this Court in reply to the affidavit made by the landlord who bitterly complained of non payment. From May, 1974, onwards till June 1975, no payment was made. To explain these laches, in paragraph 2 of his affidavit the tenant says that the cycle shop which he was running in a part of the suit premises, had to be kept

closed because the premises were in a dilapidated condition and it was impossible to work, as there were leakages in the monsoon. Moreover, he was ill in the month of December, 1974 and January, 1975, and was otherwise in grave financial difficulties. Next he submitted that he had deposited all the arrears of rent upto the end of June, 1975, but he did not mention the date of the deposit in his affidavit in reply which was filed on 22-7-1975. This reply has its own background. On 17th June, 1975, the landlord put in an affidavit setting out the above defaults and made a grievance that the tenant had flouted the orders of this Court and neglected to deposit the rent regularly in the Courts below as well as in this Court. He further stated that as the tenant was in arrears of a pretty large amount, he was entitled to no reliefs. A copy of this affidavit was served on the tenant and for a month and more he seems to have kept mum and when all these matters were on board for hearing, appears to have taken this step of deposit as a last straw to stave off the evil consequences.

10. To recapitulate, it would be quite manifest that the orders made by the lower Court in the miscellaneous application were not complied with fairly and squarely. Except the first deposit which was made immediately after the order, the subsequent payments were most irregular. They were made at the sweet will and pleasure of the tenant. During the pendency of the appeal and civil revision application no steps whatsoever were taken by the tenant to make the deposit despite the decision against him fixing the standard rent at the agreed rate. So long as this order was not modified on any interim application which the tenant could have preferred either in the appeals or in the civil revision application, the tenant was bound to make the payment regularly till the disposal of these appeals. This aspect has some bearing when I proceed to consider the language of Sections 11 and 12 which cover the point at issue. Thirdly, on filing the special civil application in the High Court, he obtained the interim rule and on his own gave an undertaking to make the deposits regularly. He, however, observed the undertaking in breach. It is only when the landlord rushed to the High Court with his affidavit dated 17th June, 1975, that he seems to have deposited the arrears on or about 22nd July, 1975, i.e., a couple of days before these matters reached the actual hearing. It

would be patent that the tenant has proved to be a contumacious defaulter.

11. On these facts Mr. Apte for the tenant raised three contentions. In the first instance he submitted that his case is covered by Section 12 (1) of the Bombay Rent Act and as the petitioner-tenant has expressed his readiness and willingness to pay the rent, the landlord is entitled to no decree for possession. On this very score, according to Mr. Apte, the decree for possession will have to be set aside. The next contention taken was that the interim rent was fixed not by any order made in the suit, but in his own application preferred under Section 11 (3) of the Bombay Rent Act which would be hereafter referred to as 'the Act'. The provisions contained in sub-section (4) of Section 11 of the Act are totally irrelevant so far as these applications are concerned and he could not be a defaulter. Thirdly, it was submitted that the present case is covered by Section 12 (3) (b) of the Act which inter alia lays down that if there be a dispute about the standard rent and the tenant pays the dues on the 1st day of hearing or any other date fixed by the Court, he is entitled to a relief against forfeiture, an expression used by the Transfer of Property Act. What is of considerable importance is not the payment on the first day of hearing, but the clearance of arrears before the judgment is delivered in the suit for eviction. In support of such a submission he relied upon certain observations in the case of Kalidas Bhavan v. Bhagwandas Sakalchand, (1958) 60 Bom LR 1359.

12. The points raised by Mr. Apte necessitate a scrutiny of the scheme of the Bombay Rent Act and in particular the provisions contained in Sections 11 and 12. Section 11 makes a provision for fixation of standard rent and permitted increases in certain cases. Sub-section (1) envisages cases for fixing the standard rent in a given set of circumstances, which are five in number, out of which we are concerned with the last covered by clause (e) which relates to any dispute between the landlord and the tenant regarding the amount of standard rent. In simple words, the tenant can rush to the Court exercising jurisdiction under the Bombay Rent Act, for getting the standard rent fixed if there be any dispute between him and the landlord. No doubt the present petitioner has availed of this opportunity. Sub-section (2) speaks of the dispute regarding the

amount of permitted increases, and the Court is empowered to fix the same on getting an application either from the landlord or from the tenant. From the language of these two sub-sections, it would be obvious that these cases are not covered by the provisions of Section 12 (2) to which I would make a reference shortly.

13. Now sub-section (3) of Section 11 deals with an application for fixing the standard rent or determining the permitted increases on an application made by a tenant who has received a notice from his landlord under sub-section (2) of Section 12. The Court, on getting such an application, is also empowered to fix interim rent and make an order directing the tenant to deposit such amount in Court pending the final decision of the application. If the order is not complied with, i.e., the tenant fails to make the deposit as ordered, the application is liable to be dismissed. Sub-clause (4) speaks of similar remedies which could be availed of by the tenant who moves the Court under Section 11 at any stage of a suit for recovery of rent whether with or without a claim for possession of the premises. But in such a matter the tenant has to move the Court for fixing the interim rent and if an order is made, he has to deposit the amounts as directed by the Court. In case of default the defence is likely to be struck off. Sub-section (5) lays down that no appeal shall lie from any order made under sub-section (3) or (4), whereas sub-section (6) speaks of an application being made jointly by all or any of the tenants interested in respect of the premises situated in the same building. An analysis of this section and particularly sub-section (3) would reveal that it comes into operation only where a tenant who has received a notice under sub-section (2) of Section 12 applies to the Court for fixation of standard rent. If he makes such an application before the expiry of one month after notice referred to in sub-section (2) of Section 12, and pays or tenders the amount of rent as ordered by the Court under Section 11 (3), he will be deemed to be ready and willing to pay the standard rent within the meaning of Explanation I to Section 12.

14. When no notice under Section 12 (2) has been given to the tenant, the tenant can make an application for fixation of standard rent either under sub-section (1) or (2) of Section 11 and this is

what the present tenant has done. This aspect has some bearing, because Mr. Apte has been repeatedly emphasizing Explanation I to Section 12 and claiming protection under sub-section (1) of Section 12 in contending that the moment he makes an application and obtains an interim order, it is tantamount to his readiness and willingness to pay the rent and the Court is precluded from making a decree for possession. I will have to refer to this part of his argument which, to my mind, does not carry the merit of plausibility. I may refer at this stage to sub-section (4) of Section 11 to complete the discussion. Where the Court has to fix the standard rent in a suit, the provisions of sub-section (4) are attracted provided the suit is one for rent with or without a claim for possession. May it be mentioned here that sub-section (3) was substituted for the original sub-section (3) by Maharashtra Act 14 of 1963.

15. On this analysis, so far as the factual aspects before me are concerned, the point that is required to be determined is whether a tenant who has already made an application under Section 11 (1) of the Bombay Rent Act is required to make any further or separate application under Section 11 so as to bring his case under sub-section (3) of Section 11 after getting a notice from the landlord contemplated by sub-section (2) of Section 12, or whether he can make a request to the Court already entertaining his application to fix the interim rent. On this point this Court has held in the case of *Karamsey Kanji v. Velji Virji*, (1954) 56 Bom LR 619 that if an application is already pending when the suits are filed or when the notice under Section 12 (2) is issued by the landlord, no separate application need be made. Agreeing, with respects, with this view expressed by the then learned Chief Justice Chagla, I think it was redundant on the part of the tenant to make a fresh application under Section 11 (3) of the Act. The old application could be treated or be deemed as an application preferred on receipt of the notice issued by the landlord under Section 12 (2) of the Bombay Rent Act and he can obtain an order for fixation of interim rent and comply with the same. Another factual aspect which cannot be lost sight of, so far as these proceedings are concerned, is that by common consent this miscellaneous application and the three suits were treated as one proceeding. From this point of view also it could be said that the miscellaneous ap-

plication, although preferred earlier than the issuance of the notice under Section 12 (2) by the landlord, could be treated as an application under Section 11 (3) of the Act and the order made therein will have the same effect and consequences contemplated by Section 11 (3). In simpler words, it could be said that it would be an application after notice was issued by the landlord terminating the tenancy on the ground of non-payment of rent.

16. This takes me on to Section 12. Sub-section (1) lays down that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays or is ready and willing to pay the amount of standard rent and permitted increases. The rest of the sub-clause is not material for the purposes of these proceedings. What amounts to readiness and willingness is laid down in Explanation I which runs thus:

"In any case where there is a dispute as to the amount of standard rent or permitted increases recoverable under this Act the tenant shall be deemed to be ready and willing to pay such amount if, before the expiry of the period of one month after notice referred to in sub-section (2), he makes an application to the Court under sub-section (3) of Section 11 and thereafter pays or tenders the amount of rent or permitted increases specified in the order made by the Court."

17. Mr. Apte oversimplified these provisions by a somewhat curious submission that the moment a tenant makes an application he should be deemed to be ready and willing to pay the arrears of rent and, therefore, the landlord is disqualified from recovering possession. His readiness and willingness is exhibited by filing the application for fixation of standard rent as defined by Explanation I. I am afraid, Mr. Apte is half-reading the explanation or does not desire the Court to take into account the second requirement which is more stringent. The language of Explanation I is quite plain and clear and admits of no ambiguity. It contemplates two contingencies; firstly, the filing of an application before the expiry of the period of one month after the notice referred to in sub-section (2) and secondly, the payment of rent as specified in the order made by the Court. Without recounting what I have already observed in the foregoing paragraphs I take it that the petitioner fulfils the first

condition viz., of having made an application under sub-section (3) of Section 11. But he has miserably failed to establish that he has paid or tendered the amount as specified in the order made by the Court which is reproduced in one of the foregoing paragraphs. On the facts summarised at the outset and the notable defaults committed by the tenant and the lame excuses put forth in this Court, it would be pretty clear that he has not at all complied with the second condition and, therefore, the argument of Mr. Apte deserves to be dismissed without further considerations. By no stretch of imagination on these facts it could be said that the tenant has established his readiness and willingness so as to disentitle the landlord to the relief of possession.

18. This finding by itself is sufficient to dispose of all these applications; but much was made by Mr. Apte that the conditions requiring regular payments are not attracted and there is ample discretion in the Court to condone the delay in making the payment. The case, in his opinion, is covered by Section 12 (3) (b) and as observed in (1958) 60 Bom LR 1359 (Kalidas's case) if the arrears are paid before the judgment is delivered, it is a fair compliance with the statutory provisions. This authority seems to be considerably shaken by the subsequent pronouncement of the Supreme Court as well as of this Court. In Abbasbhai's case (AIR 1964 SC 1341), it has been pointed out that the tenant cannot remain content by raising a defence of there being a dispute about standard rent so as to bring his case within the four corners of Section 12 (3) (b), but if he is keen on getting the protection under the said section, he must move the Court at the earliest, soon after the written statement is filed, to fix the interim rent and should go on making deposits till the disposal of the suit at the rate of the interim rent. In case the standard rent is fixed at a higher rate, than the interim rent, then the Court should give him reasonable time to make good the deficit and if he fails a decree for possession should follow. It has been further observed in this case that in all such matters the proper procedure would be to take up the question of standard rent in the first instance and to make suitable orders for interim rent, its deposit, and on hearing the parties to fix the standard rent. After fixing the standard rent, the tenant should be called upon to clear all the arrears together with the costs, if any, which the

Court may intend to award, and it is only on such complete clearance the tenant would be entitled to relief against forfeiture, an expression proverbially used in the Transfer of Property Act which is tantamount to telling the tenant that he would not be evicted or his possession would be protected.

19. The next case on the point is to be found in Venkatrao Anant Pai v. Narayanlal Bansilal, (1969) 71 Bom LR 607, which had to consider the ambit of Section 12 with particular reference to sub-section (2) and the remaining two clauses of sub-section (3). On referring to certain observations made by the Supreme Court in Abbasbhai's case, (AIR 1964 SC 1341) the Division Bench pointed out that if the appeal or revisional Court altered the standard rent by increasing it, further time should be given by that Court. This eventuality does not arise in this case. Patel, J., speaking for the Court, further observed that when the trial Court has fixed in its judgment the standard rent, it would be obligatory on the tenant to pay the said amount during the pendency of the appeal and non-payment of the rent fixed by the trial Court cannot be defended by saying that he filed an appeal or revision and the question was still under dispute. Commonsense suggests that such disputes may go on for years and ten years' period is by no means unusual and it could not be intended by the Legislature to punish the landlords by keeping them out of the rents because of the disputes. If the standard rent is fixed and is pending in revision before the District Court, High Court or in appeal before the Supreme Court, the tenant must continue to pay the standard rent then determined and increases as determined by the operative judgment and if he does not do so, Sections 11 (4) and 12 (3) (b) read with the Explanation are not satisfied and he is not entitled to the protection. In the instant case sub-section (4) of Section 11 does not come into play, but the principle would be still applicable to these facts. With due respects whether this Court could bind down the proceedings before the Supreme Court or not I may only add that so long as the matter is seized either by the appellate Court or by the High Court, in such or similar proceedings it would be the bounden duty of the tenant to comply with the lower Court's decree on the point of standard rent; otherwise he will have to be deem-

ed not to qualify himself to the protection of Section 12 (3) (b).

20. This aspect is made all the more clear in the subsequent Supreme Court case in *Shah Dhansukhlal v. Dalichand Virchand*, 70 Bom LR 714 = (AIR 1968 SC 1109). This was also a case of ejectment under the Bombay Rent Act, possession having been sought on the ground of default. A dispute about standard rent was raised. When there is no such dispute, the case is covered by Section 12 (3) (a) with which we are not concerned. As the case falls under Section 12 (3) (b), I may refer to the pertinent observations made by the Supreme Court which run thus:

"To be within the protection of Section 12 (1) of the Bombay Rents, Hotels and Lodging House Rates Control Act, 1947, where a tenant raises a dispute about the standard rent payable, he must make an application to the Court under Section 11 (3) of the Act and thereafter pay or tender the amount of rent and permitted increases, if any, specified in the order made by the Court."

To be within the protection of that provision, the tenant must not only pay all the arrears due from him on the first day of hearing of the suit, but he must thereafter continue to pay or tender in Court regularly the rent and the permitted increases till the suit is finally decided."

It would be thus clear from these observations that the emphasis is on regular payment of rent and permitted increases as ordered by the Court and not a consolidated payment just before the delivery of the judgment. In view of these observations of the Supreme Court, very little doubt can now be entertained about the scope of Section 12 (1) read with the Explanation. It has been further pointed out that by merely taking a defence and sitting tight on the hedge the tenant cannot kill the time and tell the Court at the last moment that as he was uncertain about the result of the standard rent, he was waiting for the final verdict and the moment it is out he has deposited or cleared all the arrears. To give such a latitude to a chronic defaulter would be tantamount to adding a premium on his defaults and frustrating the very object of the Legislation. By Section 12 certain inroads are made on the landlord's rights and there is a departure from the general

law. While construing these provisions the Courts are required to take a stringent view. No doubt the enactment is meant for the protection of tenants, but it should not be so read or construed as to punish the landlords. To make such a concession as claimed by Mr. Apte in these proceedings would be nothing short of a punishment to the landlord and deprivation of his vested rights to take possession forthwith the default was committed. For these reasons all these applications will have to be rejected.

21. Before parting with these proceedings I must add a word about costs. Generally in such proceedings the Courts are inclined to make no order as to costs; but this is a singular proceeding and a class by itself. The tenant has exploited all possible means to defeat the equities of the landlord and the landlord is entitled to the costs in this Court also.

22. Rules in these four applications discharged with costs.

Applications dismissed.

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SAPRE, J.

Shrikrishna Keshav Kulkarni and others, Appellants v. Balaji Ganesh Kulkarni and others, Respondents.

Second Appeal No. 1091 of 1967, D/-13-1-1975.*

(A) Evidence Act (1872), Sections 91, 92, Provisos 2, 3, 6 Illustration (g) — Agreement for sale of two ancestral houses jointly held by Defendants 1 and 3 who were brothers for a consideration of Rs. 2,250/- out of which Rs. 200/- were paid as earnest money — No separate oral agreement pleaded — Held neither Section 91 nor provisos 2, 3 and illustration (g) to proviso 6 would enable the plaintiff to lead evidence to spell out two different agreements in respect of two houses by showing that the brothers were separated and houses were separately owned by them on the date of agreement — Contract being one and indivisible court cannot also direct specific performance against one of the defendants alone. (Specific Relief Act (1963), Section 12 (1).) (Paras 6, 7)

*(Against decision of R. P. Salve, Asstt. Judge at Jalgaon in Civil Appeals Nos. 75 and 106 of 1966).

FT/FT/B917/76/RSK

(B) Limitation Act (1963), Article 54 — Suit for specific performance — Starting point of limitation.

Under the agreement for sale of two ancestral houses jointly held by defendants 1 and 3 the sale was to be executed after the attachment which the creditors had brought was raised. Held in the absence of any indication when the attachment would be raised it had to be treated as a case in which no date was fixed for the performance of the contract. To such a case, the starting point of limitation was when the plaintiff had notice that performance was refused. In this case that date was when one of the defendants sold one house under a registered sale deed. On that date the plaintiff could be said to have been posted with the knowledge that the defendants were refusing performance of the contract and the suit having been brought within three years from that date was within time.

(Para 9)

S. B. Kotwal with M. R. Kotwal, for Appellants; J. G. Pradhan, for Respondent No. 2.

JUDGMENT:— The suit giving rise to this second appeal was filed by the appellant, who died during the pendency of this appeal and whose legal representatives have been brought on record, for specific performance of a contract of sale (Ex. 83) dated 15th October, 1957. The agreement was executed by defendants 1 and 3, who are brothers. It was in respect of two houses bearing Gram Panchayat Houses Nos. 383 and 384. The consideration for the sale was Rs. 2,250/-, out of which Rs. 200/- were paid as earnest amount. The houses were under attachment of creditors and the sale deed was to be executed after the attachment was raised. It was the case of the plaintiff that although a single document was executed, it contained two separate agreements, because defendants 1 and 3 were separate and the two houses were separate, defendant No. 1 being the owner of house No. 384 and defendant No. 3 being the owner of House No. 383. The plaintiff was put in possession of the two houses on the date of the agreement.

2. After the agreement was made by defendants 1 and 3 with the plaintiff, they agreed to sell the houses to one Abdul Gani and received some amount of consideration by way of earnest money. Later, Abdul Gani brought Small Cause Suit No. 359 of 1960 against defendants 1 and 3 to recover the consideration paid

by him. The plaintiff intervened and paid Rs. 250/- to Abdul Gani on behalf of defendants 1 and 3 and the suit was compromised on 14th February, 1961. Thereafter, defendant No. 1 sold House No. 384 to defendant No. 2 on 6th February, 1963 under a registered sale deed (Ex. 96) for a consideration of Rs. 1,200/-. On the basis of this sale deed, defendant No. 2 tried to dispossess the plaintiff, which led to proceedings under Section 145 of the Code of Criminal Procedure. The plaintiff had, therefore, filed the present suit on 22nd May, 1964. It was initially filed only against defendants 1 and 2. Defendant No. 3 was not joined. On the trial Court expressing the view that the suit was liable to be dismissed if defendant No. 3, who was also a party to the agreement (Ex. 83), was not joined, the plaintiff joined defendant No. 3, but made him no more than a formal party, and claimed no relief against him. It appears that the plaintiff had filed a separate suit against defendant No. 3, being Suit No. 59 of 1964, for specific performance of the agreement in respect of House No. 383 and he had obtained a decree against defendant No. 3 in that behalf.

3. The trial Court decreed the plaintiff's suit, but it directed the plaintiff to deposit the entire amount of consideration mentioned in Ex. 83 and not the proportionate consideration in respect of House No. 384 owned by defendant No. 1, which defendant No. 1 had sold to defendant No. 2. The plaintiff and defendant No. 2 both went in appeal to the District Court, challenging the decree of the trial Court. The District Court dismissed the appeal filed by the plaintiff and allowed the appeal filed by defendant No. 2. It set aside the judgment and decree of the trial Court and dismissed the plaintiff's suit for specific performance of the agreement (Ex. 83) dated 15th October, 1957. This the District Court did for two reasons. The first was that the suit in the present form was not maintainable. The contract (Ex. 83) was one contract and the plaintiff could not split up the cause of action embodied in the contract so as to claim relief only against defendants 1 and 2 in respect of House No. 384 without claiming any relief against defendant No. 3 in respect of House No. 383, both of which houses were the subject-matter of the contract (Ex. 83). The second ground was that the plaintiff's suit was barred by limitation.

4. Mr. Kotwal on behalf of the appellant has challenged both the find-

ings recorded by the District Court against the appellant and the consequential dismissal of the plaintiff's suit for specific performance.

5. The first point that falls for decision is whether the suit in its present form, namely, to enforce the agreement dated 15th October, 1957 (Ex. 83) in respect of House No. 384, which is only one of the two houses in the agreement, is maintainable. Mr. Kotwal does not dispute that under Section 12 (1) of the Specific Relief Act, 1963, the specific performance of a part of a contract cannot be granted. Mr. Kotwal also does not dispute that from the document (Ex. 83) itself no two separate agreements in respect of the two Houses Nos. 383 and 384 can be spelled out. It will be seen from the document that the two brothers, defendants 1 and 3, had agreed to sell their ancestral houses to the plaintiff for a consideration of Rs. 2,250/- and had received Rs. 200/- as advance from the plaintiff. In the document (Ex. 83) itself there is no indication that the two brothers are separate; that the property agreed to be sold comprises two separate houses and that while defendant No. 1 is the owner of House No. 384, defendant No. 3 is the owner of House No. 383. There is also no indication how the amount of Rupees 2,250/- has to be apportioned, if at all, between the two brothers or the two properties. There is further no indication that the amount of Rs. 200/- received by the two brothers was received by them separately and that each had received Rs. 100/-. The submission of Mr. Kotwal, however, is that although there is a single document embodying the agreement, from certain circumstances that are appearing on record it is possible to separate the two agreements embodied in Ex. 83, one made by the plaintiff with defendant No. 1 in respect of House No. 384 and the other made by the plaintiff with defendant No. 3 in respect of house No. 383. Those circumstances are: The two brothers are separate. The two houses are separate. House No. 384 belongs to defendant No. 1. House No. 383 belongs to defendant No. 3. Defendant No. 1 has no interest in house No. 383. Similarly, defendant No. 3 has no interest in House No. 384. Defendant No. 1 had alone sold house No. 384 to defendant 2 on 6th February, 1963. The plaintiff Keshav in his deposition at Ex. 82 has stated that he had paid Rs. 200/- at the time of the agreement to defendants 1 and 3, Rupees 100/- each. The consideration was fixed

at Rs. 1,125/- each. Mr. Kotwal contended that this evidence of the plaintiff had gone unchallenged. The above evidence and circumstances, according to Mr. Kotwal, have to be taken into account in reading the document (Ex. 83) that there were two separate agreements which the plaintiff had made, one with defendant No. 1 in respect of house No. 384 and the other with defendant No. 3 in respect of house No. 383.

6. As already stated, from the written document (Ex. 83) it is not possible to spell out two separate agreements as submitted by Mr. Kotwal. There is no indication in Ex. 83 that the two brothers were separate; that the property agreed to be sold comprised two different houses; that each brother owned one of the two houses; that one had no interest in the other; that each brother was to receive Rs. 1,125/- as consideration and that each had received Rs. 100/- out of the amount of Rs. 200/- paid by the plaintiff as earnest. It is only through oral evidence that Mr. Kotwal is trying to show that the document Ex. 83 embodied two separate agreements, but such kind of oral evidence is barred under Sections 91 and 92 of the Evidence Act. Section 91 provides:—

"When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained." Section 92 provides:—

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms." Mr. Kotwal, however, relied upon the second, third and sixth provisos to Section 92 and illustration (g) to proviso (6) to show that oral evidence was admissible to show that what were embodied in

the document (Ex. 33) were two separate agreements, one between the plaintiff and defendant No. 1 in respect of house No. 384 and the other between the plaintiff and defendant No. 3 in respect of house No. 383. Proviso (2) reads as under:—

"Proviso (2). — The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

Proviso (3) reads as under:—

"Proviso (3). — The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved."

Proviso (6) reads as under:—

"Proviso (6). — Any fact may be proved which shows in what manner the language of a document is related to existing facts."

Illustration (g) is as under:—

"(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500/-.' B may prove the verbal warranty."

Proviso (2) and proviso (3) are clearly inapplicable, because the plaintiff had not pleaded any separate oral agreement and it was for the first time in his evidence that the plaintiff tried to contend that out of the consideration of Rs. 2,250/-, defendant No. 1 and defendant No. 3 were to be paid Rs. 1,125/- each and each of them was paid Rs. 100/- from the earnest amount of Rs. 200/-. That kind of evidence could not be looked into without the plaintiff having pleaded any separate oral agreement. Proviso 6 and illustration (g) also cannot help the appellant. The language of Ex. 83 clearly shows that the two brothers, who jointly owned their ancestral property, had agreed to sell it to the plaintiff for a consideration of Rs. 2,250/- and they together had received Rs. 200/- as advance consideration. One does not know if and when the two brothers had separated and the two houses had been divided between them. The plaintiff in his evidence throws no light on these matters. The only circumstance relied upon by Mr. Kotwal was the conduct of defendant No. 1 in selling House No. 384 to defendant No. 2 on 6th February, 1963, vide the registered sale deed

(Ex. 96). But that was in the year 1963 and from this circumstance it cannot be inferred that on 15th October, 1957, when the agreement (Ex. 83) was brought into existence, the two brothers were separate and while defendant No. 1 owned house No. 384, defendant No. 3 owned House No. 383. In fact, it is the case of the plaintiff himself that in about the year 1960 both defendants 1 and 3 had agreed to sell the suit houses to Abdul Gani, So. it cannot be said that on the date of the agreement (Ex. 83) the facts that existed were that the two brothers were separate and defendant No. 1 owned House No. 384 and defendant No. 3 owned House No. 383, and, therefore, proviso (6) is not attracted and it cannot be said that the language of the document can be explained by way of clarification through oral evidence how that language is related to the existing facts, namely, the two brothers being separate and the two houses being separately owned by them. No question of applying illustration (g) to proviso (6) arises, because the plaintiff has not come forward with any case of an oral agreement in addition to the written agreement (Ex. 83).

7. Not only, therefore, the document (Ex. 83) containing the contract is one but from the language of the document also it is not possible to spell out two separate agreements. The contract evidenced by Ex. 83 being thus one, it is not possible for the Courts to direct specific performance of a part of the contract, inasmuch as the plaintiff was trying to enforce the contract only in respect of House No. 384 against defendant No. 1 when the contract was in respect of House No. 383 also and it was between defendants 1 and 3 and the plaintiff. Section 12 (1) of the Specific Relief Act, 1963, would operate as a bar to this being done.

8. Mr. Kotwal submitted that the finding recorded by the lower appellate Court that the suit in its present form is not maintainable is not correct, because the plaintiff had subsequently joined defendant No. 3. But that argument will not serve the purpose, because the plaintiff was not claiming any relief against defendant No. 3 in respect of House No. 383, which was a part of the property comprised in the contract. Mr. Kotwal submitted that the plaintiff could not claim any relief against defendant No. 3, inasmuch as he had already filed a separate suit against defendant No. 3 for specific performance of the agreement in

respect of House No. 383 and had obtained a decree in that suit. But for this situation, the plaintiff has to thank himself. The present suit bearing No. 44 of 1964 appears to be earlier in point of time than Suit No. 59 of 1964 filed by the plaintiff against defendant No. 3. It is not known why the plaintiff had chosen to file a separate suit against defendant No. 3 and had not chosen to join defendant No. 3 in his very first suit. Merely because the plaintiff finds it difficult to claim a relief against defendant No. 3 in this suit, he cannot get over the hurdle that the suit for specific performance of a part of the contract cannot be decreed. The suit as framed is, therefore, liable to be dismissed.

9. The second point that falls for decision is whether the suit of the plaintiff is within limitation. As already noted, the suit contract was made on 15th October, 1957. The suit was filed on 22nd May, 1964. Article 54 of the Limitation Act, 1963 provides for limitation of three years for a suit for specific performance of a contract. The starting point for limitation is "The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused". Under the agreement (Ex. 83), the sale deed was to be executed after the attachment which the creditors had brought was raised. The lower appellate Court has rightly pointed out that the date of the raising of the attachment not being clear from the document, it could not be found out as to what could be the date fixed for the performance of the contract. Surprisingly, the Court held that the starting point of limitation would be 15th October, 1957, which was the date of the agreement. That, however, does not appear to be the correct position in law. The starting point of limitation, as already noted, was the date fixed for performance of the contract, or, if no such date is fixed, the date on which the plaintiff has notice that performance is refused. In the absence of any indication when the attachment would be raised and what would be the date for the performance of the agreement, which was after the attachment was raised, it had to be treated as a case in which no date was fixed for the performance of the contract. To such a case, the starting point of limitation is when the plaintiff has notice that performance is refused. In the instant case, it was when defendant No. 1 sold house

No. 384 to defendant No. 2 on 6th February, 1963, under the registered sale deed (Ex. 96) that the plaintiff could be posted with the knowledge that the defendants were refusing performance of the contract. The suit was filed on 22nd May, 1964, that is, well within three years from 6th February, 1963, and would be within limitation.

10. Mr. Pradhan for respondent No. 2, however, drew my attention to the allegations in the plaint wherein it was stated that defendants 1 and 3 had agreed to sell the suit houses to Abdul Gani in the year 1960. Mr. Pradhan has argued that the plaintiff had knowledge in the year 1960 itself that defendants 1 and 3 were refusing performance of the contract and the suit having been filed more than three years after 1960, it is barred by limitation. It is true that in the plaint it has been stated that the agreement to sell to Abdul Gani was in respect of the suit houses, but that appears to be an incorrect statement. Ex. 88 is the true certified copy of the decree in Small Cause Suit No. 359 of 1960 and it shows that the house agreed to be sold by defendants 1 and 3 to Abdul Gani was house No. 378/1, which was altogether a different house. By defendants 1 and 3 agreeing to sell some other house to Abdul Gani would not, therefore, amount to defendants 1 and 3 refusing performance of the suit contract. The limitation for the present suit could not thus start in the year 1960 when defendants 1 and 3 had agreed to sell some other house to Abdul Gani.

11. The suit of the plaintiff would, therefore, be in time, but in view of the fact that he cannot get a decree for specific performance of only a part of the contract, his suit is liable to be dismissed. The decree passed by the lower appellate Court is, therefore, correct and this appeal must fail.

12. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1976 BOMBAY 347

(At NAGPUR)

MASODKAR, J.

Jagannath Marotrao Gavande and others, Petitioners v. The State of Maharashtra and another, Respondents.

Special Civil Appln. Nos. 1751, 1790, 1805 and 1842 of 1976, D/- 12/13-2-1976.*

(A) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), Sections 33 and 21 — Appeal — Declaration of surplus land under Section 21 (1) — Appeal against — Effect of — Filing of appeal operates as stay of taking possession and of vesting of surplus land in favour of State. (Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) (Distribution of Surplus Land) Rules (1975), Rule 7). (Civil P. C. (1908), O. 41, Rule 5).

Once the appeal is filed under Section 33 the declaration made by the Collector under sub-section (1) of Section 21 to the extent challenged in appeal loses its finality and it will be the decision of the Maharashtra Revenue Tribunal, i.e., the appellate authority, which would become final and operative and therefore, under sub-section (2) and sub-section (4) the Collector will have to work out or give effect to that decision. The phraseology of sub-section (3) of Section 21 which makes the declaration final and conclusive subject to appeal or revision indicates that till the final decision of the appeal the matters are treated still sub-judice. AIR 1948 Bom 347, Foll.

(Paras 14, 15, 22, 24)

Looking to the whole scheme of Section 21 it is reasonable to hold that excepting the declarations regarding the forfeiture, all other matters of declaration must await final decision in case an appeal or revision is preferred. The effect of filing the appeal under Section 33 is obviously to put the declaration in jeopardy to the extent the appeal challenges either the whole or part of the declaration. There is no reason to exclude the doctrine of applying legal maxim of res sub-judice to the proceedings under sub-section (1) read with sub-section (3). On the other hand that would further the obvious intent of the Legislature in provid-

*(To set aside order passed by Maharashtra Revenue Tribunal at Nagpur, in Ceiling Appeal No. 123, ALC-A 105 and 141 of 1976, D/- 7-2-1976 and 9-2-1976.)

ing the remedy of appeal to an aggrieved party. (Para 13)

Scheme of sub-rule (3) of Rule 7 of the Distribution Rule is clearly indicative of the intention underlying the remedy of appeal and its legal effect on further proceedings, is that once it is brought to the notice of the authorised officer that there is no final declaration with regard to the surplus land, he is disabled to hand over the possession to the allottees. That itself shows that once the declaration with regard to surplus land made by the Collector or Surplus Land Tribunal under sub-sec. (1) is subjected to appeal under sub-sec. (3), all further proceedings must await the result of such an appeal.

(Para 17)

Appeals are the creation of the statute. They are to be provided by the substantive law. There is a distinction between the procedure in appeals and the appeal themselves and right thereto. It is from the provisions of a given statute the Court is required to find out whether the appeal provided is a continuation of the initial proceeding or it is merely a supervisory form that is enacted for. Provisions of Section 33 with regard to appeals under Section 21 create a substantive form of judicial review. The jurisdiction, therefore, is conferred in favour of the Maharashtra Revenue Tribunal by the plenary provisions of Section 33 and not by the Regulations nor by the Code of Civil Procedure. Sub-section (3) of Section 33 merely deals with the procedure and not with the jurisdiction of the Appellate Tribunal. The scope cannot be enlarged nor can be curtailed by reference to the Regulations or to the Code of Civil Procedure. (Para 18)

Thus the cumulative effect of the provisions of sub-sections (1) and (3) of Section 21 reading together, sub-section (2) of Section 21 being executory in nature leading unto serious consequences indicated by sub-section (4) of that section; there being a pecuniary liability statutorily fastened under Section 21-A and there being no similar provision to compensate the surplus holder deprived of the possession during the pendency of the appeal the reading of the Rule 7 (3) of Distribution rules indicating that the authorised officer has to stay further proceedings if intimated about the appeal having been filed; and looking to the nature, jurisdiction and the relief that can be given in an appeal or revision, it appears fair, wholesome, just and proper to hold that filing of an appeal operates

as stay of taking possession and of vesting the surplus land in favour of the State. (Para 24)

Cases Referred: Chronological Paras

AIR 1948 Bom 347 = 50 Bom LR 203 15
AIR 1931 PC 263 = 1931 All LJ 833 15
(1881) ILR 6 Bom 110 15

C. G. Madkholkar with D. K. Deshmukh and A. M. Gorde, for Petitioners in all Appln. Nos.; R. R. Deshpande, Asst. Govt. Pleader for Respondent/State in all Appln. Nos.; R. N. Deshpande, for the Intervener, in all Appln. Nos.

ORDER:— In the wake of accelerated ameliorative economic measures relating to the equitable distribution of agricultural lands that exceed the ceiling limit, the original Act i.e., the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, has undergone several swift amendments in the year 1975. Under the amended provisions of Section 2-A, Tribunals have been constituted for the purpose of holding enquiry and further determining the surplus holding and for taking steps to possess and distribute lands. These Tribunals have been clothed with powers under Section 44-A formerly possessed by the Collector to proceed to take possession of the land as is provided for by Section 21 (2). The provisions of Section 21 (4) declare that such surplus land would stand vested in the State with effect from the date on which the possession of the land is taken and the scheme permits distribution of the surplus land under Chapter VI of the enactment. Under the amended provisions the basic structure of the law has not been materially affected except that there is legislative emphasis on speed in determination of the cause and necessity to distribute the land to those who are entitled to the benefits thereof under the provisions of the law. It may be stated before reference is made to the grievance in these petitions that the structure of the law remains in the same procedural gamut without any radical departure, in that it postulates the need of filing returns, serving notices, holding enquiries into the statutory issues and making declarations. The matters are enjoined to be considered under Section 18 and are enumerated even under the present provisions and those include matters with regard to the total area of land held by the holder on 26th September, 1970, as well the transfers which should be ignored and other similar matters which are statutorily raised in the shape of

questions to be answered by the authority. After the matters are considered under Section 18 and if there be any dispute between tenant and landlord the question is adjudicated under Section 20, the Collector or the Tribunal is required to make a declaration under Section 21 (1) as to (a) the total area of land which a person or family unit is entitled to hold as ceiling area; (b) as to the total area of land which is in excess of the ceiling area; (c) the name of the landlord to whom possession of the land is to be restored under Section 19 and the area and particulars of such land; (d) the area, description and full particulars of the land which is delimited as surplus; and (e) the area and particulars of land out of surplus land, in respect of which the right, title and interest of the person or family unit holding it is to be forfeited to the State Government. In all those matters indicated by clauses (a) to (e) of sub-section (1) of Section 21, the Collector has to make a declaration. Upon this basic declaration which is obligatory to be announced in the presence of the holder and other persons interested who are present at the time that declaration is made further statutory results are indicated. The basic requirements of the notice, the enquiry and the declaration to be made have not been any way affected by any of the amendments. The scheme of Section 21 further shows that after the declaration is made under sub-section (1), steps regarding taking possession of the surplus land are required to be taken by the Collector or the Tribunal exercising its powers. Sub-section (4) indicates that upon taking this possession and from the date on which possession is taken, the land has to be deemed to have been acquired by the State Government for the purposes of the Act and it stands vested in the State Government. However, against the declaration so made with regard to matters mentioned in clauses (a) to (e) of sub-section (1) of Section 21, an appeal is provided expressly by Section 33 (1) (2).

2. Sub-section (3) of Section 21 around which much of the controversy in these present petitions has eventually centred in terms treats the declaration earlier rendered final subject to appeal under Section 33 (1) to Maharashtra Revenue Tribunal or revision provided for under Section 45 (2). A little later on that provision will be closely examined.

3. Turning to the petitions with this background of law, all these peti-

tions raise an interesting and important question to be determined as to the effect of filing of the statutory appeal before the Maharashtra Revenue Tribunal against a declaration under sub-section (1) of Section 21 and the powers of that Tribunal with regard to matters of stay of further proceedings which are indicated by sub-section (2) of Section 21, sub-section (4) of Section 21 and by Section 27, i.e., possession, vesting and distribution of surplus land.

4. It is not necessary to consider the facts in each case. Suffice it to observe as is not in dispute that the petitioners in each of these petitions have filed the returns and their cases were decided by the Tribunals respectively after holding enquiry as required by Section 18 and declarations were made by the Surplus Land Determination Tribunal under Section 21 (1) (hereinafter referred to as Surplus Tribunal) and orders of those Tribunals are annexed to each of these petitions as Annexure-A. By those orders against each of the petitioners, declaration is made that they are surplus holders and they hold surplus land, that is to say, in Writ Petition No. 1751/76 to the extent of 7 Acres 20 Gunthas, in Writ Petition No. 1790/76 to the extent of 21.77 Acres, in Writ Petition No. 1805/76 about 9-00 Acres and in Writ Petition No. 1842/76 about 5 Acres 18 Gunthas.

5. It is also not in dispute that all these petitioners have preferred their respective appeals as is evidenced by the annexure being the appeal memo in each case within the time prescribed by Section 35 of the Ceiling Act. The appeals are entertained by the Maharashtra Revenue Tribunal (hereinafter referred to as the Revenue or Appellate Tribunal) in that the same are not dismissed in motion hearing. However, in each of these petitions, it appears, the petitioners moved separate applications for interim stay of further proceedings and in each case by the impugned order the Revenue Tribunal has rejected that prayer, however, keeping alive the appeal before itself.

6. In Writ Petition No. 1805/76 no reasons are given why the stay is refused. In Petition No. 1842/76 stay is refused because the contention is about the Potkharab land. In Petition No. 1751/76 stay is refused because the land-holder was contending for the validity of a partition and in Petition No. 1790/76 stay is refused because the appellant was trying to set up the partition of 5th June, 1970.

As the stay is refused in all these cases, the petitioners complain that in spite of the appeals entertained by the Revenue Tribunal, they would be divested of their property under Section 21 (4) and further the property shall pass not only to the State but eventually would be distributed to several persons and their appeals in fact would be rendered infructuous. Thus presently they feel aggrieved by these interlocutory orders.

7. Apart from the ends of justice, balance of convenience and the necessity to maintain status quo during the pendency of the appeals, it is urged on behalf of the petitioners, that upon true construction of the provisions of appeal and particularly the provisions of Section 21 (3), it would appear that as soon as the appeal is filed the declaration under Section 21 (1) is put in jeopardy; in other words there is no finality to the order made by the Collector and the presentation of appeal should in law operate as stay of further proceedings. It is contended that unless such a construction is placed on the express terms of the statute, valuable rights which may eventually be upheld by the Revenue Tribunal would be lost and the very purpose of the providing for an appeal would be rendered infructuous. I was taken through several of the provisions of the Act as well as the Rules to indicate the legislative anxiety that a person subjected to the process of this law should have the full and complete opportunity of adjudicating his grievance and then and then only should be deprived of the surplus determined according to law. It is contended that appeal under the present statute is a continuation of the enquiry and lies against all the matters mentioned in sub-section (1) of Section 21. If that be so, the provisions of sub-section (2) or provisions of sub-section (4) of Section 21 would not be available once an appeal is filed and entertained. Reference was made to the Rules called Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) (Distribution of Surplus Land) Rules, 1975 (hereinafter referred to as Distribution Rules) to indicate how the distribution procedure is regulated by those Rules and how the presentation of appeal affects that procedure.

8. On behalf of the State the learned counsel submits that sub-section (3) of Section 21 read with Section 33 would indicate that the finality attaches to the order made by the Collector under sub-section (1). Even assuming that the

finality attached to the order made in appeal, it is incorrect, according to the learned counsel, to treat that the presentation of appeal or filing of it operates as stay of further procedure indicated by sub-section (2) of Section 21 or the stage of sub-section (4) of Section 21. Reliance is placed on the Maharashtra Revenue Tribunal Rules and Regulations and power of the Revenue Tribunal to pass stay orders in appeals. Alternatively, it is submitted that under sub-section (3) of Section 33 the Code of Civil Procedure governs the exercise of the powers by the Revenue Tribunal in the matters of appeal and, therefore, the declaration contained in Order 41, Rule 5, that presentation of appeal does not operate as stay should be extended to the appeals under the Ceiling Act. It is further contended on behalf of the State that these are discretionary matters and expressly under the Regulations the Tribunal having the power to reject the stay, the petitioners are not entitled to any relief.

9. It would thus appear that much of the controversy centres on the interpretation and the effect of the provisions with regard to presentation of the appeal and its legal consequences. If the presentation of appeal has the effect in postponing the steps required to be taken by the statute in that taking of the possession followed by vesting and distribution, then it follows that during the pendency of the appeal there would be stay of those steps.

10. To understand the exact conspectus of the provision, I propose to quote sub-section (3) of Section 21 which reads as follows:

"21. * * * * *

(3) The declaration made under this section, subject to the decision of the Maharashtra Revenue Tribunal in appeal under Section 33, or of the State Government in revision under sub-section (2) of Section 45, shall be final and conclusive, and shall not be questioned in any suit or proceeding in any court." (Emphasis provided).

The plain reading of the provision indicates that the finality to the declarations is subjected to the decision of the Maharashtra Revenue Tribunal or to the decision of the State Government, first in appeal and the latter in revision. The emphasis that it should be so subjected cannot at all be missed and it may be men-

tioned that by Amending Act 32 of 1965, the words were specifically added in the body of sub-section (3). When the Legislature uses the phraseology making declarations final and conclusive subjecting it to the orders to be made in appeal or revision, it appears plain intention that whatever would be decided in appeal or revision will be final adjudication of rights of the parties. The word "conclusive" has been specifically added to emphasise that the declarations can be only challenged by the modality indicated by law, i.e., either preferring an appeal or if the conditions of Section 45 (2) are available by the modality of filing a revision application. It is well settled that such appeals by the very nature of things are the extensions of the original proceedings; nay, they are the continuation thereof. In other words, whatever the original authority could do is capable of being done subject to any limitation statutorily placed upon by the appellate authority. Sub-section (3) permits the appeal against the declaration made by the Collector under sub-section (1) of Section 21. It is significant that under sub-section (1) similar phrase occurs which enjoins upon the Collector "to make a declaration". The process appears to be one of making judicial order with regard to matters specified in clauses (a) to (e) under sub-section (1) of Section 21. The Collector, under sub-section (1) was to make a declaration and then proceed to announce the same. These stages are separately indicated in the phraseology of sub-section (1) itself. Against the making of the declaration the appeal lies, and Section 33 (1) (2) indicates that any part of that declaration can be subjected to appeal. Therefore, there is no doubt that the provisions of sub-sections (1) and (3) of Section 21 are to be read together and by the process of adjudication contemplated therein eventually a final declaration in the sense that adjudication of the rights of the parties with regard to the matters in clauses (a) to (e) is finally and conclusively achieved.

11. Reference to sub-section (2) was made on behalf of the State along with sub-section (4) of Section 21 to point out that in spite of the finality given to the declaration under sub-section (3), the Collector can proceed and land can vest in the State Government; in other words it is submitted that though appeal may be filed, there is no bar for the Collector to take proceedings for entering upon possession and thus legally vesting the

land in State. From this, the argument is, the appeal would not operate as stay.

12. For appreciating all these submissions and this approach, the provisions of sub-section (2) and sub-section (4) of Section 21 will have to be closely considered. Sub-section (2) is enabling in its nature and executory in its purpose. It permits the Collector by following the procedure prescribed to prepare the statement and exhibit it at the village Chawadi as well sending the copy thereof to the interested persons and where there is a case of forfeiture, it states that the property forfeited shall stand vested in the State and further prohibits making of certain transfers. After an Explanation there is a proviso which operates in the cases of tenancy or with regard to surplus lands under any other law or other such matters. Thus excepting the cases of forfeiture where vesting takes place on the date of the announcement of the declaration and imposing bar for transfers, sub-section (2) in other cases enjoins a procedure preliminary to take possession. Sub-section (4) requires the Collector to take possession after announcement in the prescribed manner of the delimited surplus land as well restore possession to the landlord who is held entitled to resume certain lands having reference to sub-section (1) (c) of Section 21. Latter part of sub-section (4) proceeds to declare that from the date on which the possession is taken in the prescribed manner, the State Government is deemed to have acquired the land for the purposes of the Act and it shall vest without further assurance and free from all encumbrances in the State. Land covered by proviso to sub-section (2) is liable to vest after the proceedings mentioned in sub-section (2) terminate.

13. This shows that upon declaration the statute does not make it possible the legal effect of divesting the landholder of his property and vesting it in the State Government. Declaration more or less is an independent stage on the basis of which the Collector is authorised in the prescribed manner to enter upon the land and take possession. It is only after the possession is so taken, the law declares that the land stands acquired by and vested in the State. It is obvious therefore that to achieve this far-reaching legal effect there must be a final and conclusive declaration. It cannot be conceived that a declaration which is liable to be reversed under the provisions of

the very same Act will enable the Collector to take such serious stage of divesting the persons of their estate and further entering upon its possession and enjoyment and State getting the rights of acquisition for the purposes of this Act leading unto its distribution. Looking to the whole scheme of Section 21 it appears reasonable to hold that excepting the declarations regarding the forfeiture, all other matters of declaration must await final decision in case an appeal or revision is preferred. In other words, though sub-section (2) opens with the words "after a declaration under sub-section (1) is made", the Collector may proceed to take steps to enter upon the surplus land for taking possession, on the nature of things the declaration under sub-section (1) is meant the declaration that is final and conclusive under sub-section (3). The effect of filing the appeal under Section 33 is obviously to put the declaration in jeopardy to the extent the appeal challenges either the whole or part of the declaration. There is no reason to exclude the doctrine of applying legal maxim of *res sub judice* to the proceedings under sub-section (1) read with sub-section (3). On the other hand that would further the obvious intent of the Legislature in providing the remedy of appeal to an aggrieved party.

14. The phraseology of sub-section (3) of Section 21 which makes the declaration final and conclusive subject to appeal or revision indicates that till the final decision of the appeal the matters are treated still *sub judice*.

15. This Court had an occasion to consider similar phraseology available in the provisions of Section 14 (3) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1944, and a Division Bench of this Court in *Indra Singh v. Shiavax Cawasji*, (AIR 1948 Bom 347) relying on the Privy Council decision in *Annamalay Chetty v. B. A. Thornhill*, (AIR 1931 PC 263) and *Nilvaru v. Nilvaru*, ((1881) ILR 6 Bom 110) found that once the appeal is filed, the finality of the order made by the original authority disappears and it is the decision of the appellate authority that becomes final and operative. The principle underlying that decision equally applies to the provisions of sub-section (3) of Section 21. In other words, once the appeal is filed under Section 33 the declaration made by the Collector under sub-section (1) to the extent challenged in appeal loses its finality and it will be the decision of the

Maharashtra Revenue Tribunal, i.e., the appellate authority, which would become final and operative and therefore, under sub-section (2) and sub-section (4) the Collector will have to work out or give effect to that decision.

16. It was contended for the State that sub-sections (3) and (4) have been recast by the amending Acts and there is departure from the earlier scheme, in that before the amendment under sub-section (4) there was express mention that Collector would proceed to take possession after final decision in appeal or revision. The deletion of that clause, however, does not affect the provisions of sub-section (1) and sub-section (3), for, in spite of such a clause, it would be obvious that finality and conclusiveness is attached to the ultimate order that can with jurisdiction be made by the authorities created by the statute.

17. Reference to rules, i.e., the Distribution Rules above stated and particularly sub-rules (2) and (3) of Rule 7 would indicate that the authorised officer is precluded from handing over the possession of the lands to the allottees if it comes to his notice that any land included in the final statement has not been finally declared surplus land or in an appeal appellate authority or competent authority had issued a stay against the distribution on proceedings. This sub-rule (3) by itself indicates that even the rule-making authority contemplates final declaration of surplus land and receipt of orders from the appellate authority against distribution proceedings. That obviously shows that if the authorised officer is apprised of the fact that there is no final declaration of surplus land, the rule contemplates a stay by him with regard to handing over of possession of the land in favour of the allottees. If the possession has already been taken the rule contemplates clearly that further distribution proceedings can be subjected to stay by the appellate or any other competent authority and the authorised officer is enjoined to obey those stay orders. Scheme of sub-rule (3) is clearly indicative of the intention underlying the remedy of appeal and its legal effect on further proceedings, in that once it is brought to the notice of the authorised officer that there is no final declaration with regard to the surplus land, he is disabled to hand over the possession to the allottees. That itself shows that once the declaration with regard to surplus

land made by the Collector or Surplus land Tribunal under sub-section (1) is subjected to appeal under sub-section (3), all further proceedings must await the result of such an appeal.

18. The provisions regarding the appeal may briefly be noted to find out whether there is any substance in the submissions of the State drawing support from the Regulations and Order 41, Rule 5, of the Code of Civil Procedure. Appeals are the creation of the statute. They are to be provided by the substantive law. There is a distinction between the procedure in appeals and the appeals themselves and right thereto. It is from the provisions of a given statute the Court is required to find out whether the appeal provided is a continuation of the initial proceeding or it is merely a supervisory form that is enacted for. As stated earlier, in the contemplation of the ceiling law and particularly in the structural part of Section 21, reading sub-sections (1) and (3) together, appeal has been provided as a continuation of the original proceeding initiated either upon notice or upon filing of the return. The matters of declaration mentioned in sub-section (1) (a) to (e) can be effectively reviewed and adjudicated upon in the process of these appeals. Provisions of Section 33 with regard to appeals under Section 21 thus create a substantive form of judicial review. The jurisdiction therefore, is conferred in favour of the Maharashtra Revenue Tribunal by the plenary provisions of Section 33 and not by the Regulations nor by the Code of Civil Procedure. Sub-section (3) of Section 33 merely deals with the procedure and not with the jurisdiction of the appellate Tribunal. Relying upon sub-section (3), the procedural part of the Code of Civil Procedure may be available for appropriate exercise of the powers which flow from sub-section (1) of Section 33. It is not left to doubt as to what power the Tribunal can effectively exercise in exercise of the appellate jurisdiction. Section 34 declares that the appellate Tribunal may confirm, modify or rescind the decision, order, declaration or award which is brought before it under Section 33. Section 35 makes a special provision with regard to limitation for appeals. Thus the format of Sections 33, 34 and 35 indicates a self-contained creation of jurisdiction permitting judicial review by the higher Tribunal over the decisions which are enumerated in sub-section (1) of Section 33. The scope cannot be enlarged nor can be cur-

tailed by reference to the Regulations or to the Code of Civil Procedure.

19. Even the declarations of the statute which permit appeals may in given cases indicate that once the appeal is filed the whole matter becomes res sub judice and the order subjected to appeal loses its finality and conclusiveness. That should be the normal effect of providing for effective judicial review by the appellate Court. To avoid the doctrine of jeopardy as well as to clarify sometimes the principles of merger, provisions are enacted which declare, as is done by Rule 5 of Order 41 of the Code of Civil Procedure, that filing of appeal shall not operate as stay. It is a matter of intention of the statute to be gathered from several provisions and particularly in want of any such declaration to infer whether filing of an appeal shall operate or not as a stay of the order, declaration or decision which is subjected to appeal by the statute.

20. It appears that advisedly having eliminated the right of representation by legal counsel, the amending provisions of the Ceiling Act have kept a right of appeal available to aggrieved party. In the very nature of things it is difficult to follow that a declaration which is capable of being modified, rescinded or reversed in an appeal after its filing should still be available to the Collector for taking possession and should enure to the benefit of the State for vesting of that property for the purposes of the Ceiling Act and to pass the said property in the process of equitable distribution contemplated by this law. Several of the working complications stare in the face if the look is taken to some other provisions of this Act.

21. By Section 21-A a person or the family unit that possesses surplus land is obliged to pay compensation for the use and occupation of the surplus land to be determined by the Collector from the year following the year in which surplus was found till the possession is taken. Sub-section (4) of Section 21 declares that as soon as the possession is taken the land is deemed to have vested in the State without further assurance and free from all encumbrances. This has to be followed by the distribution of this land acquired by the State under Chapter VI wherein the interests of several persons would come up with regard to this land. This is a salutary scheme underlying the provisions of the high ob-

jectives with which this law has been enacted and presumably no exception can be taken to its basic terms.

22. However, assuming that the declaration of surplus land is effectively set aside in appeal by the Maharashtra Revenue Tribunal which is obviously permissible because of Section 34 read with Section 21 (1), there is no express provision permitting retake of the land from the persons who are called allottees and there is no further provision of declaration that the State Government shall stand divested of the land nor there is any provision which will permit grant of compensation to the person deprived of that land during the pendency of the appeal. Reliance was placed on Section 39 for the State and upon the inherent powers of the appellate Court, i.e., the Maharashtra Revenue Tribunal to do justice by applying the principles of restitution. The provisions of Section 39 really do not call for interpretation in the present proceedings but ex facie these indicate that they provide for the execution of the orders as is provided for in Section 21 of the Mamlatdar's Courts Act and even in a given case State may claim immunity from Section 39 because of the statutory declaration as is available in sub-section (4) of Section 21 of the Ceiling Act that it possesses the land free from encumbrances. In other words, the effect of this declaration would be that in spite of the appeal which by its own nature is a sort of challenge to the right of the State, law assumes that State holds the land as a free-hold and it is doubtful whether the effect of this declaration can be curtailed by an implication. Undoubtedly restitutive processes are the part of the effective exercise of judicial power but whether those processes which are available to the Courts of universal jurisdiction would be available to the Tribunals of limited powers statutorily defined is a question that raises a debate by itself which need not be resolved in this controversy. Suffice it to say that the provisions to which reference has already been made indicate that as soon as an appeal is filed under sub-section (3) of Section 21, the finality is lost to the extent the matter under sub-section (1) of Section 21 is under challenge. It is only upon the final and conclusive decision is made in appeal the Collector under sub-section (2) read with sub-section (4) can effectively take steps to possess the surplus land followed by the sta-

tutory declaration of acquisition and vesting.

23. Reference to the provisions of Section 45 of the Ceiling Act also indicates that this is the inherent scheme of this legislation. Under sub-section (2) of Section 45 revisional jurisdiction is conferred upon the State Government. It is meant to be exercised as and when occasion arises. That jurisdiction operates upon the enquiry and proceedings right from the stage of Section 17 to Section 21. It will take in the declarations made under sub-section (1) of Section 21. Proviso to sub-section (2) of Section 45 indicates the conditions of that jurisdiction and those being, firstly, where an appeal against any such declaration or part thereof has not been filed within the period provided for such an appeal; secondly the possession of such land has not been taken under sub-section (4) of Section 21; and thirdly the period of three years from the date of such declaration or part thereof has not elapsed. All these conditions have to exist cumulatively. The second condition is of primary importance and throws light on the intention of the Legislature. If the possession is taken immediately because there is a final and conclusive declaration under sub-section (1) as was contended for, then by very reason of the proviso the condition No. 2 shall never be satisfied and though the legislature in terms created a jurisdiction in favour of the State Government meant to be exercised by it in the ends of justice and further the objects of the statute, the proviso itself will lose its force and will be rendered nugatory.

24. The cumulative effect of these provisions i.e., sub-sections (1) and (3) of Section 21 reading together, sub-section (2) of Section 21 being executory in nature leading unto serious consequences indicated by sub-section (4) of that section; there being a pecuniary liability statutorily fastened under Section 21-A and there being no similar provision to compensate the surplus holder deprived of the possession during the pendency of the appeal the reading of the Rule 7 (3) of Distribution rules indicating that the authorised officer has to stay further proceedings if intimated about the appeal having been filed; and looking to the nature, jurisdiction and the relief that can be given in an appeal or revision, it appears fair, wholesome, just and proper to hold that filing of an appeal operates as stay of taking possession and of vest-

ing the surplus land in favour of the State. If before the appeal is filed possession is taken, then the provisions of Rule 7 (3) read with the provisions of Code of Civil Procedure as well as the Regulations on which reliance was placed on behalf of the State indicate that the distribution proceedings can be effectively stayed in appropriate cases by the Maharashtra Revenue Tribunal. As far as taking of possession and vesting is concerned filing of appeal operates as stay; but if the possession is lost, the aggrieved party is not without remedy to the extent indicated above.

25. That being the position of law, it has to be held as each of the petitioners has filed the appeal that operates as a stay disabling the Collector from taking possession and vesting the property in favour of the State. To such declarations the petitioners in each of these four petitions are entitled. The orders made do not affect the rights of the petitioners to remain in possession during the pendency of the appeal. As soon as the appeals are decided as stated in the body of the judgment, the provisions enabling the Collector to enter upon the land come into effect and if the possession is taken the land shall stand vested in favour of the State. It is not necessary expressly to set aside these orders in view of the legal position indicated above. In fact upon the view I have taken, these orders are infructuous.

26. Petitions thus succeed and are allowed. However, there would be no orders as to costs in any of them.
Petitions allowed.

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AGGARWAL, J.

The Scindia Steam Navigation Co. Ltd., Appellant v. The Union of India and another, Respondents.

First Appeal No. 1334 of 1966, D/- 12-8-1975.

(A) Requisitioning and Acquisition of Immovable Property Act (1952), Section 8 (2) (a) — Determination of compensation — Statutory restrictions under the relevant Rent Control legislation cannot be ignored.

In determining the compensation under clause (a) of sub-section (2) of Section 8, the authority has to bear in mind

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the relevant statutory restrictions under the Rent Control Laws applicable to the requisitioned property, although there is no relationship of a landlord and tenant between the owner and the competent authority who requisitions property. In the matter of fixing the compensation, such statutory restrictions cannot be ignored. The mode of compensation is regulated on the basis of the rent which would have been payable for use and occupation of the property, if it had been taken on lease for that period. It could not have been the intention of Parliament that in the matter of compensation the competent authority who requisitions property needed or likely to be needed for any public purpose should pay higher compensation than payable under the existing Rent Control Laws.

Under the Act the amount of compensation is not to be worked out only under clause (a). The owner may receive additional payment for which special provision is made under clause (b), for matters like pecuniary loss due to requisitioning, expenses on account of vacating the requisitioned premises, etc., as enumerated in sub-clauses (i), (ii), (iii) and (iv) of that clause. The compensation may be supplemented by the Authority by having regard to the provisions of clause (a) of sub-section (1) of Section 8 which imposes a duty to "have regard to the circumstances of each case". AIR 1961 Punj 128 (FB) and AIR 1970 Delhi 232, Distinguished. (Para 13)

Cases Referred: Chronological Paras

AIR 1970 Delhi 232	6, 15
AIR 1962 SC 151 = (1962) 3 SCR 49	11
AIR 1961 Punj 128 = 62 Pun LR 812 (FB)	14
AIR 1957 SC 309 = 1957 SCR 20	9
AIR 1954 Bom 323 = 56 Bom LR 238	12, 14

Soli Sorabjee with Dara R. Zaiwala, i/by M/s. Payne and Co., Attorneys, for Appellant; Raja S. Bhonsale, Asst. Govt. Pleader, for Respondents.

JUDGMENT:— The appellants are the owners of Scindia House situate at Dugali Road, Ballard Estate, Bombay. The Union of India — the 1st respondent requisitioned the entire third floor of the Scindia House for the Customs Department, Bombay, in the month of April, 1964, under the Requisitioning and Acquisition of Immovable Property Act, 1952 (hereinafter referred to as 'the Act'). The appellants claimed compensation at the rate of Rs. 2/- per sq. ft., but the 2nd respondent, by his order dated 9th April,

1966, fixed the monthly compensation at the rate of 42 Paise per sq. ft. with effect from 11th April, 1964. The appellants being dissatisfied with the rate of compensation have filed the present appeal.

2. Scindia House was built in 1938, upto the four floors. In the same year, the third and fourth floors were let out by the appellants to Hindustan Lever Limited for a period of about 25 years. The lease expired in October, 1963 and the possession of the 3rd and 4th floors was surrendered to the appellants. The Union of India, in the First place, requisitioned the 3rd and 4th floors, but ultimately on the representation of the appellants, the 4th floor was released for the appellants' own use. The appellants, by their letter dated 11th April, 1964, addressed to the Collector of Bombay — the 2nd respondent, placed on record that the possession of the 3rd floor of Scindia House was given to the Customs authorities on that date. By the same letter, the appellants proposed that they be paid rent at the prevailing rate of Rs. 2/- per sq. ft. for the carpet area of 9754 sq. ft. (Air-conditioned) including the lobby and also a monthly rent of Rs. 500/- for fixtures consisting of partitions of cabins, fans, light etc. The rest of the terms and conditions are not material for our purposes. The Collector of Bombay did not respond favourably to the offer of the appellants as according to him, implications of the requisition order were not appreciated by the appellants and that the compensation had to be fixed under Section 8 of the Act. Thereafter, the appellants through their attorneys carried on correspondence and stated in one of their letters that it would be legitimate to infer from the long delay on the part of the Customs in coming to any understanding with the appellants and that the Customs Department did not agree to the basis proposed by the appellants for fixation of rent or compensation and therefore a dispute could well be said to have arisen between the parties which, having regard to the provisions of the Act, should be determined by arbitration. Ultimately, by a letter dated 24th April, 1965, the appellants' attorneys were informed that the District Deputy Collector, Bombay Suburban District, was authorised by the Collector to hear the claim of the appellants for fixing the rental compensation and requested them to call at his office on 14th May, 1965, at 3 p.m. along with the documentary evidence in support of their

claim for compensation. The appellants appeared through their attorney Mr. C. R. Jussawalla, Solicitor. Thereafter, various hearings took place and Mr. Jussawalla represented the appellants at these hearings and the documents referred to and relied upon by the parties were exchanged and discussed. The Assistant Collector of Customs, by his letter dated 6th October, 1965, informed the Collector of Bombay that the rent paid by M/s. Hindustan Lever Ltd., to the appellants from 1938 to 1963 both for the 3rd and 4th floors was Rs. 1,950.80 per month and the air-conditioning charges which were initially fixed at Rs. 1,000/- were subsequently enhanced to Rs. 2,500/- per month, and thus the rent for the 3rd floor would come to Rs. 2,225.40 per month. On the basis of the rent of Rs. 1,950.80, the rate of rent was worked out at 23 Paise per sq. ft. In the result, the 2nd respondent took the view that the rate of Rs. 00.42 Paise proposed by the Collector of Customs appeared to be reasonable and by the order dated 9th April, 1966, in appeal, he fixed the compensation at Rs. 4092.90 Paise per month.

3. Mr. Zaiwala, the learned Counsel for the appellants, has raised three points. Firstly, the appellants were not properly heard by the 2nd respondent, inasmuch as no evidence was recorded. The reports of the appellants' Architects and the 1st respondent's Engineers were merely exchanged between the parties. Secondly, the 2nd respondent has not given any reason for rejecting the claim of the appellants. Thirdly, the 2nd respondent has misdirected himself on law as to the basis on which the rent should have been fixed.

4. In support of the first contention, the learned Counsel took me through the record and the order and pointed out that merely reports were exchanged and no evidence was recorded. This position is manifestly clear. The question, however, is whether the appellants were prevented from leading evidence or denied any opportunity to cross-examine the 1st respondent's officers. If not, their contention that they were not properly heard would be unfounded. Now, the minutes of the meetings show that though the appellants were throughout represented by a firm of Solicitors and Mr. C. R. Jussawalla, a partner of the firm, was appearing in the proceedings, he did not make any application that he desired to examine either the appellants or any wit-

nesses on their behalf or that he desired to cross-examine any of the witnesses of the Collector of Customs, Bombay. It appears from the minutes of the meeting held on 6th August, 1965, that Mr. Paranjape, Assistant Engineer Central P. W. D., produced a copy of statement showing how he had worked out the rate of 42 Paise per sq. ft. Mr. Jussawalla took time to take advice of his Architects and to examine the calculations arrived at by Mr. Paranjape and to give his reactions. At the same meeting, he had orally referred to the rental rates prevailing in the nearby Marshall, Orient and Sudama Buildings and he was therefore asked to bring proof in support of the same. He stated that he would bring the necessary evidence next time. At the next hearing, Mr. Jussawalla brought copies of two letters written by M/s. Tata Industries Private Ltd. and the Central Bank of India, stating that the rate of rent they were paying was Rs. 1.25 and Rs. 2/- per sq. ft. for the floor area. This was the type of proof on which reliance was placed. During the hearing of 11-10-1965, Mr. Jussawalla was shown a letter dated 6-10-1965 written by the Collector of Customs. This is the same letter in which information about the previous letting to Hindustan Lever Ltd., at the rate of 23 Paise per sq. ft. was communicated. After perusing that letter, Mr. Jussawalla argued that the compensation was to be fixed considering the present position and not the position prevailing in 1938. The minutes show that the hearing was completed on that day and the matter was adjourned for passing a final order. The position which emerges from what transpired at the various hearings shows beyond doubt that there was no desire on the part of the appellants to lead evidence or to examine witnesses. This position is further fortified by the appellants' attorneys' letter dated 8-3-1966 addressed to the District Deputy Collector, complaining about the failure or neglect on the part of the authority for not deciding the matter. In this connection, the following statements are important:—

"You will recollect that an inquiry was held by you for fixing the rental compensation of the above requisitioned premises. Our clients were represented by Mr. C. R. Jussawalla of our firm. Arguments and submissions were advanced on behalf of our clients before you and similarly they were also advanced on behalf of the Customs Department.

The inquiry was concluded by you nearly five months ago. It is regretted that you have not yet given your decision in the matter. It is not understood why publication of your decision in the matter is being withheld for such a long time particularly having regard to the fact that as intimated to you, our clients have not received any compensation in respect of the said premises ever since the Customs Department occupied the same.

In these circumstances, we request that you will be good to decide the matter which was the subject-matter of the inquiry within a week from the receipt hereof by you. Our clients have so far abstained from taking any legal proceedings in the matter by way of a writ petition or otherwise out of consideration for the Government Department being Customs Department.

We trust therefore the needful will be done in the matter as requested above."

The above letter was addressed by the appellants' attorneys M/s. Payne and Co. Its contents show that arguments and submissions of the parties to the dispute were heard and the inquiry stood concluded. From the record, the minutes of the meetings, the contents of the above letter and the conduct of the parties, it is reasonable to infer that the appellants and their attorneys were satisfied with the manner in which the inquiry was conducted and the evidence received. Had there been any reason to complain about the non-recording of evidence as is now sought to be made out, the same would have been in the forefront of this letter at least. On the contrary, decision was solicited on the basis of the arguments and submissions advanced on behalf of the appellants by Mr. Jussawalla. In this state of things, I do not find any substance in the first contention.

5. In order to substantiate the second contention, the learned Counsel Mr. Zaiwala referred to the order in appeal and argued that the 2nd respondent has not given any reasons for rejecting the claim of the appellants. The learned Counsel pointed out that there is no discussion of the report of the appellants' Architects M/s. Kora and Bhatt, nor is there any discussion of the calculations submitted by Mr. Paranjape, Assistant Engineer, C. P. W. D. He submitted that the 2nd respondent did not consider the pros and cons of the two reports and he

ought to have compared the two reports and indicated his reasons for accepting Mr. Paranjape's calculations and rejecting the report of M/s. Kora and Bhatt. Now, it is true that the 2nd respondent has not given any reasons for rejecting the report of the appellants' Architects. What seems to have weighed with the 2nd respondent was the fact that the previous tenants of the appellants were paying rent at the rate of 23 Paise per sq. ft. In the light of this information the factual aspect whereof was not challenged by Mr. Jussawalla on behalf of the appellants, the 2nd respondent came to the conclusion that the rate of 42 Paise per sq. ft. proposed by the Collector of Customs was reasonable. The 2nd respondent accordingly fixed the compensation at 42 Paise per sq. ft. In the circumstances of the case, it was not necessary, in my opinion, for the 2nd respondent to have analysed the report of the appellants' Architect or compare the same with the report of Mr. Paranjape as urged on behalf of the appellants. The order of the 2nd respondent does clearly indicate as to why he was unable to accept the claim of the appellants at the rate of Rs. 1.50 per sq. ft. as worked out by their Architect. I, therefore, do not find any merit in the second contention.

6. The principal contention is the third contention based on the decision in the case of *Satnarain v. Union of India*, AIR 1970 Delhi 232. That case also arose under the Act. In determining the compensation under Section 8 (2) (a) of the Act, the principles laid down for fixation of standard rent in the rent laws, according to the Delhi High Court, may furnish a useful guide for determining the recurring payment as rent, though the provisions of rent laws will not apply as such because requisition of property does not create a relationship of landlord and tenant. The recurring payment to be made to the owners-claimants as rent cannot be merely the standard rent to be fixed under the provisions of the Rent Control Act. The value of the land will be the value on the date on which possession of the requisitioned premises was taken. The costs of construction of a building will be the cost of constructing the building at the time of its requisition. Mr. Zaiwala contended that the 2nd respondent ought to have followed the principles laid down for fixation of standard rent to the suit property, though the recurring payment to be made to the appellants cannot be merely the rent arriv-

ed at by the appellants' Architects. The 2nd respondent ought to have arrived at the value of the land and of the cost of construction of the requisitioned premises at the time when they were requisitioned viz., in April, 1964. On the other hand, the learned Assistant Government Pleader contended that at the highest the compensation which the appellants could get per month was Rs. 2,225.40 inclusive of air-conditioning charges being the rent recovered by them from their previous occupant M/s. Hindustan Lever Ltd. As against this, the amount of compensation fixed by the 2nd respondent is Rupees 4,096.68 per month and in the circumstances, the same is just having regard to the relevant provisions of sub-sections (1) and (2) of Section 8 of the Act. It would have been unlawful for the appellants to recover rent in excess of the rent charged from Hindustan Lever Ltd., having regard to the restrictions imposed by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "the Bombay Rent Act"). In rebuttal, Mr. Zaiwala submitted that in the present case no rent is fixed under the Bombay Rent Act and, therefore, the appellants could have applied to the Court under Section 11 (1) (b) for fixation of standard rent. The rent agreed with Hindustan Lever Ltd., was nominal rent as the premises were given on a long lease. By agreement under Section 8 (1) (a) of the Act, the Government could have agreed to pay to the appellants compensation in excess of the standard rent and that could not have been unlawful and, therefore, the appellants were entitled to receive more rent than was paid by Hindustan Lever Ltd. In the alternative, the appellants could have themselves made use of the 3rd floor premises as they were in need of the same or the appellants could have given the premises on licence in which event they could not have been bound by the Rent Control Law. The rent charged from Hindustan Lever Ltd. did not include air-conditioning charges, nor did it include the fixture charges.

7. In order to appreciate the rival contentions, the relevant provisions of the Requisitioning and Acquisition of Immovable Property Act, 1952, are reproduced:—

"8. (1) Where any property is requisitioned or acquired under this Act, there shall be paid compensation the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say—

(a) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement;

(b)

(c)

(d) at the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinion is a fair amount of compensation;

(e) the arbitrator shall, after hearing the dispute, make an award determining the amount of compensation which appears to him to be just and specifying the person or persons to whom such compensation shall be paid; and in making the award, he shall have regard to the circumstances of each case and the provisions of sub-sections (2) and (3), so far as they are applicable;

(f)

(g)

(2) The amount of compensation payable for the requisitioning of any property shall consist of—

(a) a recurring payment, in respect of the period of requisition, of a sum equal to the rent which would have been payable for the use and occupation of the property, if it had been taken on lease for that period; and

(b) such sum or sums, if any, as may be found necessary to compensate the person interested for all or any of the following matters, namely:—

(i) pecuniary loss due to requisitioning;

(ii) expenses on account of vacating the requisitioned premises;

(iii) expenses on account of reoccupying the premises upon release from requisition; and

(iv) damages (other than normal wear and tear) caused to the property during the period of requisition, including the expenses that may have to be incurred for restoring the property to the condition in which it was at the time of requisition.

(3)"

If the parties cannot fix the amount of compensation by an agreement, the same is required to be determined by an arbitrator. At the commencement of the proceedings before the arbitrator, the parties have to state a fair amount of compensation. After hearing the dispute, the amount of compensation which appears to be just is to be fixed and in

making an award, regard is to be had to the circumstances of each case and the provisions of sub-section (2) in the present case. Now, the amount of compensation payable for the requisitioning of the property is the sum equal to the rent. Such rent is to be determined on the basis if the requisitioned property had been taken on lease from the appellants. Thus, the amount of compensation is to be worked on the basis of rent which can be fetched by leasing out the property. The words "rent" and "lease" are the key-notes and they are dominant for fixing the compensation. They fix the scope and limit of compensation. We have, therefore, to concentrate on the word "rent" and the expression "if it had been taken on lease" used in clause (a) of sub-section (2) of Section 8.

8. The words "rent" or "lease" are not defined in the Act, though the words "landlord" and "tenant" are defined under Section 2 thereof. The word "lease" is defined under Section 105 of the Transfer of Property Act. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The money, share, service or other thing to be rendered is called the "rent". A lease is thus a transfer of immovable property for a certain period for a consideration. The lessor parts with his right to enjoy the property during the period of the lease and the lessee takes the right to the exclusion of the lessor. Lease distinguishes from licence. In the case of a licensee, he possesses no estate or interest in the premises. Licensee's possession is not exclusive. By a licence merely permission is given to occupy the premises for a particular time. The word "rent" can be used in diverse sense. It may be used in the generic sense of a recompense paid by a tenant to his landlord for exclusive possession of the premises secured by him.

9. The word "rent" also came for consideration in *Karani Properties Ltd. v. Miss Augustine*, AIR 1957 SC 309 at page 312. The term "rent" is not defined under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950.

Their Lordships of the Supreme Court observed thus:—

"The term 'rent' has not been defined in the Act. Hence it must be taken to have been used in its ordinary dictionary meaning. If, as already indicated, the term 'rent' is comprehensive enough to include all payments agreed by the tenant to be paid to his landlord for the use and occupation not only of the building and its appurtenances but also of furnishing, electric installations and other amenities agreed between the parties to be provided by and at the cost of the landlord, the conclusion is irresistible that all that is included in the term 'rent' is within the purview of the Act and the Rent Controller and other authorities had the power to control the same." Under Section 7 of the Bombay Rent Act, it shall not be lawful to claim or receive on account of rent for any premises any increase above the standard rent, unless the landlord was, before the coming into operation of the Bombay Rent Act, entitled to recover such increase under the provisions of the Bombay Rent Restriction Act, 1939, or the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1944, or is entitled to recover such increase under the provisions of the Bombay Rent Act, 1947. Under Section 18 (1), if any landlord receives any consideration other than the standard rent or the permitted increases in respect of the grant, renewal or continuance of a lease of any premises, such landlord shall, on conviction, be punished. Therefore, the law of the land as applicable in April, 1964, placed statutory restriction on the appellants from claiming or receiving on account of rent above the standard rent and contravention of this restriction was made penal.

Tuesday, 12th August, 1975.

10. "Standard rent" is defined under sub-section (10) of Section 5, meaning where the standard rent is not fixed by the Court and the Controller respectively under the Bombay Rent Restriction Act, 1939, or the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1944, subject to the provisions of Section 11 of the Bombay Rent Act, 1947, the rent at which the premises were let on the first day of September 1940, or where they were not let on the first day of September, 1940, the rent at which they were last let before that day, or where they were first let after the first of September, 1940, the rent at which they were first let, or in any of

the cases specified in Section 11, the rent fixed by the Court. Under this definition, subject to the provisions of Section 11, the standard rent of the appellants' premises was the rent at which the 3rd floor premises were let by the appellants, before the first day of September, 1940. It was urged by Mr. Zaiwala as stated above that the appellants could have made an application for fixation of standard rent as the 3rd and 4th floor premises were let out to Hindustan Lever Ltd., at a nominal rent in consideration of the long lease. This submission was not substantiated by the learned Counsel either from the lease or any material on record. On the other hand, the case of the appellants before the 2nd respondent was that he should fix the compensation on the basis of the position prevailing in 1964 and not by considering the position existing in 1938. Having regard to the provisions of the Bombay Rent Act, 1947, it is abundantly clear that if the 3rd floor premises were given on lease, the appellants could not have lawfully recovered from the proposed lessee rent higher than the standard rent and such standard rent would have been the rent at which the 3rd floor air-conditioned premises were last let before 1st September, 1940.

11. On this aspect of the matter, the learned Assistant Government Pleader has placed reliance on para. 7 of the judgment in the case of Corporation of Calcutta v. Smt. Padma Debi, AIR 1962 SC 151. In that case, their Lordships of the Supreme Court were required to consider the provisions of Section 127 (a) of the Calcutta Municipal Act, 1923, for the purpose of gross annual income at which the building might reasonably be expected to let. It was in that connection that the Supreme Court had to consider the implications of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. In the opinion of the Supreme Court, a combined reading of the provisions of Sections 2 (10) (b), 3 and 33 (a) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, leaves no room for doubt that a contract for a rent at a rate higher than the standard rent is not only not enforceable but also that the landlord would be committing an offence if he collected a rent above the rate of the standard rent. One may legitimately say under those circumstances that a landlord cannot reasonably be expected to let a building for a rent higher than the stan-

dard rent. A law of the land with its penal consequences cannot be ignored in ascertaining the reasonable expectations of a landlord in the matter of rent. In this view of the matter, in the opinion of the Supreme Court, the law of the land must necessarily be taken as one of the circumstances obtaining in the open market placing an upper limit on the rate of rent for which a building can reasonably be expected to let. In this context, the following observations are illuminating:—

"It is said that Section 127 (a) does not contemplate the actual rent received by a landlord but a hypothetical rent which he can reasonably be expected to receive if the building is let. Hypothetical rent may be described as a rent which a landlord may reasonably be expected to get in the open market. But an open market cannot include a 'black market', a term euphemistically used to commercial transactions entered into between parties in defiance of law. In that situation, a statutory limitation of rent circumscribes the scope of the bargain in the market. In no circumstances the hypothetical rent can exceed that limit."

12. This Court in the case of Dawoodji Versey v State of Bombay, 56 Bom LR 238 = (AIR 1954 Bom 323) was required to construe the meaning of the expression "market value" in Sec. 23 (1) of the Land Acquisition Act, 1894, in relation to the ascertainment of compensation under the Bombay Land Requisition Act, 1948. This Court held that in ascertaining the market value, the Court must have regard to the value of the property to the owner in its actual condition at the time when he is expropriated with all its existing advantages and potentialities; but the value must be ascertained in the light of circumstances existing at the time of requisition and not divorced therefrom. Any circumstance which puts statutory restrictions upon the liberty of contract or otherwise depreciate the value must be taken into consideration. In that case, 18 rooms in two chawls were requisitioned by an order D/- 30-1-1948. In determining the compensation, the Compensation Officer found that the owner was charging rent from his tenants at the rate of Rs. 5/- per month in respect of each room in the year 1942-43. The Compensation Officer, having regard to the expenses incurred for making repairs and the amenities provided etc., declared that the fair and reasonable rate of compensation for each of the 18 requisitioned rooms was Rs. 10/-

per month in respect of rent plus Rs. 3/- per month as water charges plus permissible additional Municipal General Tax. Under sub-section (1) of Section 8 of the Bombay Land Requisition Act, 1948, the method of ascertaining compensation is provided for. After holding an inquiry, compensation is to be determined by an officer authorised in this behalf by the State Government who shall determine such amount of compensation as he deems just having regard to all the circumstances of the case, and in particular he shall be guided by the provisions of sub-section (1) of Section 23 and Section 24 of the Land Acquisition Act, 1894, in so far as they can be made applicable. In this connection, Mr. Justice Saha (as he then was) observed thus:—

"..... But a monthly tenancy protected by the normal rent restriction statute is the nearest equivalent to it and the rent that such a monthly tenant may pay affords a fairly accurate basis for ascertaining the periodic compensation to be rendered. In my view, therefore, the rent which the premises would fetch, having regard to the provisions of any restriction statutes in force at the time of the requisition, must be accepted as an adequate basis for ascertaining the periodic compensation to be made to the owner."

The learned Judge further observed:—

"It is difficult to accept the view that the 'notional fair rent' must be ascertained unaffected by the rent restrictive legislation in force at the date of requisition. The rent which a building fetches depends upon a variety of factors such as the nature of the construction, the locality, the convenience provided for the purpose for which the building may be used, the surroundings and the general economic conditions and the statutory restrictions imposed by legislation upon the quantum of rent which may be charged. The rent ascertained without considering all the circumstances and especially the Legislative restrictions may in my view be regarded as unreal rent. It is true that a relation of landlord and tenant does not result from requisition. But if the test for ascertaining compensation is the loss which the owner may suffer by being compelled to part with the land, the real basis for compensation can only be that which the owner would have obtained if he had parted with his right of possession to a willing transferee at the time of expropriation. If the statute imposes a limit upon what can legiti-

mately be regarded as rent, any attempt to ignore the provisions of the rent restriction statute would be to ascertain rent by imputing to the parties an intention to agree to an unreal rent the liability for payment of which cannot be enforced by legal proceedings."

13. In my opinion in determining the compensation under clause (a) of sub-section (2) of Section 8, the authority has to bear in mind the relevant statutory restrictions under the Rent Control Laws applicable to the requisitioned property, although there is no relationship of a landlord and tenant between the owner and the competent authority who requisitions property. In the matter of the fixing the compensation, such statutory restrictions cannot be ignored. The mode of compensation is regulated on the basis of the rent which would have been payable for use and occupation of the property, if it had been taken on lease for that period. In this context, the words "if it" used in the said clause are of significance. The scale of compensation is clearly defined. Moreover, it could not have been the intention of Parliament that in the matter of compensation the competent authority who requisitions property needed or likely to be needed for any public purpose should pay higher compensation than payable under the existing Rent Control Laws. The Act is different from other kindred pieces of legislation under which the provisions of sub-section (1) of Section 23 of the Land Acquisition Act, 1894, are made applicable for determining the amount of compensation. The basis of notional fair rent or hypothetical rent which can reasonably be expected in the open market is not the standard rent. It must be observed that under the Act the amount of compensation is not to be worked out only under clause (a). The owner may receive additional payment for which special provision is made under clause (b), for matters like pecuniary loss due to requisitioning, expenses on account of vacating the requisitioned premises, etc., as enumerated in sub-clauses (i), (ii), (iii) and (iv) of that clause. These are specified items. The compensation may be supplemented by the Authority by having regard to the provisions of clause (a) of sub-section (1) of Section 8 which imposes a duty to "have regard to the circumstances of each case". The Authority is enjoined upon to award compensation which appears to it to be just and in that sense equitable and fair.

Thus, the amount of compensation in the aggregate will have to depend on the facts and circumstances of each case in view of the various provisions of sub-sections (1) and (2) of Section 8, as regards requisitioned premises.

14. Mr. Zaiwala relied upon a decision of Full Bench of the Punjab High Court in the case of *Union of India v. Roshan Lal*, AIR 1961 Punj 128 (FB). In that case, the property was requisitioned under the Defence of India Act, 1939. Section 19 (1) of that Act provides for mode of determining compensation and principles to be followed. The provisions of sub-section (1) of Section 23 of the Land Acquisition Act, 1894, were made applicable in determining the compensation. The earlier view of the Punjab High Court was that compensation for requisitioned premises must be equal to the fair rent fixed by the Rent Controller. (See *Raghubir Saran v. Punjab State*, 1954-56 Pun LR 530). After considering the conflicting decisions of its own Court and other cases including 56 Bom LR 238 = (AIR 1954 Bom 323), the Court observed:—

"Upon a careful consideration of the matter, it appears to me that there is a preponderance of authority for the view that where property is compulsorily requisitioned, the amount of compensation should not be determined solely on the basis of fair rent as fixed under the Rent Control Laws. The figure so fixed is merely a piece of evidence which may be taken into consideration as giving an indication of the market rents; other circumstances must be taken into consideration also."

The above decision is of no assistance to the appellants. In the case, the compensation was to be determined on the basis of sub-section (1) of Section 23 of the Land Acquisition Act, 1894, whereas in the present case the method of compensation is equal to the rent which would have been payable for the use and occupation of the property, if it had been taken on lease.

15. Coming to the decision of the Delhi High Court in *Satnarain v. Union of India*, AIR 1970 Delhi 232, when properly examined, shows that the requisitioned premises had never been let out on rent. It was therefore that the provisions of sub-section (4) of Section 8 of the Delhi and Ajmer Rent Control Act, 1952, were applied by the learned Judge. Section 8 of the said Act makes provision for cases in which standard rent may be

fixed by Court. In the case before me, the requisitioned property was the subject-matter of previous letting prior to 1st September 1940 and therefore, it was not a case in which the Authority was required to follow the principles governing cases in which standard rent could be fixed by Court.

16. In my judgment, the appellants could not have claimed rent higher than the rent which they were receiving from Hindustan Lever Ltd. before 1st September, 1940. In the present case, the 3rd floor was let out before 1st September, 1940 and therefore the question of determination of the compensation was more than simplified. Although on the basis of rent of Rs. 2,225.40 inclusive of air-conditioning paid by Hindustan Lever Ltd., the amount of Rupees 2,225.40 only could have been allowed, but the 2nd respondent has fixed the amount of Rs. 4,096.68 as compensation. The amount awarded is, therefore, a just and fair compensation. It may be stated that the appellants had not made out a case of pecuniary loss being caused to them due to requisitioning and if such a case was made out, that was also required to be taken into consideration by the 2nd respondent in determining the compensation. If such a loss was in fact suffered, they would not have failed to include the same in the claim made by their letter dated 11th April, 1964, or at the subsequent hearing. I, therefore, do not find any substance in the argument of Mr. Zaiwala that the appellants' claim should have been considered under Section 8 (2) (b) (i) of the Act.

17. There is also no force in the point that the air-conditioning charges have not been taken into account in fixing the compensation. Apart from the fact that the air-conditioning charges are included in the letter dated 6th October, 1965, as mentioned earlier, Mr. Paranjape, Assistant Engineer, C. P. W. D., in his calculations, has added 30 per cent. for extra services and air-conditioning. Therefore, the compensation awarded on the basis of 42 Paise per sq. ft. is inclusive of the air-conditioning amenity provided by the appellants.

18. On the question of the claim of Rs. 500/- per month for the use of fixtures, cabins etc., Mr. Zaiwala was unable to point out any material on record, on the basis of which the amount of compensation could be determined. The claim is not well founded. Firstly, there

was no evidence that the fixtures, cabins etc., were provided after Hindustan Levers surrendered the third floor premises. Secondly, if the same fixtures, cabins etc., were provided to Hindustan Levers, there is no evidence to show that separate rent was charged for the same. The burden lay on the appellants to establish their claim by some cogent evidence. In the light of the above discussion, the third contention and the points raised in rebuttal also must be rejected.

19. No other ground having been canvassed, the appeal fails and the order passed by the 2nd respondent is hereby confirmed. The Appeal is, therefore, dismissed with costs.

Appeal dismissed.

AIR 1976 BOMBAY 363

(At NAGPUR)

DHARMADHIKARI AND SHIMPI JJ.

Gulabrao Bablaji Ujjainkar and others, Petitioners v. State of Maharashtra and others, Respondents.

Special Civil Appln. No. 1926 of 1975, D/- 5-3-1976.

(A) Land Acquisition Act (1894), Sections 4 (1) and 17 (as amended by Bombay Act 8 of 1958) — Commissioner — Additional Commissioner empowered under Section 13 (3), Maharashtra Land Revenue Code is a Commissioner within meaning of Sections 4 and 17. (Maharashtra Land Revenue Code (1966), Sections 13 (3) and 11 (2)).

Once under sub-section (3) of Section 13 of the Maharashtra Land Revenue Code the powers of the Commissioner are conferred upon the Additional Commissioner, then he exercises the powers of the Commissioner under Sections 4 (1) and 17 of the Land Acquisition Act as a Commissioner and not as an Additional Commissioner, and, therefore, is a 'Commissioner' within the meaning of Section 4 as well as Section 17 of the Land Acquisition Act. AIR 1963 SC 1503, Rel. on; AIR 1969 SC 483 and AIR 1965 SC 1619, Dist. (Para 5)

Although under Section 11 (2) of the Maharashtra Land Revenue Code, unless the State Government directs otherwise, all revenue officers in a division shall be subordinate to the Commissioner, once a direction is issued under Section 13 (3) empowering the Additional Commissioner

to discharge the duties and functions of the Commissioner under the Land Acquisition Act, then obviously such a subordination comes to an end. It may be that for certain administrative purposes or for the purposes of transfer etc., the Additional Commissioner may be subordinate to the Commissioner. However, it is apparent that the Additional Commissioner exercises the same powers and duties once the notification under Section 13 (3) of the Maharashtra Land Revenue Code is issued in his favour and thereafter for the purposes of the Land Acquisition Act, he is a 'Commissioner' for all practical purposes. After he is invested with the powers of the Commissioner under the Land Acquisition Act, he exercises the functions and powers of the Commissioner and, therefore, it is not correct to say that even while exercising his powers and functions of the 'Commissioner' under the Land Acquisition Act, he still remains an Additional Commissioner, an officer subordinate to the Commissioner. If such a construction is accepted, then the very purpose of conferring powers under sub-section (3) of Section 13 of the Maharashtra Land Revenue Code will be frustrated. The said provision becomes redundant. (Para 5)

Cases Referred: Chronological Paras

AIR 1969 SC 483 = 1969 Cri LJ 803	5, 6
AIR 1965 SC 1619 = 1965 (2) Cri LJ 553	5, 6
AIR 1963 SC 1503 = (1963) Supp 1 SCR 539	5
AIR 1961 SC 606 = 1961 (1) Cri LJ 740	8
(1990) 25 QBD 391 = 59 LJQB 559	5

J. N. Chandurkar, for Petitioners;
M. M. Qazi, Addl. Govt. Pleader and R. R. Deshpande, Hony. Asst. to the Addl. Govt. Pleader, for Respondents.

DHARMADHIKARI, J.:— The five petitioners before us are challenging in this writ petition the notification dated November, 18, 1975, issued by the Additional Commissioner, Nagpur Division, Nagpur, declaring that the lands belonging to the petitioners are needed or are likely to be needed for the public purpose, viz., providing of house sites to the landless labourers in the rural areas. By the same notification, the Additional Commissioner further issued a direction under sub-section (4) of Section 17 of the Land Acquisition Act that the provisions of Section 5-A of the Land Acquisition Act shall not apply in respect of the said lands. This notification is challenged by the petitioners mainly on two grounds;

(i) that the Additional Commissioner had no authority to issue the notification under Section 4 (1) of the Land Acquisition Act and, therefore, the notification as well as the direction issued by him is without jurisdiction being ultra vires of his powers; (ii) the list of the landless labourers prepared by the authorities concerned is not correct because many persons mentioned in the aforesaid list have got their own houses in the village. Therefore, according to the petitioners, there is no basis for the acquisition.

2. In reply to these contentions, it is contended by the respondents that vide the notification dated August 31, 1974, issued by the Government in exercise of the powers conferred upon it by sub-section (3) of Section 13 of the Maharashtra Land Revenue Code, the Government has directed that every Additional Commissioner shall exercise all the powers and discharge all the duties and functions conferred on the Commissioner under the Land Acquisition Act. Therefore, according to the respondents, the Additional Commissioner is a Commissioner within the meaning of Sections 4 (1) and 17 of the Land Acquisition Act. So far as the merits of the matter are concerned, an affidavit has been filed before us duly sworn by the Additional Commissioner that there are about 52 Landless labourers in the village to whom the plots are to be allotted and the averments made in the petition that some persons out of these 52 persons are having houses of their own in the village is not correct. Therefore, the said allegation made in the petition is specifically denied by the respondents. For properly appreciating the controversy involved in this petition, it will be useful if the relevant provisions of the Land Acquisition Act, the Bombay General Clauses Act as well as the Maharashtra Land Revenue Code are referred to.

3. The Land Acquisition Act, in its application to the State of Maharashtra, was amended by the Bombay Act VIII of 1958. By the said Amending Act, in Section 4 (1) as well as in Section 17, the words "Commissioner" were added. By the same Act, the Bombay General Clauses Act was also amended and in Section 3 (13), the term "Commissioner" was defined as under:

"'Commissioner' shall mean the Commissioner of a division appointed under the Bombay Land Revenue Code, 1879."

Thereafter the Bombay Land Revenue Code as well as the other Revenue Codes applicable to the other parts of the State were repealed and a consolidated Act known as the Maharashtra Land Revenue Code, 1966, was enacted. Therefore, obviously, in view of the provisions of Section 9 of the General Clauses Act, any reference made to the repealed Revenue Codes, including the Bombay Land Revenue Code, in any other enactment including Land Acquisition Act, will have to be construed in reference to the provisions of the re-enacted Maharashtra Land Revenue Code.

4. In the Maharashtra Land Revenue Code, the term "Commissioner" is not defined but Section 6 of the Code provides that the State Government shall appoint a Commissioner for each division; and may appoint in a division an Additional Commissioner and so many Assistant Commissioners as may be expedient, to assist the Commissioner. Section 11 of the Code then lays down that unless the State Government directs otherwise, all revenue officers in a division shall be subordinate to the Commissioner. Then Section 13 (3) of the Code reads as under:

"The Additional Commissioner and the Assistant Commissioner, and the Additional Collector and the Additional Tahsildar shall each exercise within his jurisdiction or part thereof such powers and discharge such duties and functions of the Commissioner, the Collector or, as the case may be, the Tahsildar under the provisions of this Code or under any law for the time being in force, as the State Government may, by notification in the Official Gazette, direct in this behalf." As already observed, by the notification issued under Section 13 (3) of the Maharashtra Land Revenue Code, 1966, on August 30, 1974, the Government of Maharashtra has directed every Additional Commissioner shall exercise all the powers and discharge all the duties and functions conferred on the Commissioner under the Acts specified in the Schedule appended to the said notification, which includes the Land Acquisition Act.

5. However, Shri J. N. Chandurkar, the learned counsel for the petitioners, contended before us that the powers under Section 4 (1) and Section 17 (4) of the Land Acquisition Act are conferred by the legislature only on the Commissioner. The Land Acquisition Act

deals with the acquisition of the private property of a person and, therefore, should be strictly construed. He further contended that under the Constitution, it is one of the fundamental rights of the citizen to hold the property. The Land Acquisition Act deals with the deprivation of the property of the citizens. If this is so, then such a legislation will have to be strictly construed. He further contended that by the Land Acquisition Act, wide powers are being conferred upon the Commissioner to form an opinion and acquire the property. These powers in a sense are unguided. Therefore, in its wisdom, the legislature has chosen a very high officer of the status of the Commissioner for exercising the said powers which relate to the formation of opinion and issuing of the notifications or directions based on his subjective satisfaction. He further contended that the Land Acquisition Act is a Central legislation and by issuing a notification under sub-section (3) of Section 13, it is not open to the State Government to modify or amend the Land Acquisition Act itself thereby conferring the powers upon the Additional Commissioner or the Assistant Commissioners when the legislation in its wisdom has not chosen to do so. He further contended that the Additional Commissioner is subordinate to the Commissioner and he cannot be equated with the 'Commissioner' for all purposes. In support of this proposition, he has relied upon two decisions of the Supreme Court in *Hari Chand Aggarwal v. Batala Engineering Co., Ltd.* (AIR 1969 SC 483) and *Ajaib Singh v. Gurbachan Singh*, (AIR 1965 SC 1619). It is not possible for us to accept these contentions. It cannot be forgotten that the Land Acquisition Act was amended by the State legislature by Act VIII of 1958, which is called the Bombay Commissioners of Division Act, 1957. By this Act, Section 3-A was added in the Land Acquisition Act and in Sections 4, 5-A, 6, 7 and 17, after the words "appropriate Government", the words "or the Commissioner" were inserted. By the same Act, the definition was introduced in the Bombay General Clauses Act, defining the term "Commissioner". This Act had received the assent of the President of India. Though the words "or Commissioner" were inserted in the various provisions of the Land Acquisition Act, the said term is not defined in the Land Acquisition Act, 1894 itself. So far as the State of Maharashtra is concern-

ed, the Land Acquisition Act, 1894, which is the Central enactment, in its application to the State of Maharashtra, meaning thereby as amended by the State of Maharashtra, governs the field. As the term "Commissioner" is not defined in the Land Acquisition Act itself, obviously for understanding the meaning of the said expression, a reference will have to be made to the Bombay General Clauses Act, 1904 as amended. However, a contention is raised by Shri Chandurkar that the Land Acquisition Act being a Central Act, for understanding the meaning of the expression "Commissioner" recourse could only be taken to the General Clauses Act, viz., the Central Act and not to the Bombay General Clauses Act. In our opinion, this will not be the correct position. As already observed, by Act No. VIII of 1958, both these enactments, viz., the Land Acquisition Act as well as the Bombay General Clauses Act are amended. The General Clauses Act no doubt, is a Central Act but on the same subject covering practically the same area, the Bombay General Clauses Act was also enacted. The amendment was introduced in the Land Acquisition Act by Act No. VIII of 1958, which is a State enactment. Therefore, for properly understanding the meaning of the expression introduced by the State Legislature, recourse could only be taken to the State General Clauses Act. The expression "Commissioner" is not introduced in the Land Acquisition Act by any Central enactment. The said words were inserted in the various provisions of the Land Acquisition Act by the State Legislation. If this is so, for understanding the true import and the scope of the said expression, recourse will have to be taken to the State General Clauses Act, viz., the Bombay General Clauses Act only. In the Bombay General Clauses Act the expression "Commissioner" is defined meaning thereby a Commissioner of a division appointed under the Bombay Land Revenue Code, 1879, as already observed the words "Bombay Land Revenue Code" will have to be read as the Maharashtra Land Revenue Code, 1966, in view of the provisions of Section 9 of the Bombay General Clauses Act. Therefore, for properly understanding the true scope and import of the said expression, a reference will have to be made to the Maharashtra Land Revenue Code, 1966 only. As already observed by Section 6 of the Maharashtra Land Revenue Code, the Government is given a power to appoint a Com-

missioner for each division, including an Additional Commissioner and an Assistant Commissioner. Then Section 13 (3) of the Code confers a power upon the State Government by issuing a notification in the Official Gazette to direct that the Additional Commissioner shall exercise the powers and discharge the duties and functions of the Commissioner under the provisions of the Maharashtra Land Revenue Code as well as under any law for the time being in force. The notification to which a reference has already been made, in terms confers a power upon the Additional Commissioner to exercise all the powers and discharge all the duties and functions conferred on the Commissioner under the Land Acquisition Act. If this is so, then in our opinion, once such powers are conferred upon the Additional Commissioner for all practical purposes, so far as the Land Acquisition Act is concerned, he becomes a Commissioner. It is no doubt true that sub-section (2) of Section 11 lays down that unless the State Government directs otherwise, all revenue officers in a division shall be subordinate to the Commissioner. But, in our opinion, once a direction is issued under Section 13 (3) empowering the Additional Commissioner to discharge the duties and functions of the Commissioner under the Land Acquisition Act, then obviously such a subordination comes to an end. It may be that for certain administrative purposes or for the purposes of transfer etc., the Additional Commissioner may be subordinate to the Commissioner. However, it is apparent that the Additional Commissioner exercises the same powers and duties once the notification under Section 13 (3) of the Maharashtra Land Revenue Code is issued in his favour and thereafter for the purposes of the Land Acquisition Act, he is a 'Commissioner' for all practical purposes. After he is invested with the powers of the Commissioner under the Land Acquisition Act, he exercises the functions and powers of the Commissioner and, therefore, in our opinion, it is not correct to say that even while exercising his powers and functions of the 'Commissioner' under the Land Acquisition Act, he still remains an Additional Commissioner, an officer subordinate to the Commissioner. If such a construction is accepted, then the very purpose of conferring powers under sub-section (3) of Section 13 of the Maharashtra Land Revenue Code will be frustrated. The

said provisions become redundant. It is not possible for us, therefore, to accept such a contention. This is not a case wherein any strict construction of the Land Acquisition Act is, therefore, called for. The Additional Commissioner is also a responsible officer in the hierarchy of Revenue Officers. Practically he is of the rank of the Commissioner. When he exercises the powers or discharges the duties under the Land Acquisition Act, he shall be deemed to be doing so as the Commissioner. As observed by the Supreme Court in *Roop Chand v. State of Punjab* (AIR 1963 SC 1503), a delegate who exercises the powers in terms of a statute and not otherwise, stands on a different footing. In this context, the Supreme Court posed a question and observed as under:—

"The question then arises, when the Government delegates its power, for example, to entertain and decide the appeal under Section 21 (4), to an officer and the officer pursuant to such delegation hears the appeal and makes an order, is the order an order of the officer of the Govt.? We think it must be the order of the Government. The order is made under a statutory power. It is the statute which creates that power. The power can, therefore, be exercised only in terms of the statute and not otherwise. In this case the power is created by Section 21 (4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government. It is of interest to observe here that Wills, J., said in *Huth v. Clarke*, (1890) 25 QBD 391 that the word delegate means little more than an agent'. An agent of course exercises no powers of his own but only the powers of his principal. Therefore, an order passed by an officer on delegation to him under Section 41 (1) of the power of the Govt. under Section 21 (4), is for the purposes of the Act, an order of the Government. If it were not so and it were to be held that the order had been made by the officer himself and was not an order

of the Government — and of course it had to be one or the other — then we would have an order made by a person on whom the Act did not confer any power to make it. That would be an impossible situation. There can be no order except as authorised by the Act. What is true of Section 21 (4) would be true of all other provisions in the Act conferring powers on the Government which can be delegated to an officer under Section 41 (1). If we are wrong in the view that we have taken, then in the case of an order made by an officer as delegate of the Government's power under Section 21 (4) we would have an appeal entertained and decided by one who had no power himself under the Act to do either. Plainly, none of these things could be done."

Therefore, in our opinion, once under sub-section (3) of Section 13 of the Maharashtra Land Revenue Code the powers of the Commissioner are conferred upon the Additional Commissioner, then he exercises the powers of the Commissioner under Sections 4 (1) and 17 of the Land Acquisition Act as a Commissioner and not as an Additional Commissioner, and therefore, is a 'Commissioner' within meaning of Section 4 as well as Section 17 of the Land Acquisition Act.

6. The decision on which reliance has been placed by Shri Chandurkar, viz., in *Hari Chand Agarwal v. Batala Engineering Co. Ltd.*, (AIR 1969 SC 483) and *Ajaib Singh v. Gurbachan Singh*, (AIR 1965 SC 1619), are of no assistance while construing the present provisions and deciding the controversy involved in the present petition. These two cases are clearly distinguishable. In *Ajaib Singh's* case, the Additional District Magistrate, who had been invested with the powers of the District Magistrate under Section 10 (2) of the Code of Criminal Procedure, was in charge of the office of the District Magistrate when the latter was transferred. He passed an order detaining the appellant under the Defence of India Rules, 1962. In this context it was held in that case that the Act and the Rules, show unmistakably that the power of detention can only be exercised by the State Government or an officer or authority to whom it might be delegated but who shall in no case be lower in rank than a District Magistrate. As the Additional District Magistrate is lower in rank than the District Magistrate and even though he had been invested with the powers under the Code and also under

any other law for the time being in force he is still not the District Magistrate unless the Government appoints him as such under Section 10 (1) of the Code of Criminal Procedure.

7. In the Second case, viz., in *Wari Chand's* case, by a notification issued in exercise of the powers conferred by Section 40 (1) of the Defence of India Act (1962), the Central Government directed that the powers exercisable by it under the various sections shall also be exercisable by each of the authorities mentioned in column 3. These authorities were all the Collectors, District Magistrates, and the Dy. Commissioners in the State. It would thus be seen that the Central Government in making authorisation of the powers under Section 29 of the Act, authorised officers of a very high status to exercise the powers. The authorisation showed that the functions to be discharged under the notification were made to be performed by the officers like the Collectors, and the District Magistrates and no other officers. Therefore, on the construction of the particular statute and the words of the notification, their Lordships, therefore, held that the Additional District Magistrate could not exercise the powers under Section 29. Here in this case we are not concerned with the construction of a notification as such. Here in terms under sub-section (3) of Section 13 of the Maharashtra Land Revenue Code, the powers are conferred upon the Additional Commissioner. In view of this notification issued under the Maharashtra Land Revenue Code, the Additional Commissioner became the Commissioner for all practical purposes and in that capacity has issued the notifications and directions under Sections 4 (1) and 17 (4) of the Land Acquisition Act as a Commissioner. In this view of the matter, in our opinion, these two cases will not help Shri Chandurkar.

8. It was conceded by Shri Chandurkar that the Commissioner referred to in the Land Acquisition Act is not referred to as a *persona designata*. But the reference is made to him in the Land Acquisition Act is in his official capacity. Once, therefore, the powers of the Commissioner are conferred upon the Additional Commissioner by issuing necessary notification under sub-section (3) of Section 13 of the Code, then to that extent he is equated with the status of the Commissioner for exercising the powers conferred upon him either under the Maharashtra Land

Revenue Code or other laws including the Land Acquisition Act. Such a view seems to have been taken by the Supreme Court in *Central Talkies Ltd. v. Dwarka Prasad*, (AIR 1961 SC 606) and, in our opinion, the law laid down therein by the Supreme Court will aptly apply to the present case also. In the result, therefore, it is not possible for us to accept the contention of Shri Chandurkar.

9. So far as the merits of the case are concerned, in para. 4 of the petition, a statement is made by the petitioners that a number of persons whose names are mentioned in the list are in fact having their own houses in the village. The statement made in the petition is obviously vague. If a reference is made in this behalf to the scheme, viz., the scheme for making a provision of the house sites to the landless persons in the rural areas, it is quite clear that the scheme aims at providing house sites to the landless workers in the rural areas. The scheme contemplates providing of house sites free of cost to the families of the landless workers who do not already own a house site or a built up house or a hut on the land of their own. With the house sites so provided, the workers will have a built up house or a hut thereon and can live in peace without being constantly threatened with the eviction by the owner of the land on which they have built up their houses or huts. It is not clear from the averments in the petition as to whether the persons who, according to the petitioners, have got their houses or huts in the village, are having those houses or huts on the land belonging to them. If these houses are built up on the lands belonging to others, then they are severed by the provisions of the scheme, as they cannot live in peace, because there is a constant threat of eviction by the owners of the lands on which they have built up their houses or huts. By the scheme framed by the Central Government, the Central Government wants to provide house sites to the landless labourers. No averment is made in the petition that any of the persons whose names are given in the list have got their own house sites and the houses belonging to them are built up on the same. In this view of the matter, in our opinion, it cannot be said that the acquisition of the land for providing house sites to those persons is uncalled for or unwarranted. Even otherwise, in the additional affidavit filed by the Additional

Commissioner, he has specifically denied these allegations made by the petitioners in the petition. He has stated on oath that there are about 52 landless labourers who do not have their own houses at all. In this view of the matter, it is not possible for us to accept the contention of Shri Chandurkar that the acquisition proceedings are wholly bad.

10. It was also contended by the petitioners that their lands are covered by the flood zones and, therefore, are unsuitable for the purposes of constructing of huts. This position is also denied by the respondents in their return. According to the respondents there is no nalla adjacent to this survey number and, therefore, the land is safe from floods. It appears from the record that the spot was duly inspected by the Sub-Divisional Officer-cum-Land Acquisition Officer with panchas, and on spot inspection as well as from other materials available on record, the authorities concerned formed an opinion that there is no nalla adjacent to this survey number and the land in question is safe from floods. This is obviously a question of fact. Apart from it, this Court, while exercising its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, cannot sit in appeal over the opinion formed by the competent authorities, nor can it substitute its own opinion in place of the opinion of those competent authorities.

11. After considering all the material placed on record and after inspecting the spot, the competent authorities have found that the land in question is suitable for the purposes of construction of the houses. Therefore, in our opinion, it is not correct to say that the authorities concerned had not applied their mind to the relevant facts and circumstances of the case, or the opinion formed by them is either mala fide or is not based on any material on record.

12. In the result, therefore, the petition fails and is dismissed. However, in the circumstances of the case, there will be no order as to costs.

Petition dismissed.

peremptorily fixed the period for payment. Section 148, in terms, allowed extension of time, even if the original period fixed had expired, and Section 149 was equally liberal. A fortiori, those sections could be invoked by the applicant, when the time had not actually expired. An order extending time for payment, though passed after the expiry of the time fixed, could operate from the date on which the time fixed expired. The procedural orders though peremptory (conditional decree apart) are in essence in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen with the time fixed. Sections 148, 149 and 151 clothed the High Court with ample power to do justice to a litigant if sufficient cause was made for extension."

6. The facts of the present case are somewhat different, namely, in the present case the application for extension of time has been made after the period fixed by previous order for furnishing security had expired and the application for leave to defend stood dismissed.

7. Mr. Ray Chowdhury in support of his contention also refers to an unreported decision being F. A. 151 of 1964 (Biswanath Kundu v. Manindra Nath Sadhukhan). Their Lordships in this case while disposing of a similar application considered several decisions including the decisions of the Judicial Committee. Their Lordships also relied on the Supreme Court decision reported in AIR 1961 SC 882. It was pointed out before their Lordships that in the case before the Supreme Court an application was made before the time granted had run out. Their Lordships observed

"We may mention also in passing that the Supreme Court decision in Mahanth Ram's case is also an authority for the proposition that in appropriate cases the court is not powerless to allow extension of time either under Sections 148, 149 or under Section 151 of the Code as the case may be, even if the application is made after the original period fixed has expired and this would be clear from the illustration given in the judgment. We are bound by the decision of the Supreme Court."

Their Lordships of the Supreme Court gave the illustration in the following way.

"For example, it cannot be said that, if the appellant had started with the full

money ordered to be paid and came well in time but was set upon and robbed by thieves the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding even though a final order had been passed."

8. Considering the facts that the petitioners complied with the order passed by the Court at the time of issuance of the Rule and that the present application has been filed few days after the expiry of the time granted by this Court and that the petitioners are ready and willing to comply with the order of this Court passed on August 13, 1975 and relying on the principles laid down in the decision reported in AIR 1961 SC 882 we allow this application. The petitioners are directed to furnish security to the extent of Rs. 5,500 to the satisfaction of the Court below within three weeks from this date. On furnishing the said security and the same being accepted, leave would be granted to the petitioners to contest the suit. In default the application for leave will stand rejected. The order dated August 13, 1975 is modified to the extent indicated above.

9. Let the order be communicated to the court below immediately.

10. Let the records also go down within a week.

11. There will be no order for costs in this application.

B. C. RAY, J.:— I agree.

Application allowed.

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ANIL KUMAR SEN AND M. N. ROY, JJ.

Chhotalal Hariram and another, Petitioners v. Dilip Kumar Chatterjee and others, Respondents.

A. F. O. O. No. 659 of 1969, D/- 30-4-1976.

(A) Civil P. C. (1908), O. 22, R. 4 — Abatement of suit — Suit for specific performance of contract of sale against vendor — Transferees of principal defendant vendor, parties to suit — Death of principal defendant-vendor — Legal representatives not brought on record — Suit abates — (Contract Act (1872), S. 37).

FT/FT/B739/76/VBB

The suit can proceed on two contingencies after the death of principal defendant where his heirs and legal representatives had not been substituted. It can so proceed if the right to sue survives as against the transferee defendants alone. This is what Order 22, Rule 2, Civil P. C. provides. Alternatively, the suit can proceed against the remaining defendants if the claim against them is distinct and severable and the relief prayed for in the suit can be granted even in the absence of the deceased defendant. But neither of the contingencies can be said to have been fulfilled in the instant case, (Para 12)

The privity of contract sought to be enforced was between the plaintiff vendee and the principal defendant vendor. The obligation to fulfil and complete the contract is on the vendor and on his death such obligation vests in the legal representatives of the vendor under Section 37 of the Contract Act — the contract in question not being entirely personal. The law no doubt enjoins that under certain circumstances, such a contract is also enforceable against subsequent transferees from the vendor: vide Section 40 of the T. P. Act and Section 19 of the Specific Relief Act. But such transferee is not the person to complete the contract since he was not the person who had entered into the contract. His position is of the nature of a trustee holding the property in trust for the benefit of the vendee who had earlier entered into the contract to the extent necessary to give effect to the contract: vide Sec. 91 of the Trusts Act. The position that follows from Section 40 of the T. P. Act and Section 19 of the Specific Relief Act is that such a contract is enforceable against such transferees in the sense that when the vendor is made to perform the contract in favour of the vendee, title to the property passes on to the latter overriding the transfer thereof to the subsequent transferees and the subsequent transferees are in law bound to acknowledge this position and convey the title. The primary obligation to perform the contract therefore, always remains on the vendor and on his death on his legal representatives. Hence, there is no escape from the position that on the death of the principal defendant vendor it was necessary that his legal representatives must be brought on the record in his place and the right to sue could not have survived against the subsequent transferees alone. That not having been done, the suit must be taken to have abated against

the said principal defendant.

(Paras 13, 14)

The second contingency cannot also be said to have been fulfilled. Suit having abated against the principal defendant, it can proceed as against the other defendants only if the claim as against them is severable and distinct and the relief prayed for in the suit can be granted as against them even in the absence of the deceased defendant. In a suit for specific performance of a contract of sale against the vendor and the subsequent transferees from him, the claim against the latter is not at all severable or distinct. They are merely to join in the conveyance to be executed by the vendor on specific performance of his contract. The transferees are not to perform the contract on their own nor are they to execute any conveyance independently of the original vendor, if performance of contract by the vendor has failed. Hence the relief claimed in the suit is such that it cannot be granted in the absence of the principal defendant, the vendor. Therefore, the suit was no longer maintainable against the transferees of principal vendor when it abated against the principal defendant vendor and was liable to be dismissed as against them. AIR 1954 SC 75 and AIR 1967 SC 978, Rel. on. (Para 15)

Cases Referred: Chronological Paras

AIR 1967 SC 978 = (1967) 1 SCR 873 13
AIR 1954 SC 75 = 1954 SCR 360 13, 14
AIR 1931 Cal 67 = 34 Cal WN 698 14

S. K. Kapoor with Mrs. Ruma Pal and Mr. Partha Dutta, for Petitioners.

ANIL K. SEN, J.:— This appeal arises out of a suit for specific performance of a contract of sale and raises a short but an important question for decision. The question so raised is as to whether such a suit abates on the death of the vendor defendant when his legal representatives are not brought on record even though subsequent transferees from the vendor are already on record as parties defendants. The question so raised arises on the following facts.

2. One Kali Kinkar Chatterji (predecessor-in-interest of the present respondents) instituted the aforesaid suit for specific performance of a contract dated August 16, 1961, of sale against the vendor F. N. Gazdar in respect of premises No. 31, Benaras Road, Howrah (hereinafter referred to as the suit property). While contesting the suit F. N. Gazdar sold the suit property on January 7, 1961, to two persons, Karamshi Walji Patel and

Karsan Patel (hereinafter referred to as the Patels), Patels on an application made by them had themselves added as parties defendants in the suit.

3. Principal defendant F. N. Gazdar died on April 7, 1964. On an application made on June 10, 1964, plaintiff Kali Kinkar substituted one S. N. Gazdar in place of the deceased defendant claiming him to be the nephew of the deceased. On an application made on July 7, 1964, the plaintiff brought on record one Amba Devi as an heir and legal representative of the deceased defendant on a claim that she is a sister of the deceased.

4. Then followed a spate of applications on behalf of the plaintiff either for bringing on record further heirs and legal representatives in place of the deceased defendant or for amendment of the description of such heirs and legal representatives already brought on record. All these applications were opposed by the Patels who in their turn filed an application on January 5, 1965, for recording abatement of the suit on the death of the principal defendant.

5. All these applications were tried on evidence. The learned Judge in the court below found on evidence that S. N. Gazdar who alone was substituted within the period of limitation in place of deceased defendant was no real person and as such there was no substitution at all in time on the death of the principal defendant. On such a finding the learned Judge by an order dated March 1, 1967, recorded abatement of the suit as a whole. Of course in recording such an order of abatement the learned Judge did not expressly refer to the fact that the subsequent transferees from the principal defendant viz., the Patels were already on record.

6. Thereafter the plaintiff filed an application for substitution by setting aside abatement but that application was not pressed and was dismissed. Then came the plaintiff with an application for review of the order recording abatement under Order 47, Rule 1 read with Section 151 of the Code of Civil Procedure on March 30, 1967.

7. Pending this application for review, the plaintiff Kali Kinkar died and his heirs and legal representatives, the respondents in this appeal were brought on record by substitution. Patels in their turn sold the suit property to Chotalal Hariram and Morarji Hariram (hereinafter

referred to as Harirams) and they were added as parties for allowing them to contest the review application.

8. The review application was heard on contest and was allowed by the successor-in-office of the learned Judge who had earlier recorded the abatement. According to the learned Judge, who allowed the review application, when under Section 19 of the Specific Relief Act the contract is enforceable both against vendor and his transferees, the transferees being already on record the suit cannot abate as against the transferees and hence the suit cannot abate as a whole. He further held that the order recording abatement of the suit as a whole had been made on an apparent error of non-consideration of the fact that the transferees being on record the suit does not abate against them, and hence the order is liable to be recalled. The learned Judge then made the following order:

"Accordingly I hold that the suit could not abate as a whole. It can be proceeded with against the defendant Nos. 2 and 3."

9. The said order was made on April 12, 1969, and being aggrieved thereby the second transferees, viz., the Harirams have now filed the above appeal to this court. Though there is appearance on behalf of the respondents, none appears to contest the appeal at the hearing.

10. Mr. Kapoor, the learned Advocate for the appellant has contended that the learned Judge allowing the review application was in error in not appreciating that in a suit for specific performance of a contract of sale, the vendor is a necessary party and on his death, his heirs and legal representatives are required to be brought on record, inasmuch as, such a contract cannot be enforced in the absence of the vendor or his legal representatives. The person primarily bound to complete the contract is the vendor and on his death his heirs and legal representatives. The subsequent transferees have merely an obligation to join in the conveyance for completing the title in favour of the vendor, but such transferees have no obligation independent of the vendor to fulfil the contract of sale which was not their contract at all. Hence according to Mr. Kapoor in the absence of the primary party (such is the effect according to him on the death of the vendor), the suit can no longer proceed and this aspect was wholly overlooked by the learned Judge allowing the review application.

11. At one stage, it seemed to us that the view taken by the learned Judge allowing the review application is correct. On a closer scrutiny of the legal position we, however, find that it is not so and that the contention of Mr. Kapoor has enough substance. The learned Judge in allowing the review application merely held that suit as against the transferees, Patels had not abated. Of course it had not so abated because none of them had died. The Judge recording abatement of the suit as a whole did not really mean that it abated as against the transferees. What in substance he meant is that the suit having abated against the principal defendant, is no longer maintainable and as such the entire suit must be deemed to have abated. But the learned Judge who allowed the review application had not considered as to whether the suit had abated against the vendor, the principal defendant and if so, whether in spite of such abatement the suit can proceed as against the transferee defendants.

12. In our view the suit can proceed on two contingencies after the death of the principal defendant when his heirs and legal representatives had not been substituted. It can so, proceed if the right to sue survives as against the transferee defendants alone. This is what Order 22, Rule 2 of the Code of Civil Procedure provides. Alternatively the suit can proceed against the remaining defendants if the claim against them is distinct and severable and the relief prayed for in the suit can be granted even in the absence of the deceased defendant. But neither of the contingencies can be said to have been fulfilled in the present case.

13. Let us first consider whether on the death of the principal defendant, the right to sue survives as against the transferee defendants alone or not. The privity of contract sought to be enforced was between the plaintiff vendee and the principal defendant vendor. The obligation to fulfil and complete the contract is on the vendor and on his death such obligation vests in the legal representatives of the vendor under Section 37 of the Contract Act — the contract in question not being entirely personal. The law no doubt enjoins that under certain circumstances, such a contract is also enforceable against subsequent transferees from the vendor vide Section 40 of the T. P. Act and Section 19 the Specific Relief Act. But such transferee is not the

person to complete the contract since he was not the person who had entered into the contract. His position is of the nature of a trustee holding the property in trust for the benefit of the vendee who had earlier entered into the contract to the extent necessary to give effect to the contract vide Section 91 of the Trusts Act. The position that follows from Section 40 of the T. P. Act and Section 19 of the Specific Relief Act is that such a contract is enforceable against such transferees in the sense that when the vendor is made to perform the contract in favour of the vendee, title to the property passes on to the latter overriding the transfer thereof to the subsequent transferees and the subsequent transferees are in law bound to acknowledge this position and convey the title. The primary obligation to perform the contract therefore, always remains on the vendor and on his death on his legal representatives. As has been pointed out by the Supreme Court in the case of Durga Prosad v. Deepchand, AIR 1954 SC 75 (reaffirmed in AIR 1967 SC 978) the correct frame of the relief to be claimed and given in a suit for specific performance of a contract of sale is to direct specific performance against the vendor — the subsequent transferees from him being only called upon to join in the conveyance to ensure passing of full title to the vendee. The balance consideration is also normally payable to the vendor but subject to equities which may arise from the facts of each case. We have already pointed out that the relief so admissible against the vendor shifts on his death on his legal representatives under Section 37 of the Contract Act and not on the transferees, their obligation remaining what it was even when the vendor was alive.

14. In the case of Kafilladdin v. Samiraddin, 34 Cal WN 698 = (AIR 1931 Cal 67) (approved by the Supreme Court in AIR 1954 SC 75) it was laid down by this court that in enforcing specific performance of a contract of sale, both the contracting party and the subsequent purchaser must join in the conveyance. The reason assigned is instructive. It was pointed out that in case the vendor, i.e., the contracting party is not made to execute the conveyance then he "may subsequently raise the objection that his title had not passed for want of consideration or otherwise to the subsequent purchaser and therefore the conveyance executed by the subsequent purchaser in favour of the plaintiff did not pass good title". Therefore, to convey perfect title

to the vendee in all such cases both the vendor and the subsequent transferee from him are required to be made parties to convey the title to the vendee. This requirement is not altered in any way by the death of the vendor — his position being taken by his legal representatives. Hence, there is no escape from the position that on the death of the principal defendant vendor it was necessary that his legal representatives must be brought on the record in his place and the right to sue could not have survived against the subsequent transferees, Patels alone. That not having been done, the suit must be taken to have abated against the said principal defendant.

15. Now let us proceed to consider whether the second contingency can be said to have been fulfilled. Suit having abated against the principal defendant, it can proceed as against the other defendants only if the claim as against them is severable and distinct and the relief prayed for in the suit can be granted as against them even in the absence of the deceased defendant. On the analysis of the legal position made hereinbefore, in a suit for specific performance of a contract of sale against the vendor and the subsequent transferees from him, the claim against the latter is not at all severable or distinct. They are merely to join in the conveyance to be executed by the vendor on specific performance of his contract. The transferees are not to perform the contract — not their own nor are they to execute any conveyance independently of the original vendor, if performance of contract by the vendor has failed. Hence the relief claimed in the suit is such that it cannot be granted in the absence of the principal defendant, the vendor. Therefore, the suit was no longer maintainable against the Patels when it abated against F. N. Gazdar, the vendor — principal defendant and was liable to be dismissed as against them. That exactly is what was done earlier when abatement of the suit as a whole was recorded. In our view that was the correct order and the learned Judge allowing the review application was clearly in error in setting aside that order on an erroneous view that suit is still maintainable as against the Patels even after the death of the principal defendant and even when his legal representatives had not been brought on record by substitution.

16. On the conclusions as above, we allow this appeal, set aside the order

dated April 12, 1969, passed by the Court below and restore the order dated March 1, 1967, passed by the said Court.

17. There will be no order as to costs.

M. N. ROY, J.:— I agree.

Appeal allowed.

AIR 1976 CALCUTTA 341

RABINDRANATH BHATTACHARYA
AND ARUN KUMAR JANAH, JJ.

Gopal Krishna Mukherjee and others,
Petitioners v. The State of West Bengal
and others, Opposite Parties.

Civil Revn. Case No. 229 of 1972, D/-
30-4-1976.

(A) W. B. Land (Requisition and Acquisition) Act (2 of 1948), Sections 8 and 8-A — Court of reference is a Civil Court — It can review its order by taking recourse to Order 47, Rule 1, Civil P. C. (Civil P. C. (1908), Section 141 and O. 47, Rule 1).

The Court where a reference is made by the Collector under Section 8 of the W. B. Act is a Court of Civil Judicature. Under Section 141, Civil P. C. the procedure provided in the Civil P. C. in regard to suits are to be followed as far as it can be applicable in all proceedings in any Court of Civil Jurisdiction. Clearly therefore, according to this section the land acquisition Court or the court to which a reference is made can take recourse to the provision of Order 47, Rule 1 for the purpose of review, if justice so demands. From the facts that provision for appeal is made in Section 8-A of the W. B. Act and that there is no provision for review, it could not be contended that it should be deemed that the power to review is not there with the court of reference. The provision for appeal is quite different from those applicable to the proceedings of the original jurisdiction for making awards. It creates an opening for going higher up to challenge the award of the Court. It relates to the appellate jurisdiction. The review is a process available under Section 141, Civil P. C. connected with the final determination of the decree and to be adopted by the court of reference, if justice so demands. (Para 4)

(B) Civil P. C. (1908), Section 115 and Order 47, Rule 1 — Decision of Lower Court on basis of non-existent Law —

ET/FT/B646/76/MVJ

Error apparent on face of record — Court refusing to review its decision — Proper case for interference by High Court.

Where the Court of reference under W. B. Land (Requisition and Acquisition) Act relies upon a non-existent law, the mistake is an error apparent on the face of record and a ground which is sufficiently reasonable for the Court to review the award for coming to a just and proper decision. The Court refusing to review its award fails to exercise jurisdiction vested in it to review and it would be a fit case for interference by High Court.

(Para 7)

Saktinath Mukherjee, for Petitioners;
Malay Kumar Basu, for the State.

R. BHATTACHARYA, J.:— This is a revisional application under Section 115 of the Code of Civil Procedure filed by the petitioners against the order of the Additional District Judge, First Court, Howrah rejecting the application for review of an Award passed in a reference case sent to the court by the Collector in connection with an acquisition of land.

2. In this case some land was requisitioned for Durgapur-Calcutta Gas-Grid-Project under the provision of Section 3 of the West Bengal Land (Requisition and Acquisition) Act, 1948, (West Bengal Act II of 1948) and the possession of the same was taken on 7th September, 1960. Thereafter, by a Notification under Section 4 of the Act II of 1948, the land was acquired and compensation was granted by the Collector. Being aggrieved at the assessment by the Collector, the claimants prayed for a reference to the Civil Court for enhancement of compensation and other dues as they did not get proper compensation according to their assessment. They valued danga lands at the rate of Rs. 600/- per cottah and the rate for tank was also mentioned in the petition for reference. The reference petition was heard by the learned Additional District Judge and the learned Judge accepted the valuation arrived at by the Collector. During the hearing of the reference certain deeds of conveyance were taken in evidence by both the parties, namely, the claimants and the State of West Bengal. The learned Judge who made the Award in his judgment considered the provisions of the second proviso to Section 7 (1) of the Act II of 1948 and he found that the kobalas exhibited by the claimants could not be comparable units in view of the common features regarding land values and the provisions of

the Act, under which the lands were acquired. The grievance of the claimant-petitioners is that in the judgment, the learned Land Acquisition Judge relied upon the second proviso to Section 7 (1) of Act II of 1948 which had previously been struck down and also repealed by an amending Act and that the learned Judge, therefore, had no basis and proper criterion to assess the just valuation of the lands acquired. In this view of the matter a review application was filed. The learned Judge who heard the reference was, in the meantime, transferred and in his place was appointed Mr. A. K. Chatterjee, who disposed of the review application. According to the present Judge of the Land Acquisition Court, the petition was liable to be rejected as the petitioners could have no grievance because his predecessor-in-office dismissed the reference on the view that there was no scaling down to the valuation level of 1948 in the judgment in question, as envisaged in the second proviso to Section 7 (1). According to him, there was no apparent mistake or error on the face of the record.

3. We have heard Mr. Mukherjee, the learned Advocate appearing on behalf of the petitioners and Mr. Basu, the learned Advocate for the State of West Bengal, the opposite party. During the argument of Mr. Basu a point was taken that the application for review was not maintainable according to law, particularly, in view of the provision of Act II of 1948. Admittedly, the land in question was ultimately acquired under the provisions of the West Bengal Land (Requisition and Acquisition) Act, 1948. Section 7 (4) (iii) lays down that where there is the disagreement between the Collector and the person interested in the compensation on the question of the assessment of compensation payable, the matter may be determined by a court under reference according to clause (b) of sub-section (1) of Section 8 of the Act. In Section 8 (2) we find that amongst other sections, Section 26 of the Land Acquisition Act, 1894 will be relevant and applicable according to this Act. According to Section 26 (2) of the Land Acquisition Act, every Award made by the court shall be deemed to be a decree and the statement of the grounds of every such Award a judgment within the meaning of Section 2, clause (2) and Section 2, clause (9) respectively of the Code of Civil Procedure, 1908. Now, proceedings under reference before the Court are in the nature of suits in the court of

original jurisdiction. The Code of Civil Procedure, 1908, is an Act to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. There can be no doubt whatsoever that the court where the reference is made by the Collector under Section 8 of Act II of 1948, is a Court of Civil Judicature. Section 141 of the Code of Civil Procedure, 1908 says that the procedure provided in this Code in regard to suits shall be followed as far as it can be applicable in all proceedings in any Court of Civil Jurisdiction. Clearly, therefore, according to this section the land acquisition court or the court to which a reference is made can take recourse to the provision of Order 47, Rule 1 for the purpose of review, if justice so demands. Mr. Basu wants to submit with reference to the inclusion of Section 53 of the Land Acquisition Act that as in the present West Bengal Act II of 1948 there is no such provision, the intention of the Legislature might be that the provision of the Civil Procedure Code should not be applicable in cases of reference, and, as such, the question of review does not arise. The Act II of 1948 was of the year 1948 when the Code of Civil Procedure of 1908 was already in force, and the Section 141 thereof stands conspicuously. There was, therefore, no necessity for any provision like Section 53 of the Land Acquisition Act of 1894. Such provision, if there be any, would have been a surplusage.

4. Next, it has been argued by Mr. Basu that there is the provision for appeal in Section 8-A of the Act and in the absence of any provision for review, it should be deemed that the power to review was not there with the court of reference. The court of reference, under Section 8, has been provided for in the matter of adjudication of dispute for compensation and in view of Section 141 of the Code of Civil Procedure, the proceeding for trial of disputes of original nature is to be followed, and for that purpose, the procedure for review may be resorted to, if necessary. The provision for appeal is quite different from those applicable to the proceedings of the original jurisdiction for making awards. It creates an opening for going higher up to challenge the award of the Court. It relates to the appellate jurisdiction. The review is a process available under Section 141 of the Code of Civil Procedure connected with the final determination of the decree and to be adopted by the court of reference, if justice so demands. We cannot,

therefore, hold that the provision for appeal may indicate that the court of reference cannot review its own award or decree. Section 141 of the Code of Civil Procedure speaks of suits in the original jurisdiction and consequently in Section 8 (a) it has been made clear that the provision of the Civil Procedure Code, 1908, regarding appeals shall apply to the awards treated as decrees to be made by the court. In view of our discussion we cannot, therefore, hold that the learned Additional Court of the District Judge hearing the reference had no jurisdiction to review its own award or decree passed.

5. Lastly, it was contended by Mr. Basu that there was no occasion for review. On this point we have heard Mr. Mukherjee. There is no doubt that in the original award made by the predecessor-in-office of Mr. Chatterjee we find that he made an attempt to assess the valuation of the land acquired according to the provision of Section 7 of Act II of 1948 and in that connection he relied upon the second proviso to sub-section (1) of Section 7 of the Act. The second proviso deleted by the W. B. Act VIII of 1954 runs as follows:

"Provided further that if such market value exceeds by any amount the market value of the land on the 31st day of December, 1946, on the assumption that the land had been at that date in the state in which it in fact was on the date of the publication of the notice referred to in sub-section (1) of Section 4, the amount of such excess shall not be taken into consideration."

6. Due to oversight or otherwise it was not brought to the notice of the learned Judge that the said proviso was not there and that according to the provision of the Act after amendment, he was to assess the valuation as it was at the time when the land was acquired, and in this case, on 7th of September, 1952. The learned Judge had no idea that he was to assess the valuation according to that provision. All the time he had in his mind the second proviso to sub-section (1) of Section 7 which was not in the enactment. Practically speaking, the learned Judge decided the case and made the award on the basis of a provision which was not the law at the relevant time. This was clearly a decision without any proper basis and by application of a law not in existence.

7. According to the provision of Order 47, Rule 1, Civil Procedure Code, amongst other grounds, we find that if there be any mistake or error apparent on the face of record or if there be any other sufficient reason, the learned court will be entitled to review the order for ends of justice and for proper and correct decision. In the present case there can be no doubt that the learned Judge did not consider the relevant Act for the purpose of determination of the issue and he relied upon a non-existent law. This kind of mistake is a mistake apparent on the face of record, and moreover, this was a ground which is sufficiently reasonable for the court to review the award for coming to a just and proper decision. In this view of the matter we find that the learned Judge of the court below was wrong in holding that there was no ground for review. The finding is clearly erroneous and he acted without jurisdiction not to act according to the provision of Order 47, Rule 1 to dispose of the application for review. To be more precise, he failed to exercise the jurisdiction vested in him to review. In this view of the matter, we find that a proper case has been made out to interfere with the decision of the learned Judge of the court below and to set aside the impugned order. We must hold that the learned Judge below ought to have reviewed the award.

8. When we find that no proper application of mind was made and no proper law was considered to make a proper assessment of compensation, it is desirable, as submitted by the learned Advocates on both the sides, that the parties should be given an opportunity to produce further evidence if they so like, for the court to consider their respective cases and to come to a proper decision by an award.

9. In the result, the application succeeds and the Rule is made absolute. The impugned order is hereby set aside and the review application is allowed and the reference made by the Collector is sent back to the court below for proper consideration and decision according to law after giving the parties an opportunity to adduce further evidence if they so like.

10. In the facts and circumstances, we pass no order as to costs.

11. Let the records be sent down as quickly as possible and the hearing

be expedited by the court below as the matter is long pending.

JANAH, J.:— I agree.

Application allowed.

AIR 1976 CALCUTTA 344

SABYASACHI MUKHARJI, J.

Sm. Padmabati Dassi and others,
Petitioners v. Biswanath Dhar and others,
Respondents.

O. S. No. 48 of 1976, D/- 9-4-1976.

(A) Hindu Law — Religious endowment — Shebaitship and pala of shebait — Nature of — If and when can be subject-matter of devolution according to deed of trust.

Shebaitship is property. Pala of Shebait or turn of worship is a right of peculiar nature. Shebait must jointly perform their duties and where shebait has no personal interest in the property or in the income the right of pala or turn of worship cannot be said to be property which is heritable or which would be the subject-matter of devolution according to the deed of trust. (1897) ILR 19 All 428, Rel. on. (Para 5)

Where according to the scheme of management laid down by the settlor in the deed of trust each shebait named by him was to have one year pala by rotation but one of them dies much before the date on which his pala comes according to the scheme his turn must go to the next paladar named in the deed and not by devolution of his right to the male heir of the deceased shebait. (Para 5)

Held that in the instant case the scheme read in the background of the intention of the settlor and consistent with Clauses 15 and 16 leads to the conclusion that the shebait as such had no personal pecuniary interest in the debutter property, and therefore pala or turn of worship in such a case cannot be said to be property which is heritable and of which a line of inheritance had been laid down by the settlor. AIR 1974 SC 1932, Rel. on. (Para 6)

Cases Referred: Chronological Paras
AIR 1974 SC 1932 = (1975) 1 SCR 728 6
AIR 1972 Cal 95 4
AIR 1952 Cal 705 = 89 Cal LJ 162 4
(1952) Suit No. 3245 of 1952 (Cal) 4
AIR 1928 PC 33 = 55 Ind App 74 4
(1909) ILR 36 Cal 975 = 13 Cal WN 1084 4

FT/FT/B764/76/KSB

(1897) ILR 19 All 428 = 1897 All WN 103 5
 (1889) ILR 13 Bom 548 4
 (1875) 14 Beng LR 166 = 22 Suth WR 437 4
 (1872) Ind App Sup Vol p. 47 (PC) 4

ORDER:— Kali Charan Dhar who was possessed of considerable wealth created a debutter for the benefit of the Idol Thakur Shree Shree Iswar Radhakanto Jew, Sri Sri Iswar Radharani Thakurani and Sri Sri Iswar Narayan Jew. For the aforesaid purpose on the 29th January, 1938, the said Kali Charan Dhar executed a deed of dedication in respect of certain properties mentioned in the said deed including moveable and immovable properties and he conveyed the same to the trustees appointed by the said deed. He also laid down the manner of appointment of the trustees. It is not necessary for the purpose of this originating summons to refer to the said clauses in detail. It is sufficient if it is mentioned that in the deed the settlor expressed the intention of making dedication completely in favour of the said deities. The settlor appointed himself the first shebait and thereafter provided as follows:

"And the said donor doth hereby declare and direct that from and after the death of the Donor his sons Ramesh Chandra Dhar, Sripati Charan Dhar, Suresh Chandra Dhar, Tarak Chandra Dhar and Gonesh Chandra Dhar and their respective heirs shall be the shebait of the said idols and Thakurs Sree Sree Issur Radhakanto Jiu, Sree Sree Issur Radharani Thakurani and Sree Sree Issur Narayan Jew and that they shall perform the daily and periodical shebas or worships of the said Idols in the following manner, that is to say the said Ramesh Chandra Dhar and his heirs shall perform the daily and periodical sheba for the 1st year following the death of the Donor, the said Sreepati Charan Dhar and his heirs during the second year, the said Suresh Chandra Dhar and his heirs during the third year, the said Tarak Chandra Dhar and his heirs during the fourth year and the said Gonesh Chandra Dhar and his heirs during the fifth year and so on from year to year in rotation. And it is further declared that after the death of any of the said Ramesh Chandra Dhar, Sreepati Charan Dhar, Suresh Chandra Dhar, Tarak Chandra Dhar and Gonesh Chandra Dhar their respective male heirs

shall be the Shebait in their place and stead."

2. The said Kali Charan Dhar died intestate on or about 8th February, 1940 leaving him surviving his five sons, namely, Ramesh, Sripati, Suresh, Tarak and Gonesh. Thereupon, Suresh Chandra and Manmatha Nath Das became the Trustees of the said debutter estate in place and stead of the said settlor Kali Charan Dhar along with Tarak Chandra Dhar and Ramesh Chandra Dhar in terms of the said deed. On or about 30th June, 1947, a suit being Suit No. 1731 of 1947 was instituted by Sripati Charan Dhar one of the sons of Kali Charan Dhar since deceased for construction of the said deed dated 29th January, 1938, for framing of a scheme, for proper management of the debutter estate and for other reliefs. On 4th January, 1950, a preliminary decree was passed by consent of the parties in the said suit. Pursuant to the preliminary decree, special referee was appointed for framing a scheme. There was an application for variation of the scheme and certain modification of the scheme was accepted and a decree was passed by this Court on the 8th September, 1954. On the 8th September, 1958 Ganesh Chandra Dhar died intestate leaving him surviving his widow Radharani and three sons, namely, Gora Chand, Gorak Chand and Gobinda Chand being the defendants Nos. 4, 5 and 6. On 27th February, 1949, Ramesh Chandra Dhar died intestate leaving him surviving his widow Santosh Kumari Dassi, four sons, namely, Kedar Nath Dhar, since deceased, Kanailal Dhar, Baidyanath Dhar since deceased and Sambhu Nath Dhar, eight daughters, namely, Sm. Sova Rani Dhar since deceased, Sm. Rebati Dhar, Sm. Parbati Dhar, Sm. Uma Rani Dhar, Sm. Jayabati Dhar, Sm. Kankabati Dhar, Sm. Menokabala Dhar and Sm. Ashima Dhar. On the 29th November 1964 the said Kanailal Dhar died intestate leaving him surviving certain heirs mentioned in paragraph 17 of the affidavit in support of the summons. Baidya Nath Dhar died intestate on the 7th December, 1966, leaving him surviving his heirs as mentioned in paragraph 18 of the said affidavit. Suresh Chandra Dhar died on the 23rd December, 1966, leaving him surviving his three sons as mentioned in paragraph 19 of the said affidavit. Kedar Nath Dhar died intestate on the 18th January, 1973, leaving him surviving his widow Satyavama Dassi and two sons being defendants Nos. 15 and

16 namely Sachindra Nath Dhar and Rathindra Nath Dhar and three daughters. Sovarani Pal died on the 14th October, 1973, leaving her surviving her husband and other persons mentioned in paragraph 21 of the said affidavit. There were orders from time to time by this Court regarding appointment of trustees.

3. In terms of the scheme of worship current turn or pala commenced from 8th February, 1975, and ended on 7th February, 1976. The next turn or pala of worship commencing from 8th February, 1976, and ending on the 7th February, 1977, was due to Sripati Charan Dhar since deceased. Sripati died intestate on 20th April, 1972, leaving him surviving the said Tarak Chandra Dhar as his only surviving brother and sole male heir under the Hindu Succession Act, 1956. In the premises on the death of Sripati Charan Dhar the shebaiti right belonging to Sripati under the deed of debutter devolved on his only surviving brother and sole male heir vested in Tarak Chandra Dhar, according to the plaintiffs. The plaintiffs in these circumstances have taken out this originating summons for answers to the three following questions:

(a) Whether upon death of Sripati Charan Dhar on April 20, 1972, Tarak Chandra Dhar became entitled to perform Sevapuja or pala of the idols Sree Sree Iswar Radhakanto Jew, Sree Sree Iswar Radharani Thakurani and Sree Sree Iswar Narayan Jew in terms of the Deed of Debutter Settlement dated January 29, 1938 as the only male heir of Sripati Charan Dhar.

(b) Did the right to perform Shebapuja or pala to the said idols by Sripati Charan Dhar devolved on and/or vested in Tarak Chandra Dhar on April 20, 1972, as the only male heir upon the death of Sripati Charan Dhar.

(c) Are the plaintiffs entitled to perform pala or seba puja of the idols Sree Sree Iswar Radhakanto Jew, Sree Sree Radharani Thakurani and Sree Sree Iswar Narayan Jew as heirs of Tarak Chandra Dhar since deceased in place and stead of Sripati Charan Dhar, since deceased in terms of the Deed of Settlement dated January 29, 1938.

4. It was contended on behalf of the plaintiffs that shebaitship was property and the devolution of the said property as indicated by the Deed of Settlement was not repugnant to Hindu Law. The settlor did not lay down any line of

succession repugnant to Hindu Law but only provided for gift over to the male heirs in the contingency contemplated by the said deed. In aid of the argument that where the property was given to the trustees and shebait had no personal or beneficial interest in the debutter property the rule in *Tagore v. Tagore*, 1872 Ind App Supp Vol. p. 47 (PC) ought not be made applicable, reliance was placed on the decision of *Gokul Chand De v. Gopi Nath Dey*, AIR 1952 Cal 705. On the other hand counsel relied on the decision in the case of *Madhavrao Ganpatrao v. Balabhai Raghunath*, 55 Ind App 74 = (AIR 1928 PC 33) as also unreported judgment of A. K. Sarkar, J., in Suit No. 3245 of 1952 (Cal) — *Ganesh Chandra Dhar v. Sripati Chandra Dhar*. It was, further, contended that pala or turn of worship was itself property and as such heritable and the settlor had laid down a line of devolution and according to the intention of the settlor on the death of Sripati Chandra Dhar, Tarak Chandra Dhar became his sole heir and, therefore, the right of pala or turn of worship on Sripati's death had developed on Tarak Chandra Dhar. In aid of this submission reliance was placed on the decisions in the case of *Mitta Kunta Audhicarry v. Neerunjun Audhicarry*, (1875) 14 Beng LR 166 in the case of *Limba v. Rama*, (1889) ILR 13 Bom 548 and in the case of *Nirode Mohini Dassi v. Shibadas Pal*, (1909) ILR 36 Cal 975. Reliance was also placed on the decision of this Court in the case of *Sm. Sovabati Dassi v. Kashi Nath*, AIR 1972 Cal 95.

5. Shebaitship is property. Pala of shebait or turn of worship is a right of peculiar nature. Shebait must jointly perform their duties and where shebait has no personal interest in the property or in the income the right of pala or turn of worship cannot be said to be property which is heritable or which would be the subject-matter of devolution according to the deed of trust. In this connection reliance may be placed on the decision in the case of *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*, (1897) ILR 19 All 428. Reliance may be placed on the observations in *Dr. B. K. Mukherjee's Treatise on "The Hindu Law of Religious and Charitable Trusts"* 3rd Edition, pages 183, 291. Having regard to the nature of the pala indicated it appears to me that it was a scheme of management laid down by the settlor and that scheme of management was that each shebait whom he had named would have one year of pala by

rotation. According to that scheme which was sanctioned by the court later on Sripati's pala would have come in February, 1976, but prior thereto he had died in April, 1972. Therefore, Sripati's turn must go to the next paladar according to the scheme. There is no question in those circumstances of devolution of the right to perform the pala of Sripati on the male heir of Sripati.

6. Counsel for the plaintiffs, however, drew my attention to the scheme as sanctioned by this Court and contended that the shebait had personal pecuniary interest in the property. In this connection he drew my attention to clause (15) of the said scheme which is to the following effect:

"Any surplus income which may be left over after the aforesaid expenses, appropriations and disbursements have been met should be paid to the Shebait for that particular year within three months of the submission of the audited annual accounts as referred to hereinafter." In my opinion clause (15) of the said scheme cannot be read divorced from the other clauses of the scheme. Clause (16) provides as follows:

"Of the sum of Rs. 27,073-4-3 referred to hereinafter the sum of Rs. 10,000 is to be deposited in current account with a scheduled bank by the trustees. All future receipts from the Debutter estate should also be deposited in the said account. The monies in the said account are to be used by the trustees for the purpose of making the aforesaid payments and disbursements including the said monthly payments to the Shebait for daily Dev-sheba and for the said four festivals as well for the purpose of paying the costs of building the said two walls and any other expenses which the trustees may reasonably incur for the administration of the said Debutter Estate."

The scheme read in the background of the intention of the settlor and consistent with clauses mentioned hereinbefore, in my opinion, leads to the conclusion that the shebait as such had no personal pecuniary interest in the debutter property. If that is the position, then pala or turn of worship in such a case cannot be said to be property which is heritable and of which a line of heritance had been laid down by the settlor. Reliance in this connection may be placed on the observations of the Supreme Court in the case of Kali Kinkor v. Panna Banerjee, AIR 1974 SC 1932. In the aforesaid view of the matter it is not necessary for me

to go into the question whether by the deed the settlor had purported to lay down a line of succession repugnant to Hindu Law or he had effected only a gift over in favour of the male heirs of the surviving shebait. The scheme of management in my opinion is clear on this point and on the death of Sripati in the manner and on the occasion as indicated the pala or turn of worship of Sripati would go to the next paladar.

8. In the aforesaid view of the matter Question No. (a) must be answered in the negative. Question (b) must also be answered in the negative and question (c) must also be answered in the negative. I direct that the costs as of suit of all the parties would come out of the debutter estate. Interim order, if any, will continue for a fortnight after the Easter Vacation. It is made clear that the Receiver was appointed only over the pala of Sripati beginning from the 8th February, 1976, to the 7th February, 1977; whatever be the ultimate decision in this case this Receiver will not continue beyond February, 1977. Certified for two counsel for those who have actually engaged two counsel. Receiver and all parties to act on a signed copy of the minutes upon the undertaking of the plaintiffs to have this order drawn up.

Answer accordingly.

AIR 1976 CALCUTTA 347

SABYASACHI MUKHARJI, J.

Sri Ranjan Kumar Saha, Petitioner v. Principal, Medical College, Calcutta and others, Respondents.

Matter No. 128 of 1975, D/- 25-3-1976.

(A) Constitution of India, Article 226 — Order cancelling admission to pre-medical course passed by competent authority, that is, Chairman Central Selection Board — Order not challenged by the petitioner — Consequential communication of the order by the Principal, Medical College cannot be challenged.

(Para 8)

(B) West Bengal Medical and Dental Colleges (Regulation of Admission) Act (36 of 1973), Section 11 — Rules framed under by State Government — Provisional selection was permissible under the Rules — Petitioner having got his admission as provisional could not challenge it on ground that there was no scope for provisional admission.

(Para 9)

FT/FT/B738/76/KSB

(C) Constitution of India, Article 226 — Petitioner obtaining admission to pre-medical course on wrong basis that he belonged to Scheduled Caste — After inquiry being made by Scheduled Castes Tribe Welfare Department petitioner was found to belong to Baishya Community which is not a Scheduled Caste — Petitioner issued notice to show cause why disciplinary proceedings should not be followed — Notice held not defective and authorities had jurisdiction to cancel admission which was provisional — Fact that petitioner was allowed to attend his classes even after issue of notice did not estop the respondents from taking action against him as no period of limitation is provided in the Act for taking the action. (Paras 10, 11)

Cases Referred: Chronological Paras AIR 1976 SC 376 = (1976) 1 SCC 311 11

S. C. Bhattacharjee, for Petitioner; Manotosh Mukherjee with S. K. Gharal, for Respondents.

ORDER:— The petitioner in this application challenges the order or notice dated 1st of April, 1975, as well as the show cause notice issued prior thereto on 25th March, 1974. The case of the petitioner is that he belongs to the Surf Community of Scheduled Caste and, according to him, the said Community is recognised by the Government of West Bengal as a Scheduled Caste Community. The petitioner passed his Higher Secondary Examination from Belagachia Monohar Academy School, Calcutta, in the year 1973. Thereafter he applied for admission to the pre-medical Course in the Medical College of West Bengal on February 23, 1973. The petitioner was asked by the Selection Board to appear in the Joint Entrance Examination and he did appear in the said examination on May 9, 1973. On the 16th August, 1973, the result of the Joint Entrance examination was published and the petitioner got the required marks. On the 3rd November, 1973, the petitioner applied for admission to the pre-medical course and the petitioner was further required to deposit along with this application form the residential certificate, school leaving certificate by the Headmaster of the School and the Scheduled Caste certificate. The petitioner claimed admission by virtue of being a member of the Scheduled Caste community. It may be mentioned, the medical education in India, specially in West Bengal, is difficult and there is great demand for

such education. The State spends a considerable portion of public money on educating the medical students and like the other fields of higher education there is a tremendous demand for the opportunity for such education. This problem is accentuated by the problem of providing equal opportunities to the backward communities like Scheduled Castes and others. In order to regulate the said problem the West Bengal Medical and Dental Colleges (Regulation of Admission) Act, 1973, was introduced. The said Act was to ensure adequate medical education facilities in the districts and for the advancement of socially and educationally backward classes of citizens by regulating admission in the Medical and Dental Colleges in West Bengal and to provide for matters connected therewith or incidental thereto. The Act provides for a Central Selection Board and Section 3 enjoins how the constitution of the said Selection Board will be framed. Section 4 of the Act provides for the functions of the Board. Sub-section (3) of Section 4 after making certain provisions for admission provides:—

"Out of the remaining seats, that is, after taking into account seats excluded under sub-section (2), 15 per cent. and 5 per cent. of the seats shall be reserved for candidates belonging to Scheduled Caste and Scheduled Tribes respectively of this State."

2. It is not necessary to deal with Section 5 of the Act for the purpose of this application.

3. Section 6 of the Act provides, in order that a candidate may be considered eligible for admission in any of the seats referred to in sub-section (6) of Section 5, he shall submit his application in such form, deposit such fees and comply with such other formalities as may be prescribed. Section 7 deals with the admission. Section 8 provides that the decision of the Central Selection Board in the matter of selection and allotment of candidates or in the preparation of the waiting lists shall be final. Section 11 authorises the State Government to make rules for carrying out the purposes of the Act, and, provides making of the rules regarding the form of application, amount of the fees and other formalities and other matters.

4. Pursuant to the said authority the rules have been framed. It appears that the form of application, as framed obliges the applicant and his guardian to

give a declaration in a statement contained in the said application form and to state that the same is true and correct. Then a form of the certificate is provided as to what kind of certificate has to be given in case of Scheduled Caste and after selection what intimation has to be given to the candidate concerned is also provided in the form. The intimation of selection is provisional.

5. The petitioner, as mentioned hereinbefore, obtained selection and he was provisionally selected as appears from the Intimation Card which is to the following effect:—

INTIMATION CARD

No. CNMC/135

You have been provisionally selected for admission to the Pre-Medical Course for the session 1973-74 in the Calcutta National Medical College, subject to the following conditions:—

(1) All original documents, viz., proof of age, Mark-sheet, certificate from Heads of Institution, certificate of residence, certificate of SC/ST, to be produced by you to the office of the Principal of the Medical/Dental College concerned, are found to be in order.

(2) That you are found physically fit on medical examination to be arranged by the Principal of the Medical College in which you have been provisionally selected.

You should contact the office of the Principal, Calcutta National Medical College with the abovementioned certificates not later than 29-12-1973 failing which your provisional selection will be cancelled without further reference to you.

Sd/- Illegible
Secretary,

Central Selection Board,
Medical College, Calcutta,
Calcutta-12.

Date:

On the reverse;
Sri Ranjan Kumar Saha,
374/F, D. K. D. Rly. Colony,
P. O. Belgachia,
Calcutta-37."

Thereafter, it appears that the petitioner joined the pre-Medical Course in the R. G. Kar Medical College where the pre-medical classes of the National Medical College were being held.

6. On or about the 27th of March, 1974, the petitioner received a Show Cause Notice to the following effect:—

"GOVERNMENT OF WEST BENGAL OFFICE OF THE PRINCIPAL, MEDICAL COLLEGE, CALCUTTA.

No. SA/3616/2641/1 D/- 25-3-1974.

To,
Sri Ranjan Kr. Saha, s/o Sri Prabhat
Kr. Saha,
374/F, D. K. D. Rly. Colony, Cal-37.

You have been provisionally selected for admission to the Pre-Medical Course in the Calcutta National Medical College, against a reserved seat for Scheduled Castes for the session 1973-74 on the strength of a Scheduled Castes certificate issued in your favour by the Deputy Secretary D. V. C. which has been submitted by you to this office with your Application Form. The Scheduled Castes and Tribes Welfare Department of this Government have, on enquiry, found that you do not belong to any Community of the Scheduled Castes of this State and your admission to the Pre-Medical Course against the seats reserved for Scheduled Castes and Scheduled Tribes on production by you of the said Scheduled Caste certificate, was not regular and it has therefore been decided that the following actions should be taken against you immediately:—

(1) Disciplinary action in the shape of cancellation of your provisional selection to the pre-medical course for the session 1973-74.

(2) The Scheduled Caste certificate already issued to you be withdrawn immediately.

(3) Financial benefit payable to Scheduled Castes and Tribes candidates granted to you, if any, should be recovered from you.

You are, therefore, directed to show cause positively within 4th April, 1974, why disciplinary action as stated above including cancellation of your selection will not be taken against you. You should note that in case no reply is received from you within the date fixed above, the decision of the Board will be final.

Sd/- B. Chakraborti.
23-3-1974.

(B. Chakraborti)

Principal, Medical College,
Calcutta and Chairman,
Central Selection Board."

7. The petitioner showed cause by the letter dated 1st April, 1974, whereby the petitioner intimated that the petitioner had met the Regional Officer of the Directorate of the Scheduled Castes

Welfare Department of the Government of West Bengal and the petitioner was asked to submit his school and college certificates indicating that the petitioner belonged to the Scheduled Caste Community. The petitioner stated that in none of those certificates the petitioner's caste was mentioned and as such was unable to produce such certificates. The petitioner further informed the Principal, Medical College that apart from the certificate issued by the Deputy Secretary, Damodar Valley Corporation, he had no other documents to establish that he belonged to the Scheduled Caste community. The petitioner, therefore, requested the authorities to permit him to continue his studies.

8. Thereafter it appears that on the 14th February, an order was passed, which was produced before me, by the Chairman of the Central Selection Board and it was communicated to the petitioner. It appears further that the Deputy Secretary of the Damodar Valley Corporation was also informed. Thereafter the petitioner's name was struck off by the notice issued by the Principal, National Medical College, Calcutta. The petitioner is challenging the said show cause notice and the notice by the Principal, National Medical College, Calcutta on the 1st of April, 1975. The first challenge was that the Principal, Calcutta National Medical College was not the proper authority because the Central Selection Board was the proper authority for provisional selection for admission to the pre-Medical Course, according to the petitioner. The petitioner's contention is based on misapprehension about the order in question. It appears from the order produced before me being Order No. CSB/120 dated 14-2-1975 that the same was passed by the Chairman, Central Selection Board that the order was communicated to the petitioner. Counsel for the petitioner, however, in Court denied receipt of this order by his client. When I asked him if his client was present in Court to give him instruction about denial of this order, I was informed that his client was not present. Therefore, I cannot place any reliance upon this denial in Court of the order and the non-sanction by the Chairman, Central Selection Board. This denial appears to me to be a usual legal plea, taken without any factual basis, a phenomenon which has lamentably increased lately. Therefore, not only the first point that the Principal, National

Medical College, Calcutta was not the authority was irrelevant but the position is that the petitioner having not challenged the impugned order passed by the Chairman, Central Selection Board, cannot challenge the consequential communication by the Principal, National Medical College, Calcutta. The impugned challenge is with regard to the communication of the order which has been passed by the Chairman of the Central Selection Board.

9. The second ground of challenge was that there was no provision in the Act to make provisional selection. The petitioner's selection was provisional. The petitioner got admission on the basis of the rules framed under the authority of the Act. The term "provisional selection", as a matter of fact, had to be introduced because it takes time to scrutinise the application. The education of all the students could not be held up on that score. Therefore, in this case when the petitioner got himself admitted on the basis that his admission was provisional in my opinion, the petitioner cannot challenge on the ground that there was no scope of provisional admission. Provisional selection was permissible under the rules.

10. The next ground of challenge was that the petitioner did not have reasonable opportunity and natural justice was violated. There was no question of violation of natural justice. The petitioner was given a show cause notice after an enquiry being made by the Scheduled Castes and Tribes Welfare Department of the Government of West Bengal. Counsel on behalf of the petitioner criticised the show cause notice by stating that the show cause notice was an empty formality. I am unable to accept this contention. What was meant by the impugned show cause notice was that the petitioner was informed about the offence of the petitioner charged against him and was given an opportunity to show cause why the consequence of imposing disciplinary proceeding should not be followed. I do not find any defect in the show cause notice. If the petitioner belongs to the Baishya community which is not considered to be the Scheduled Caste in West Bengal, and that was found on enquiry it had to be intimated to the petitioner. Therefore, the admission of the petitioner obtained was on a wrong basis, and the admission for selection to the Pre-Medical Course being provisional, in my opinion, the authorities have jurisdiction to cancel the selection.

11. Counsel for the petitioner then contended that after the show cause notice the petitioner was allowed to join the pre-medical classes of the National Medical College, Calcutta. Therefore the respondents were estopped from taking any action against the petitioner. I am unable to accept this contention. If the petitioner's admission was on a wrong basis, the petitioner does not acquire any right by attending any classes. There was no period of limitation as such provided in the Act during which action against the petitioner had to be taken. Admission itself was provisional. There cannot be any estoppel against respondents in the facts of this case. Reliance was placed on a decision in the case of *Shri Krishnan v. Kurukshetra University*, reported in (1976) 1 SCC 311 = (AIR 1976 SC 376). There the appellant, a Government servant, was pursuing the course of LL.B. as an evening student. He failed in three subjects at the Part I examination but was promoted to Part II with option to clear those subjects. He was refused permission for Part II examination which was ultimately given on his giving an undertaking to secure his employer's permission. After the examination he demanded that his results be declared as the permission was not necessary. He was informed that since his percentage in Part I was short his candidature stood cancelled and his petition to the High Court was dismissed. The Supreme Court held that the University authorities having had acquiesced in the infirmities which the admission form contained and allowed the appellant to appear in the examination, then by force of the University statute the University had no power to withdraw the candidature of the appellant. The Supreme Court, however, clearly observed that this was not a case where the admission was given on a provisional basis. Therefore the Supreme Court decision would not apply if the admission was provisional as in this case.

12. In the aforesaid view of the matter, the contentions urged in support of this application must fail.

13. Before I conclude, I must observe that this case has caused me some anxiety. Even though the petitioner might have got admission by making a statement which turns out to be incorrect that is to say, he belonged to a Scheduled Caste, while did not do so, the position is that he has advanced some years in his medical studies. If his stu-

dies are now stopped, his own career will be seriously hampered which is a punishment he might well deserve but at the same time nobody else would be benefited because nobody else can be given the seat which he has occupied so long. If it was possible to allot the seat to another Scheduled Caste or a reserved candidate, perhaps then the punishment upon him would have been well deserved. But punishing the petitioner would not help the Scheduled Caste community, would cause waste of public money spent so far on the medical education of the petitioner. Therefore in a case like this though the action of the Central Selection Board cannot be considered to be bad, in view of the facts and circumstances of this case I should think if the petitioner makes an application to the appropriate authority for permitting him to continue his studies the authorities would do well to consider that application favourably.

With these observations the Rule is discharged. The interim order is vacated. There will be no order as to costs.
Rule discharged.

AIR 1976 CALCUTTA 351

R. BHATTACHARYA, J.

Sunil Kumar Banerjee, Appellant v. Sm. Shyamabala Shaw, Respondent.

A. F. A. D. No. 215 of 1966, D/- 25-3-1976.

(A) Civil P. C. (1908), Sections 96, 100 and 101 and Specific Relief Act (1963), Sections 38 and 39 — Plaintiff if entitled to relief by way of injunction — Court cannot withhold the relief — Illegal construction by thika tenant — Direction for demolition and injunction restraining defendant from construction granted — On undertaking by defendant that at the time of eviction from tenancy structures will be demolished, injunction decree modified — Held Court had no jurisdiction to pass the order. (Calcutta Thika Tenancy Act (1949), Section 10 (a)). (Para 6)

Cases Referred: Chronological Paras (1959) 63 Cal WN 824 1, 5

Samir K. Mukherjee with N. K. Manna, for Appellant.

JUDGMENT:— This second appeal by the plaintiff of the original suit arises in the following circumstances:

FT/FT/B734/76/GGM

The plaintiff, Sunil Kumar Banerjee, filed a suit for injunction, both permanent and mandatory. The allegation was that he was the Receiver of the suit property and the defendant is a thika tenant in respect of the suit property at a monthly rental of Rs. 2.06 nP. and on payment of Municipal taxes paid separately to the plaintiff. The defendant, Shyamabala Shaw, without the consent and knowledge of the landlord made certain pucca and permanent construction in the suit land contrary to the provision of the Calcutta Thika Tenancy Act, 1949. This unlawful construction the plaintiff wanted to have removed and he prayed also for permanent injunction restraining the defendant from making any further pucca construction on the suit land. The learned Munsif of the original court decreed the suit on the finding that the defendant raised unauthorised pucca construction as alleged by the plaintiff and besides allowing a permanent injunction restraining the defendant from making any pucca structure on the suit land there was the direction for removal and demolition of all pucca structures on the suit land against that decree. An appeal was taken by the defendant before the District Judge, 24-Parganas. The learned Subordinate Judge who heard the appeal found that the defendant-appellant did not challenge any of the findings of the learned Munsif on merit. He did not exactly challenge the judgment and the decree. On the day of hearing of the appeal, the defendant filed a petition giving an undertaking that she would remove the permanent structures from the suit land at her own cost and would not claim any compensation for the same in case she be evicted in future from the suit land and on this undertaking the appellant wanted that the decree for mandatory injunction for demolition of the permanent structures be set aside. The prayer was opposed, but the learned Subordinate Judge of the appellate court below, on the basis of the decision in (1959) 63 Cal WN 824, though he dismissed the appeal on merit with costs to the plaintiff-respondent, modified the decree passed by the trial court. The decree for mandatory injunction was set aside. Against that decision the present appeal has been filed.

2-3. I have heard Mr. Mukherjee, the learned Advocate appearing on behalf of the appellant. Nobody, however, appears on behalf of the respondent.

4. The only point to be considered in this appeal is whether the learned Subordinate Judge below was justified in setting aside the decree for mandatory injunction for demolition of the pucca structures on the suit land according to law and on the basis of the decision referred to by him. Mr. Mukherjee submits before me that the decision relied upon by the learned appellate Court below was wrongly interpreted and in fact that decision does not support the appellate court below. It has also been contended that the learned Subordinate Judge erred in law causing injustice to the plaintiff by disturbing the decree for mandatory injunction in view of the fact that the court has no jurisdiction to allow a wrong to continue.

5. Going through the decision of the learned Subordinate Judge it appears that according to him the principle laid down in (1959) 63 Cal WN 824 allows the court to accept the undertaking and allow the pucca structure constructed illegally to stand till a thika tenant is evicted by the landlord. The case of (1959) 63 Cal WN 824 is Monmatha Nath Mukherjee v. Sm. Banarasi. In that case the trial court accepted the plaintiff's version and allowed a decree for injunction as prayed for on being satisfied that the thika tenant wrongly made permanent structure on the suit land without the knowledge and consent of the landlord. An appeal was taken by the defendants but that failed. There was a second appeal which was taken before this Court and Mr. Justice Renupada Mukherjee remanded the case to the lower appellate Court for being reheard. There was the submission on behalf of the appellants that they were prepared to remove the structures at their own cost and without claiming any compensation from the plaintiff on the determination of their tenancy if it were found that they had no right to build any permanent or substantial structure upon the land covered by the tenancy. Mukherjee J., remanded the case on two points. The second point reads as follows:

(2) If the structures were completed before the institution of the suit, whether an order for demolition should be made on keeping in view the fact that the tenancy of the appellants has not yet been determined and also the fact that the appellants have undertaken in this Court to remove the structures at their own costs after the determination of the tenancy, if it is determined at any time,

without claiming any compensation from the plaintiff.

The lower appellate Court in that case on hearing the parties after remand with regard to the point No. 2 mentioned above said in his judgment:

"....."

So I am of opinion that though otherwise, the plaintiff is entitled to mandatory injunction, in view of this undertaking this injunction should not actually be allowed."

Against that decision a second appeal was preferred. There again the question of undertaking was considered and the finding of the court below was challenged. There the persons who gave the undertakings were not all the parties concerned but one Kailash was unwilling to give any undertaking. In that subsequent second appeal Banerjee, J., held that in those circumstances he would not have allowed the appeal on the simple ground that the undertaking was ineffective. Then other questions of law were considered. From the reading of the entire judgment reported in (1959) 63 Cal WN 824 I do not find that any specific or clear proposition of law was laid down that if any undertaking is given by the tenant for demolition when there would be any occasion for a decree for eviction against him, such undertaking would be accepted or the court might accept that undertaking in spite of the specific finding that the permanent or pucca construction made by the tenant was unlawful and against law. In the facts and circumstances, I cannot say that the learned Subordinate Judge was justified to hold that on the basis of the decision of the case in (1959) 63 Cal WN 824 the unlawful construction made by the tenant should be allowed to remain on the basis of the undertaking.

6. There can be no dispute about the status of a thika tenant as defined in Section 2 (5) of the Calcutta Thika Tenancy Act, 1949. Such tenant cannot make any pucca or permanent construction on the tenanted land without the previous permission and consent of the landlord. Of course, the thika tenant using the land for a residential purpose may erect a pucca structure on such land for such purpose with the previous permission of the Controller and on an application made by the thika tenant in this behalf. The Controller may grant him permission to erect a pucca structure if the Controller is satisfied on certain

points. In this connexion Section 10 (a) of the Calcutta Thika Tenancy Act may be looked into. In the present case, both the trial court and the appellate court below held that the defendant-tenant made pucca and permanent constructions without the consent and knowledge of the landlord and that the said construction was unauthorised and illegal and liable to be demolished. Against the decision of the trial court when the appeal was taken up for hearing those findings were not challenged. But the defendant-tenant filed an application, as already stated, giving an undertaking to demolish the same when there might be an occasion for her eviction in future. When the plaintiff got relief against a wrong done by the defendant, the question would be whether any court of justice will allow the wrong to continue if the said wrong is admittedly against the provisions of law. In the present case, if the undertaking is accepted it means that the wrong done by the tenant in the matter of making illegal construction will be allowed to continue. When the plaintiff is entitled to get the relief by way of mandatory injunction for removal of the wrong besides permanent injunction, the court has no jurisdiction to withhold the relief to which the plaintiff is entitled unless there is reasonable justification either according to law or good conscience and equity. Neither of these principles is applicable in the present case. The defendant surreptitiously and illegally against the provision of law made construction to the prejudice of the plaintiff. The wrong done to the plaintiff must be removed by demolition of the illegal structure. There can be no question of allowing the wrong to continue on any undertaking. I believe no court of justice can allow it either on the principle of equity or on the principle of good conscience when the defendant deliberately committed a wrong against the provision of law. I have no doubt to hold that the learned Subordinate Judge misread the decision appearing in (1959) 63 Cal WN 824 and applied a wrong principle of law causing injustice in the present case. In these circumstances, the appeal must be allowed and the modification made by the appellate court below must be set aside.

7. In the result, the appeal succeeds. The order of modification passed by the appellate court below in respect of the mandatory injunction is hereby set aside and the decree of the trial Court is restored in toto. I, however, pass no

order as to costs in this appeal in the absence of the respondent.

8. Send the lower court records as early as possible.

Appeal allowed.

AIR 1976 CALCUTTA 354

SABYASACHI MUKHARJI, J.

Mrityunjoy Sadhukhan, Appellant v. Deputy Commissioner (B. & P.) Corporation of Calcutta, Respondent.

Matter No. 199 of 1975, D/- 23-3-1976.

(A) Calcutta Municipal Act (33 of 1951), Section 414 — Calcutta Municipal (Amendment) Act (9 of 1974), Section 2 — Constructions made on sanction obtained by misrepresentation — Sanction cancelled — Commissioner whether bound to order demolition.

Where constructions were made on sanction obtained by misrepresentation and the sanction was subsequently cancelled by the Commissioner, the Commissioner is not bound to order demolition of the constructions but has a discretion under Section 414 not to order demolition if after giving the parties opportunity to show cause against demolition he finds that the infraction of rules was of a minor nature or did not affect the sanitation or ventilation and amenities of the building in question or other adjoining premises and Section 2 of Amending Act does not affect the discretion vested in the Commissioner under Section 414. AIR 1972 Cal 459 (FB), Rel. on; (1970) 74 Cal WN 1002 and (1965) 69 Cal WN 249 and (1964) 68 Cal WN 1049, Ref. (Paras 2, 3) **Cases Referred: Chronological Paras** AIR 1972 Cal 459 = 76 Cal WN 983 (FB)

(1970) 74 Cal WN 1002	2
(1965) 69 Cal WN 249	2
(1964) 68 Cal WN 1049	2

Sk. Abu Sufian, for Appellant; B. Banerjee, for Respondent.

ORDER:— The petitioner in this application under Article 226 of the Constitution has challenged the order dated 21st March, 1975 passed by the Deputy Commissioner (B & P) Calcutta. The order relates to premises No. 9, Raja Rajballav Street (back portion). It appears that there were certain constructions made on sanction which was obtained on misrepresentation. Therefore, the Deputy Commissioner on 3rd January, 1975,

had ordered that the building plan sanctioned in favour of Sudhamoyee Pal being Building Plan No. 22 dated 25th April, 1973, in respect of 9, Raja Rajballav Street be cancelled and the work done pursuant to the sanction be considered to be done without sanction. The City Architect was directed to take steps under Section 414. It appears that pursuant thereto notice to show cause was issued and from the records produced by the Corporation at the hearing of this application before me it further appears that cause was shown personally. After consideration of the matter, the Deputy Commissioner passed the impugned order which is to the following effect:—

"From the departmental reports and on hearing the parties I am satisfied that the constructions under reference have been done in recent times, without sanction and in pursuance of a building sanction plan which has since been revoked. So far as the side spaces are concerned, the width of the side spaces varies from 6'-0" to 5'-10" against the 2 storied house of the adjoining premises. This infringement is minor in nature and as such the open space as has been provided be allowed for the construction which has so far been made against the adjoining premises. The open space of the one storied asbestos shed and the open space of the adjoining premises on south as has since been left varies from 3'-10½" to 3'-11". This infringement is also very minor in nature and as such the open space as has been provided should be allowed against the constructions already made in this part. So far as the side space on south-east side is concerned the width of the open space against the two storied house of the adjoining premises it varies from 5'-6" to about 7'-0" or in some parts little more instead of 6'-0". Had there been any construction having attachment with this two storied existing building, I would have no other alternative but to allow this construction to stand. Such open space therefore, as has now been provided, definitely improves the open space conditions of the property and should be allowed to stand, provided however any encroachment by any beam or some other structure causing encroachment on such space, if there be any, is removed. So far as the back space is concerned the width of the back space varies from 9'-4" to 9'-8". Since the plot is very small in area and since there is no complainant to complain and since these complainants have nothing to object in the matter, the

back space, as has now been provided, be allowed against the one storied construction which has already been made. Subject to the removal of all encroachments by all beams or like causing encroachment on the open spaces at the sides and also on payment of the necessary Corporation charges prescribed in this behalf all within one month from the date of communication of this order the constructions which have so far been made without sanction and in pursuance of the plan which has since been revoked be allowed to stand."

2. The question is whether the Commissioner was in error in passing the aforesaid order. On behalf of the petitioner it was urged that the Commissioner was bound to order demolition in the facts and circumstances of the case. Reliance in this connection was placed on the cases of *O. M. Industries Ltd. v. State of West Bengal*, (1970) 74 Cal WN 1002, *Yudhisthir Dutt v. Corporation of Calcutta*, (1965) 69 Cal WN 249, *Kanai Lal Pal v. Corporation of Calcutta*, (1964) 68 Cal WN 1049. In the case of *Purshottam Lalji v. R. N. Agarwal*, 76 Cal WN 983 = (AIR 1972 Cal 459) (FB) the Special Bench of this court had to consider this question and it was held that Section 414 of the Calcutta Municipal Act vested the Commissioner with a discretion and that discretion was for the purpose of facilitating the scheme and object of the Calcutta Municipal Act, 1951. That discretion should be used bona fide and not on any extraneous ground. The section also enjoins that the Commissioner should exercise discretion quasi-judicially, that is to say, by giving the parties an opportunity to show cause and the parties were given opportunity to show cause why an order for demolition should not be made. Therefore, if in a proper case it was found that there was infraction of the rule which could not be relaxed or which had not been relaxed and the parties showed cause to the Commissioner, for example, the infraction was of a minor nature or in any way not affecting the sanitation or ventilation and amenities of the building in question or other adjoining premises, the Commissioner had discretion not to order demolition. Judged by the aforesaid standard in view of the facts and circumstances of the case, in my opinion, it cannot be said that the discretion exercised by the Deputy Commissioner as delegated from the Commissioner was improperly exercised. Counsel for the peti-

tioner drew my attention to the Calcutta Municipal (Amendment) Act, 1974. Section 2 of the said Act provides as follows:—

"2. In sub-section (3) of Section 414 of the Calcutta Municipal Act, 1951 (hereinafter referred to as the said Act),—

(i) in clause (b), the words "or an officer specially appointed by the Corporation with the approval of the State Government in this behalf, as the case may be, shall be omitted;

(ii) after the existing proviso, the following further proviso shall be added, namely:—

"Provided further that where the structure does not contravene any of the provisions of this Act or the rules made thereunder, the Commissioner may, without prejudice to any other action that may be taken against the person concerned under the provisions of this Act or the rules made thereunder, allow him to submit proper plan under the rules referred to in Schedule XVI and sanction such plan."

3. It was contended that after the amendment of Section 414 by the said amendment Act, the Commissioner had no discretion but to order demolition when the building was constructed without the sanctioned plan. I am unable to accept this contention. Section 2 of the said amending Act merely added a proviso giving an additional power to the Commissioner. It does not, in my opinion, affect the discretion vested in the Commissioner as indicated in the Special Bench Judgment referred to hereinbefore. In the aforesaid view of the matter, in my opinion, the petitioner cannot make any grievance of the said order by the Deputy Commissioner. It was also contended on behalf of the respondent that in view of Section 414-A, the petitioner had alternative remedy. In the view I have taken, it is not necessary for me to discuss this aspect any further.

4. In the aforesaid view of the matter, this application fails and is accordingly dismissed. The rule nisi is discharged. Interim order, if any, is vacated.

5. There will be no order as to costs.

Application dismissed.

AIR 1976 CALCUTTA 356**R. BHATTACHARYA, J.**

Chandi Charan Naskar, Appellant v. Bhagyadhar Mondal and others, Respondents.

A. F. A. D. No. 465 of 1968, D/- 23-3-1976.

(A) Evidence Act (1872), Section 108 — Presumption under — Computation of period of seven years.

The presumption under Section 108 relates to the factum of death and not to the date of death of the person untraced. The presumption starts from the date when the dispute arises, that is, when the suit was filed. (Para 4)

(B) Civil P. C. (1908), Section 100 — Finding of fact — Finding as to unchastity of wife without any evidence and based on unreasonable presumption, can be interfered with in second appeal. (Para 5)

(C) Hindu Succession Act (1956), Sections 4 and 14 — Unchaste widow — Not debarred from inheriting her deceased husband. (Para 6)

Cases Referred: Chronological Paras AIR 1972 Mad 357 = (1972) 2 Mad LJ 50 6

Sudhir K. Dutt, for Appellant; Murari Mohan Mukherjee, for Respondents Nos. 4 (1) to 4 (8).

JUDGMENT:— This second appeal is by the plaintiff of the original suit who was unsuccessful both in the trial court and in the appellate court below.

2. In this appeal the only question which requires consideration is whether or not the appellant had title to the disputed properties which were purchased from the sister of one Tarakali, who was the original owner of the properties to the extent of one-third share in respect of 'Ka' schedule land and also the owner of the Kha schedule properties. The allegation of the plaintiff Chandi Charan Naskar is that Tarakali died leaving only one son Satya, who also became untraced for about 12 or 13 years. As the whereabouts of Satya Charan were not known, he was presumed to be dead and the plaintiff purchased the property from his sister, who was the limited heiress of Tarakali and subsequently he also purchased Kha schedule property in the benam of defendant No. 5. The suit was for declaration of the plaintiff's title to the suit properties and also for recovery of possession as according to the allegation of the plaintiff, he was dispossessed

by the defendant No. 4. There was an alternative prayer for partition as some of the defendants were co-sharers in respect of some of the suit properties. The defendant No. 4 alone contested the claim of the plaintiff. Defendant No. 5 of course filed a written statement supporting the claim of the plaintiff. According to the allegations of the defendant No. 4, he purchased the suit properties from the widow of Satya. That widow is Gangabala. Plaintiff opposes that claim of the defendant on the ground that Gangabala became unchaste and, therefore, she was not entitled to inherit in any manner the suit properties from her husband who is supposed to be dead under presumption of law. The trial court dismissed the suit on the finding that Gangabala became unchaste during lifetime of Satya Charan and at the same time the finding was that the plaintiff could not prove the date of death of Satya Charan. According to the trial court the suit was filed after the promulgation of the Hindu Succession Act, 1956 and according to the provision of the said Act there is no bar to the unchaste widow's inheriting the property of her husband. An appeal was taken to the District Judge and the matter was heard by the Additional District Judge, Howrah. The learned Additional District Judge concurred with the findings of the learned Munsif and he also held that the suit was rightly dismissed because according to the provision of the Hindu Succession Act even an unchaste widow can inherit the property of the deceased husband. It was held, as was found by the learned Munsif, that the plaintiff failed to prove the date of death of Satya Charan. In the judgment it is indicated that he accepted the finding of the learned Munsif that Gangabala became unchaste during the lifetime of her husband.

3. I have heard Mr. Dutt, learned Advocate appearing on behalf of the appellant and Mr. Mukherjee for the respondents Nos. 4 (1) to 4 (8), the heirs and legal representatives of the defendant No. 4, now deceased.

4. The first point that requires consideration is whether the plaintiff has been able to prove the date of death of Satya Charan. In this connexion Section 108 of the Evidence Act may be referred to. According to this section the court may presume, in the facts and circumstances, that a person whose whereabouts are not known as indicated in that section for seven years or more, is dead. This presumption relates to the factum of

death and not to the date of death of the person untraced. In the present case, the suit was filed on 22-11-1957. Therefore, according to law the presumption starts from the date when the dispute arises, that is to say, when the suit was filed. As I have already stated, the presumption is that Satya Charan is dead, but it cannot be stated when actually he died. An attempt was made by the plaintiff to adduce evidence through witnesses to speak about the date of death, but both the courts disbelieved the evidence of those witnesses and quite correctly. Therefore, the fact remains that when actually Satya Charan died, is unknown and not proved.

5. Although the learned Munsif of the trial court held specifically that the plaintiff was not able to prove the date of death of Satya Charan, his further finding is that Gangabala became unchaste during the lifetime of Satya Charan. It is nobody's case that Gangabala became unchaste prior to the disappearance of Satya Charan. The only evidence of unchastity relied upon by the plaintiff is the birth of a child of Gangabala at the Howrah hospital in the year 1957. Clearly, therefore, the plaintiff wanted to say that after Satya Charan had disappeared, Gangabala also left the place but there is no other evidence of unchastity of Gangabala save and except the birth of a child long after the disappearance of Satya Charan. Simply because Gangabala left the house, it cannot be presumed that she became unchaste as soon as she left her house. Now, when both the courts below held that Gangabala became unchaste during the lifetime of Satya Charan in spite of the definite finding that there is no evidence when Satya Charan died, it must be stated that the said finding is without evidence and based upon unreasonable presumption. It is also curious that the appellate court did not discuss about the finding that Gangabala became unchaste during the lifetime of Satya Charan. In any view of the matter, as I have already said, the finding of both the courts that Gangabala became unchaste during lifetime of Satya Charan is untenable.

6. The next question that arises for consideration is whether the unchaste widow Gangabala inherited the suit properties of her husband who is presumed to be dead in view of Section 108 of the Evidence Act. On this question Mr. Dutt has argued that when Gangabala became unchaste during the lifetime of Satya

Charan she became disqualified from inheriting her husband's properties. I have already discussed about the finding that Gangabala became unchaste during the lifetime of Satya Charan. That finding is without evidence and unacceptable. In this context we are also to remember that we have only the presumption that Satya Charan was dead, but when he died we do not know. There is no evidence. It may be that he died immediately after his disappearance within seven years from such disappearance or it may also be, and there is no knowing, that he died after 12 or 13 years, as alleged by the plaintiff. When the whereabouts were not known it may either be that he died before Gangabala became unchaste or after she gave birth to the illegitimate child. In any view of the matter, the Hindu Succession Act is there which does not contain any provision which debars an unchaste widow from inheriting her deceased husband. An attempt was made by Mr. Dutt to say that Section 28 speaks about certain disease, defect or deformity, all relating to bodily defects which have been excluded from the category of disqualifications debarring any person from inheritance. Mr. Dutt wants to say that the principles of the Hindu Law that no unchaste woman should be allowed to inherit her husband has not been excluded by this Act. I am afraid, I cannot accept this contention. The Hindu Succession Act regulates succession without making any exception on ground of unchastity or otherwise. When there is no bar to succeeding husband's property by unchaste widow, it cannot be presumed that the principles of the Hindu Law as were followed previous to this Act have been retained. The Hindu Succession Act is clear and specific and there is no bar to any unchaste widow succeeding her husband. Section 4 of the Act is the overriding provision. The rule of Hindu Law has ceased to operate regarding succession with the appearance of the Hindu Succession Act, 1956. In this connexion I may refer to the decision of Jayalakshmi Ammal v. T. V. Ganesa Iyer, reported in AIR 1972 Mad 357. This point was considered in that case and it was held that according to the provision of the Hindu Succession Act, a widow, though unchaste, can succeed to the property of her son as his father's widow. In that case the judgment of the Division Bench was delivered by K. Veeraswami, C. J., I quote below a relevant portion from the judgment:

"The Hindu Succession Act, in so far as it covers the matters therein, is meant to be a complete Code relating to Hindu Succession and to that extent the Act prevails and the Hindu Law in respect of it will cease to operate. That is the effect of Section 4 which as we said, gives the provisions of the Act an effect of overriding the Hindu Law except to the extent save as otherwise, expressly provided for in the Act itself."

7. In the present case, there is no evidence that Satya Charan died before the introduction of the Hindu Succession Act and the suit was filed in November, 1957, and as such the plaintiff has not been able to prove that Gangabala being unchaste woman was unable or incapable to inherit Satya Charan's property even according to principles of Hindu Law. In this state of affairs it cannot be said that Gangabala could not inherit her husband's property according to the provisions of Hindu Succession Act or that Satya Charan's sister and sister's son had any title to the suit properties. In view of the discussion above, I find no merit in this appeal.

8. In the result, the appeal fails and the same is dismissed with costs in favour of the contesting respondents.

Appeal dismissed.

AIR 1976 CALCUTTA 358

SABYASACHI MUKHARJI, J.

Shiva Prasad Agarwal, Plaintiff v. Semiconductors Ltd., Respondent.

Matter No. 404 of 1975, D/- 27-1-1976.

(A) Civil P. C. (1908), Section 10 — Matters in issue directly and substantially not the same in both the suits — Instance.

The question involved in the previously instituted suit was whether there was proper performance of contract by the defendant-respondent to the application for stay of suit and if not to what damages the plaintiff-applicant was entitled. The question involved in the subsequent suit was whether there was wrongful repudiation of contract by the defendant-applicant and if so, whether the plaintiff-respondent was entitled to any damages. These two questions are separate questions and the disposal of one issue would not resolve the need for adjudication of the other. In the premises,

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the matters in issue directly and substantially in both the suits are not the same. The application for stay of subsequent suit, therefore, cannot be allowed. AIR 1917 Cal 248 and AIR 1975 Cal 411, Rel. on.

(Para 1)
Cases Referred: Chronological Paras
AIR 1975 Cal 69 3
AIR 1975 Cal 411 = 79 Cal WN 830 1
AIR 1917 Cal 248 = 24 Cal LJ 514 1

S. P. Mazumdar, for Plaintiff; D. Ghose, for Respondent.

ORDER:— This is an application for stay of a suit instituted in this Court on or about the 11th August, 1975. This suit being Suit No. 404 of 1975 was instituted by the respondent to this application against the petitioner claiming a sum of Rs. 9,03,310/- and in the alternative an enquiry into the damages suffered by the plaintiff and decree for the sum found due. On or about the 16th June, 1975, another suit being Suit No. 527 of 1975 had been instituted by the petitioner against three firms of which the respondent was the proprietor. The question is, whether, in these circumstances the petitioner is entitled to ask for stay of subsequently instituted suit in the Calcutta High Court. It appears that it is a common case that there was an agreement between the parties in respect whereof the terms were recorded by the offer made on the 16th February, 1974 and acceptance thereof by the 19th February, 1974. It is the case of the petitioner that there were certain additional terms upon which the parties entered into the bargain. It is also a common case that under the said agreement the goods were to be supplied in two different lots. The first lot was alleged to have been delivered by the respondent to the petitioner in December, 1974 and February, 1975. The petitioner states that the said delivery was not in accordance with the terms of the bargain between the parties and the petitioner had claimed damages as well as refund of the purchase price paid and on that basis on the 16th June, 1975, had instituted the suit in the High Court at Bombay. It has been stated that subsequently on the 26th June, 1975, the petitioner had cancelled the contract. That is the allegation of the petitioner in paragraph 20 of the petition. The second suit which has been instituted in the High Court of Calcutta was instituted by the respondent on the allegation of wrongful repudiation on the part of the petitioner and as such the respondent has claimed decree for Rs. 9,000/- and enquiry

into damages as mentioned hereinbefore. The claim of the petitioner in Bombay suit was for Rs. 1,69,988/- as well as for Rs. 6 lacs. Therefore, the main question involved in the Bombay suit is whether there was proper performance of the contract by the respondent by the purported delivery for the first instalment due under the contract. If not, to what damages or refund the petitioner is entitled for such failure on the part of the respondent to perform its obligation for the delivery of the first lot under the contract. The main question involved in the subsequent Calcutta suit would be whether there has been a wrongful repudiation of the contract by the petitioner and if so, is the plaintiff entitled to any damages or any sum of money on that account. These two questions in my opinion, are separate questions and the disposal of one issue or adjudication of one issue would not resolve the need for adjudication of the other. In the premises, I am of the opinion, that the matters in issue directly and substantially in both the suits are not the same. The principles upon which the court should exercise its jurisdiction under Section 10 of the Code of Civil Procedure are well settled. In this connection reliance may be placed on the observations in the case of Bepin Behary v. Jogendra Chandra, AIR 1917 Cal 248 and also the observations of the Bench decision of this Court in the case of Shaw Wallace & Co. Ltd. v. Bholanath, AIR 1975 Cal 411. For the aforesaid reasons I am unable to accept the contention urged in support of this application that the matters in issue in both these suits, being the same, the subsequently instituted Calcutta suit should be stayed.

2. It was, next, contended on behalf of the respondent that the claim made in Calcutta suit was in excess of the claim of the petitioner in the Bombay suit.

3. Therefore, it was urged that disposal of the Bombay suit would not give the plaintiff in Calcutta suit full relief. It was contended that according to the view of the Calcutta High Court counter claim for excess amount was not admissible and in aid of this proposition reliance was placed on the observations of this court in the case of Brijlal and Co. v. M. P. E. Board, AIR 1975 Cal 69. Having regard to the view I have taken on the first aspect of the matter, I do not propose to express any opinion on the

second contention urged in this application on behalf of the respondent.

4. It was, lastly, contended that the application was belated. In this case the writ of summons was served upon the petitioner in August, 1975. On or about 10th November, 1975, the petitioner made an application for particulars and time to file written statement expired by that time. Thereafter, on the 5th January, 1976, the petitioner has made this application for stay of the suit. It was contended that this application should be refused, because no explanation was given for this delay. On behalf of the petitioner it was contended that the ground taken in the opposition was that the application was premature. It was not contended that the application was belated. If that point had been taken, it was urged on behalf of the petitioner, then the petitioner might have tried to explain the delay. Prima facie, it appears to me that there is good deal of substance in the contention that this application is belated, but as mentioned hereinbefore in the view I have taken on the first contention, I need not rest my decision on this aspect of the matter.

5. In the premises, this application fails and is, accordingly, dismissed.

6. Cost of this application will be cost in the cause.

Application dismissed.

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BIMAL CHANDRA BASAK, J.

Sm. Kajari Saha, Applicant v. State of West Bengal; Respondent.

Matter No. 75 of 1975, D/- 12-12-1975.

(A) West Bengal Medical and Dental Colleges (Regulation of Admission) Act (1973), Sections 8 and 5 — Admission to Medical College — Candidate belonging to Scheduled Caste — 'Sunris' of West Bengal — Declaration regarding Scheduled Caste found to be false — Cancellation of admission by Central Selection Board is final. (1) West Bengal Medical and Dental Colleges (Regulation of Admission) Rules, 1973, Rule 4. (2) Constitution (Scheduled Castes) Order, 1950, Item 40, Part 13.)

Under Rule 4 of the West Bengal Medical and Dental Colleges (Regulation of Admission) Rules, 1973, an application for admission to any of the seats referred to in sub-sections (3), (6) and (7) of

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Section 5 of the West Bengal Medical and Dental Colleges (Regulation of Admission) Act has to be submitted in CSB Form No. 1. Such an application has to be accompanied by a certificate of Scheduled Castes and Scheduled Tribes in CSB form No. 1-B as required by sub-r. (2) of R. 4 and Item 15 of the application form. Under Item No. 24 of the application form any statement made in the application form found to be incorrect on scrutiny will render the application liable to rejection and admission if granted on the basis of such incorrect statement liable to be cancelled. Under Section 8 of the Act the decision of the Central Selection Board in the matter of selection and allotment of candidates shall be final.

A candidate who applied for admission on the basis of a declaration that she was "Sunri excluding Saha" a Scheduled Caste within the meaning of Item 40 Part 13 of Schedule to the Constitution (Scheduled Castes) Order, 1950, and annexed a certificate from the Chief Metropolitan Magistrate who was one of the appropriate authorities. She was provisionally admitted against seats reserved for Scheduled Caste candidates. On enquiry with the Welfare Department a report was received that the candidate was Saha and not Sunri and did not belong to a Scheduled Caste. Her admission was cancelled by the Central Selection Board after a show cause notice. In a petition challenging the cancellation.

Held (i) that it was open to Central Selection Board to declare that the admission of the candidate to Pre-medical Course leading to M. B. B. S. Course stood cancelled. (Paras 14 and 15)

(ii) Although the enquiry was not held in presence of the petitioner nor was she given any copy of report of the Welfare Department but since the petitioner was served with a notice stating about the report of Welfare Department and the petitioner had made various representations and placed various materials in pursuance of such notice, she was given adequate opportunity and principle of natural justice was not violated.

(Para 17)

(iii) That power to scrutinise implied power to make enquiries. Whether such enquiry was to be made by the Board or some other agency was a matter for the Board to consider. It was open to the Board to employ such other agency as it thought fit. As long as the Board had properly applied its independent mind before making the order, its order or de-

cision could not be challenged to be illegal merely because an enquiry was caused to be made by some other agency. (Para 18)

(B) Constitution of India, Article 226 — Scope — Power of High Court — Limited to see whether authority concerned has acted with or without jurisdiction — Sufficiency of evidence cannot be gone into.

The High Court in its constitutional writ jurisdiction is not a court of facts. It does not sit in appeal over the decision of an authority whose order is challenged. It can only see whether the authority concerned has acted with or without jurisdiction. It can also act when there is an error of law apparent on the face of the record. It can also interfere with a decision where there is no legal evidence before the authority concerned or where the decision of the authority concerned is held to be perverse, i.e., a decision which no reasonable man could have arrived at on the basis of materials before it. Subject to this, it cannot interfere with any other decision of any other authority, far less, in a case where it is a question of alleged error of facts. The sufficiency of the evidence before an authority cannot be a subject-matter of a scrutiny by the High Court in its Constitutional writ jurisdiction. It is not an appellate court. AIR 1967 SC 115, Dist.

(Para 19)

Cases Referred: Chronological Paras
AIR 1967 SC 115 = 1966 Supp SCR 387
7, 19

Bankim Chandra Dutt, in support of the Application; S. S. Mukherjee, Jr. Standing Counsel, for Respondents.

ORDER:— In this application for appropriate Writs under Article 226 of the Constitution of India, the petitioner is challenging an order contained in letter No. CSB/116 dated 14th February, 1975, being Annexure-C to the petition. By the said order the admission of the petitioner to the Pre-Medical Course leading to the M. B. B. S. Course was treated as cancelled and steps were taken to strike out the name of the petitioner from the list of students of the Calcutta National Medical College, Calcutta with effect from the date of issue of the said letter.

2. The petitioner's case, as made out in the petition, is as follows: The petitioner alleges that she is a member of the family of "Sunris" whose surname is Saha and who originally resided in Bogra, now in Bangladesh. Her fore-

fathers were all sellers of wine and belonged to the caste known as "Sunris" and not to the caste known as "Sahas" who carried on large scale business in groceries and who did not belong to the Scheduled Caste but to the Community known as Vaishyas. After partition the petitioner's family migrated to the West Dinajpur District in West Bengal. The petitioner's family used Saha only as surname and never belonged to the Saha caste. The father of the petitioner, Arun Kumar Saha, was appointed in the year 1953 in the post of Mechanic in the Overseas Communications Service, Government of India, as a member of the Scheduled Caste. It is alleged that at the time of his appointment, the father of the petitioner submitted to the Government of India a certificate dated 11th November, 1953, issued by the Commercial Tax Officer, Central Section, West Bengal, countersigned by the District Magistrate, West Dinajpur on 30th November, 1953, after proper enquiry. It was stated therein that the petitioner's father belonged to Sunri caste. On the basis of such certificate the petitioner's father was appointed in the Overseas Communications Service and the service book of the petitioner's father recorded that he belonged to Sunri caste. A copy of the relevant entry from the service book was also produced before this Court. The petitioner is also relying on several other documents and papers in support of her contention that she belongs to Sunri caste. The admitted position is that if she belongs to Sunri caste then she is a member of the Scheduled Caste. It is alleged that the petitioner passed the Higher Secondary Examination (Science) of West Bengal Board of Secondary Education held in 1973 and appeared in the Joint Entrance Examination for admission to Engineering-cum-Medical Colleges in West Bengal. It is alleged that in the said examination the petitioner obtained qualifying marks to apply for admission to Medical Colleges and obtained application form from the Medical College, Calcutta to apply for admission to pre-medical course leading to M. B. B. S./B. D. S. degree for the session 1973-74 in any of the Government Medical Colleges in West Bengal. On the 2nd November, 1973, the petitioner applied on the said form and submitted the said form for admission as a member of Scheduled Caste to the pre-Medical Course leading to the M. B. B. S./B. D. S. Course for the session 1973-74 with all documents and testimonials and

the petitioner's application was registered with the Registration No. 1145. Along with the said application the petitioner submitted an attested copy of the certificate dated 19th Feb., 1973, from the Chief Presidency Magistrate, Calcutta certifying that the petitioner belonged and still belongs to Sunri caste which is recognised as a Scheduled Caste under the Constitution (Scheduled Castes) Order 1950. The petitioner further alleges that such certificate was given by the Chief Presidency Magistrate, Calcutta, who is the prescribed authority to grant such certificate in this case, after Police verification. By intimation Card No. C. N. M. C./134 received by the petitioner on 21st December, 1973, the petitioner was informed that she had been "provisionally" selected for admission to the Pre-Medical Course against a reserved seat for Scheduled Castes and Tribes for the session 1973-74 in the Calcutta National Medical College. Pursuant to that order the petitioner got himself admitted into the Calcutta National Medical College on payment of requisite fees. It is stated that in view of an order of injunction passed by this Hon'ble Court on the application of other candidates, the admission of the petitioner to the Calcutta National Medical College was not given effect to and the petitioner continued her studies in Bethune College in 3 years Degree Course with Honours in Botany until the said injunction order was vacated. Her admission to the Calcutta National Medical College was given effect to and she was allowed to join the Calcutta National Medical College as a medical student after the order of injunction by the High Court was vacated and the petitioner was transferred to the Pre-Medical Course in the said Bethune College as deputed by the authorities of the Calcutta National Medical College. It is alleged that the petitioner passed the Pre-Medical Examinations held in August 1974 securing an aggregate of 371 marks just 4 marks short of 375 aggregate marks for 1st Division. After completion of Pre-Medical Course the petitioner was admitted to the M. B. B. S. Course in the Calcutta National Medical College and at the time of institution of this case she was reading in the 1st year of M. B. B. S. Course.

3. By a show cause notice dated 23rd March, 1974, issued by the Principal, Calcutta National Medical College who is the Chairman of the Central Selection Board, the petitioner was directed to show cause within 4th April, 1974,

why disciplinary action, as suggested therein, including cancellation of examination, should not be taken against her. In the said notice it was stated that the petitioner was provisionally selected for admission to the Pre-Medical Course in the Calcutta National Medical College against a reserved seat for Scheduled Castes/Tribes for the session 1973-74 on the strength of a Scheduled Caste/Tribe certificate issued in her favour by the Chief Presidency Magistrate, Calcutta which was submitted by the petitioner to the Board along with the application form. It was alleged that the Scheduled Castes and Tribes Welfare Department of the Government of West Bengal (hereinafter referred to as the Welfare Department), on enquiry found that the petitioner did not belong to any community of the Scheduled Castes/Tribes of this State. It was further alleged that the certificate produced by the petitioner was not regular and it was, therefore, decided that the actions should be taken against the petitioner immediately. Actions proposed consisted of disciplinary action in the shape of cancellation of the petitioner's provisional selection to the Pre-Medical Course for the Session 1973-74; withdrawal of the Scheduled Caste certificate already issued to the petitioner and recovery of financial benefit payable to Scheduled Castes and Tribes candidates granted to the petitioner, if any. By a petition dated 2nd April, 1974, the petitioner showed cause and reiterated that she belongs to "Sunri" caste which was a Scheduled Caste under the Constitution (Scheduled Castes) Order 1950. The petitioner also relied on various documents in support of her case. By further letters dated 3rd and 19th April and 18th September, 1974, the petitioner made representations to the respondent No. 4 who is the Director of the said Welfare Department. Thereafter on the 14th Feb., 1974, the Chairman, Central Selection Board, passed the impugned order which is set out hereinbelow:

"GOVERNMENT OF WEST BENGAL
OFFICE OF THE CHAIRMAN CENTRAL
SELECTION BOARD AND
PRINCIPAL MEDICAL COLLEGE,
CALCUTTA."

No. CSB/116

D/- Cal., the 14-2-75.

To,
Sm. Kajari Saha,
C/o. Sri Arun Kumar Saha,
P-43, Rabindra Sarani Top Floor,
Calcutta-1.

You were provisionally selected for

admission to the Pre-Medical Course in the Calcutta National Medical College, Calcutta against a reserved seat for Scheduled Castes/Tribes for the session 1973-74 on the strength of a Scheduled Caste/Tribe certificate issued in your favour by the Chief Presidency Magistrate, Calcutta, which has been submitted by you to this office with your Application Form.

The Scheduled Castes and Tribes Welfare Department of this Government have on enquiry, found that you belong to 'Baishya Saha' Community of this State which is not regarded as Scheduled Caste and as such your admission to the Pre-Medical Course leading to M. B. B. S. Course also is hereby treated as cancelled as a disciplinary measure.

The Principal, Calcutta Medical College, Calcutta is being informed to strike off your name from list of students of his College with effect from the date of issue of this letter.

Sd/- B. Chakrabarti

Chairman, Central Selection Board,
Principal, Medical College,
Calcutta.

Letter
date 14-2-1975."

4. This is the order which has been challenged in this proceeding. This Writ Petition was moved, on the 10th March, 1975, before A. N. Sen, J., who directed issue of a Rule Nisi as prayed for. A. N. Sen, J., also passed an ad interim order whereby the respondents were restrained from giving any effect to the said order dated 14th February, 1975, and from interfering with the petitioner's studies for the M. B. B. S. Course in Calcutta National Medical College till the disposal of the Rule.

5. In this case an affidavit has been affirmed on behalf of the Central Selection Board by one Pratul Chandra Ghosh on 13-5-1975. He is the Secretary to the Central Selection Board. He has stated in the said affidavit inter alia as follows:—

"2 (a) That the petitioner applied on the prescribed Form for admission as a member of the Scheduled Caste to the Pre-Medical Course preparatory to the M. B. B. S./B. D. S. Course for the session 1973-74 with all alleged documents and testimonials and the petitioner had been "provisionally" selected by the Central Selection Board for admission to the Pre-Medical Course against reserved seat for Scheduled Castes and Tribes for the session 1973-74 in Calcutta National Me-

dical College. On being selected, the petitioner took admission in Calcutta National Medical College on 15th January, 1974.

(b) That as per Government order, the Central Selection Board after selecting "provisionally" the students for admission to Pre-Medical Course leading to M. B. B. S. Course for the session 1973-74, sent all the supporting documents of the students who claimed themselves as members of the Scheduled Castes, to the Scheduled Castes and Tribes Welfare Department, Government of West Bengal for making necessary enquiries about the genuineness of the Caste certificates produced by the candidates including the petitioner. It took about 13 months to complete the said enquiries made by the Scheduled Castes and Tribes Welfare Department. A true copy of the said Government order is annexed herewith and marked with the letter "A".

(c) After making necessary enquiries the Respondent No. 4 sent reports to the Central Selection Board. From the said report it transpires that the petitioner does not belong to the Scheduled Caste community. A true copy of the said report of the Scheduled Castes and Tribes Welfare Department is annexed herewith marked with the letter "B".

(d) On the basis of the said report, the Respondent No. 2 issued a Show Cause Notice 3620/12642/I dated 25th March, 1974, to the petitioner directing her to show cause within 4th April, 1974, why disciplinary action should not be taken against her and her selection to the pre-Medical Course should not be cancelled. A true copy of the said show cause notice is annexed herewith and marked with the letter "C".

(e) On receipt of the said show cause notice, the petitioner made representations which were duly considered. After careful consideration, the selection Board passed an order No. CSB/116 dated 14-12-1974 stating inter alia that the Scheduled Caste and Tribes Welfare Department of the Government of West Bengal have on enquiry found that the petitioner belongs to "Baishya Saha" community of the State of West Bengal who are not regarded Scheduled Caste and as such the petitioner's admission to the Pre-Medical Course leading to M. B. B. S. course is hereby treated as cancelled as a disciplinary measure. The Principal, Calcutta Medical College, Calcutta is being informed to strike off petitioner's

name from the list of students of his college with effect from the date of issue of this letter. A copy of the said letter is annexed herewith and marked as Annexure "D".

(f) This deponent states that the selection and admission to Pre-Medical Course leading to M. B. B. S. course is essentially "provisional" and within the jurisdiction of the Central Selection Board, West Bengal, and as such the Board has the right to cancel the admission of any candidate, who has "provisionally" been selected for such admission, at any stage, if after the selection it transpires that the documents produced by the said candidate are insufficient or not genuine to prove and/or to qualify his or her candidature. Since the said case was started on March 25, 1974, which was long before the commencement of the Pre-Medical Examination of the Calcutta University, the question of passing the petitioner's Pre-Medical Course, before the cancellation order is not relevant and does not hold good in support of the petitioner's application.

(g) This deponent states that the petitioner's selection for admission to the Pre-Medical Course was made by the Central Selection Board "provisionally" subject to verification of original documents and since in the petitioner's case, on examining the documents and on enquiry it was found that she does not belong to the Scheduled Caste and she belongs to the 'Baishya Saha', who are not the members of the Scheduled Caste community, the petitioner is not entitled to continue her studies in M. B. B. S. Course as she has got no right to continue her studies against reserved seats for Scheduled Caste candidates and as such her said selection has rightly been cancelled by the Board."

6. Another affidavit has been affirmed in this proceeding by one Ganesh Chandra Ghosh on the 12th May, 1975, on behalf of the respondent No. 4. The defendant is the Chief Regional Inspector, Schedule Caste and Tribes Welfare Department, Government of West Bengal. In the said affidavit he has stated as follows:—

"3 (a) That as per Article 341 (1) of the Constitution of India, President's Notification specifying the caste etc., to be deemed as Scheduled Caste in relation to the State has been made and in the Constitution of India, the Scheduled Castes Order 1950, was published. In conformity with the provisions laid down in the

Articles of the Constitution of India there was a publication by the Ministry of Education, Government of India giving the list of Scheduled Castes and Scheduled Tribes in respect of each State recognised for Government Scholarships. In the said publication Part 14 gives the list of Scheduled Castes recognised by the State of West Bengal. In the said list Serial No. 40 shows that "Sunri" should be treated as Scheduled Castes.

(b) On receipt of the papers and documents of petitioner along with other students from respondent No. 2, the respondent No. 4 sends the file of the petitioner to the Special Officer, Scheduled Castes and Tribes Welfare West Dinajpur Branch as the petitioner's native village and permanent address is in the District of West Dinajpur.

(c) The said Special Officer was asked to enquire into the nature of the case of the petitioner and report to the respondent No. 4. The Dist. Level enquiry was conducted by the said Spl. Officer in local areas or address of the petitioner. On enquiry it was found that the petitioner does not belong to Sunri Saha and as such she is not a member of the Scheduled Caste. The report of the said enquiry was received from the Special Officer in January, 1974, which along with the report of other districts concerning some other candidates was sent to the Chairman, Central Selection Board, by the Director, Scheduled Castes and Tribes Welfare Department under his Memo No. 326-TWDS dated 18th February, 1974. A true copy of the report of the Enquiring Officer dated 22nd December, 1973, and endorsement dated 3rd January, 1974, of the Special Officer thereon is enclosed herewith and marked with the letter "X".

7. Regarding the certificate given by the Chief Presidency Magistrate it has been stated that though he had the power and authority to issue such certificate, but in the present case the same was issued after the alleged police verification in the town of Calcutta by which it is not possible to know the correct nature of the petitioner's caste. The petitioner's native village is in the district of West Dinajpur and the District Magistrate, West Dinajpur, can issue such certificate after having local enquiry which the office of the respondent No. 4 i.e., the office of the said Welfare Department had done through their District Special Officer and the Local Inspector. It was stated that in order to ascertain the correct

nature of the caste of the petitioner it was absolutely necessary to have local enquiry at the petitioner's native village which is situated in the district of West Dinajpur. It was denied that the petitioner's family is and has always been treated as Sunris belonging to the Sunri caste and not belonging to the Vaishya (Saha) Community. It was further denied that the petitioner's caste is included in the list of Scheduled Castes in the West Bengal under the Constitution (Scheduled Castes) Order 1950 (hereinafter referred to as the 1950 Order). It has further denied that the petitioner's family's surname of Saha was a well known surname of a large number of families of Sunris caste. It was further denied that the surname Saha of the petitioner's family is a surname appertaining to a group within the Sunri Caste. It was further denied that it is only a smaller group within the large caste group of Sunris. It was further denied that the petitioner though a Saha belongs to the Scheduled Caste group of Sunris as laid down in the 1950 Order. It has also stated that the caste of the petitioner has been determined as Baishya Saha by the respondent No. 4 on the basis of the report of the local inspectors which was duly endorsed by the Special Officer of West Dinajpur. It is alleged that the petitioner being a Baishya Saha was not covered by the Circular No. 3003/379/TW issued by the Assistant Secretary of the Welfare Department. The said enquiry report referred to in the affidavit discloses that the Special Officer enquired into the caste of the petitioner and made contact with one Sadananda Saha who has got a shop in the house of Dr. S. C. Saha being the father of the petitioner's father Sri Arun Kumar Saha. It appears that Sadananda Saha stated that they themselves and Dr. Saha are Baishya Saha by caste. Dr. Saha also stated that they are Baishya Sahas. Other persons also stated similarly. He submitted the report to the effect that the petitioner did not belong to Sunri Saha. Mr. Bankim Chandra Dutt, learned Advocate appearing in support of the Rule, made the following submissions before me while challenging the validity of the said Order. Mr. Dutt firstly submitted that in this case several documents were produced by the petitioner along with her application for admission including the said certificate granted by the Chief Presidency Magistrate which was issued after Police Verification. The said application was accept-

ed by the authorities concerned and on the basis of the same she was selected for admission to the Pre-Medical Course. Subsequently, she has passed the Pre-Medical Course and has been attending regular M. B. B. S. Course. Accordingly, no authority has any power to reopen this matter and reconsider the question as to whether she belongs to Scheduled Caste or not. Secondly, it was submitted by Mr. Dutt that in any event the Chairman of the Central Selection Board had no authority or jurisdiction to cancel her admission to the Pre-Medical Course. In this connection my attention was drawn to the provisions of Section 4 the relevant Act which specifies the functions of the Board. It was submitted that it does not include the power to cancel any such admission. Thirdly, it was next submitted that the impugned order was bad and illegal inasmuch as it was made in violation of the principles of natural justice. It was submitted that it appears that there was an enquiry by the Welfare Department on the basis of which the impugned order was passed. It was submitted that notice of the said enquiry was not given to the petitioner. The enquiry was not held in her presence. Copy of the Report was not also furnished to her. Fourthly, it was contended that even if it is accepted that the Chairman had any such power, he has acted on the basis of some extraneous materials. It was submitted that there is no provision in the relevant Act or the Rules for any enquiry or report by the said Welfare Department. The fifth contention of Mr. Dutt was that various materials were placed before the appropriate authorities by the petitioner after the show cause notice was issued. It was contended that the authority concerned did not take the same into consideration before taking such decision. This submission is being made on the allegation that the impugned order does not make any reference to the contentions of the petitioner or the materials placed by her. The sixth contention of Mr. Dutt was that no such enquiry is contemplated by the Memorandum copy of which is annexed to the affidavit affirmed on behalf of the respondents. Accordingly he submitted that the enquiry held was unauthorised and accordingly no reliance should have been placed on the Report of such enquiry. The seventh submission of Mr. Dutt was that on facts it is incorrect to suggest that the petitioner did not belong to the Scheduled Caste. She belongs to the Sunris

though her title was 'Saha'. Actually she was Sunri. The onus is on the Government to show that she was not so which the Government has failed to discharge. There was no legal evidence before the authorities to the contrary. Accordingly, it must be held that the petitioner belongs to Sunri Caste though her surname was Saha. In this context reference was also made to a decision of the Supreme Court in the case of *Abhoypada Saha v. Sudhir Kumar Mandal*, reported in AIR 1967 SC 115. It was lastly contended by Mr. Dutt that there was non-application of mind on the part of the appropriate authorities having regard to the fact that in this case there is no affidavit by the enquiry officer of the Welfare Department on the basis of whose report the action has been taken or by the Chairman of the Central Selection Board who has passed that order.

8. Mr. S. B. Mukherji, learned Junior Standing Counsel, appearing on behalf of the respondents, has disputed the correctness of each and every contention of Mr. Dutt. The sheet-anchor of Mr. Mukherji's defence was paragraph 24 of the application submitted by the petitioner which is in the statutory form. There it has been stated as follows:—

24. "Declaration by the applicant and Father/Guardian:

We declare that all foregoing statements are true to the best of our belief and knowledge. Any statement made in the application form, if found incorrect on scrutiny, will render the application liable to rejection and admission, if granted on the basis of such incorrect statement, will stand cancelled."

9. Accordingly, Mr. Mukherjee submitted that the authority or jurisdiction of the Board to cancel the admission cannot be questioned by the petitioner. Some time is obviously taken to scrutinise the statements made in the admission. That is why her admission was made provisionally as would appear from the relevant documents. Accordingly in view of subsequent enquiry it was within the authority of the Chairman to pass such order as he did in the present case. In this connection Mr. Mukherjee also drew my attention to Section 8 of the relevant Act which provides that the decision of the Central Selection Board in the matter of selection and allotment of candidates or in the preparation of the waiting lists shall be final. He submitted that no final decision was taken by

the Board for her admission when the impugned order was passed. What was done was merely provisional. It is true that some time had been taken but the fact still remains that until and unless a final order is passed no right is obtained by any candidate. Mr. Mukherji further submitted that on the materials before the authority concerned the authority has come to a decision after giving an opportunity to the petitioner to make representation regarding the same. There was material before the authority and the petitioner is not entitled to challenge the same in this proceeding.

10. Before I deal with the respective submissions of the parties I think it is necessary to set out the relevant provisions of law by which the present case is governed. The West Bengal Medical and Dental Colleges (Regulation of Admission) Act, 1973, (hereinafter referred to as the said Act) received the assent of the Governor on the 13th September, 1973. As amended, the long title of the said Act shows that it was an Act to regulate admission into Medical and Dental Colleges in West Bengal to ensure adequate medical facilities in the districts, to make special provisions for Scheduled Castes and Scheduled Tribes, to make special reservations and to provide for matters connected therewith or incidental thereto. The preamble of the said Act, as amended, was also to that effect. By Section 3 of the said Act the State Government was authorised to constitute a Central Selection Board (hereinafter referred to as the Board). The function of the Board has been specified in Section 4 which is set out herein below:—

"4. The functions of the Board shall be—

(a) to hold in every year by itself or through any other authority to be appointed by the Board with the prior approval of the State Government, a Joint Entrance Examination in such manner as may be prescribed and at such time as the State Government may, by notification, announce, for selection of candidates for admission to the Pre-Medical Course;

(b) to allot candidates to the different Medical and Dental Colleges in West Bengal on the basis of merit displayed by such candidates in the Joint Entrance Examination and having regard to the preferences indicated by them in their application, and

(c) to prepare a waiting list of a reasonable number of additional candidates

for filling vacancies of seats, if any, occurring in any Medical or Dental College in West Bengal."

11. Section 5 of the said Act deals with the distribution of seats for new admissions which I set out hereinbelow:—

"5. (1) The total number of new admissions to be made to the Pre-Medical Course in each of the Medical or Dental Colleges in West Bengal shall be announced by the State Government in every year simultaneously with the announcement of the date for holding the Joint Entrance Examination.

(2) Out of the total number of seats available for new admission in any year the State Government may, by notification, direct that some of these seats are to be reserved for the nominees of the State Government and some for the nominees of donors.

(3) Out of the remaining seats, that is, after taking into account seats excluded under sub-section (2), 15 per cent. and 5 per cent. of the seats shall be reserved for candidates belonging to Scheduled Castes and Scheduled Tribes respectively of this State:

Provided that—

(a) if the required number of candidates belonging to the Scheduled Tribes and fulfilling the requisite qualifications are not available the seats remaining vacant shall be filled by candidates belonging to Scheduled Castes who fulfil such qualifications and vice versa, and

(b) if the required number of candidates belonging to both the Scheduled Castes and Scheduled Tribes and fulfilling the requisite qualifications are not available the seats remaining vacant shall be treated as unreserved.

(4) The seats which Pre-Medical students seek re-admission shall if the regulations in force in any of the Medical or Dental Colleges in West Bengal so require, be excluded from the total number of seats available for new admission as announced under sub-section (1).

(5) The seats which remain vacant after taking into account the reservations referred to in sub-sections (2), (3) and (4) shall be distributed in the different districts of West Bengal in the number set out in sub-section (6).

(6) The number of seats reserved for a district shall bear the same proportion to the total number of seats available in any of the Medical or Dental Colleges in West Bengal as the population of the district bears to the population of the entire State of West Bengal.

Explanations 1 and 2.

(7) Notwithstanding anything contained in sub-sections (5) and (6) when the required number of candidates fulfilling the requisite qualifications is not available from one or more districts the seats so remaining vacant shall be treated as unreserved and shall form a general pool which shall be filled up in accordance with the provisions laid down in sub-sections (2) and (3) of Section 6.

12. Section 6 of the said Act specifies the conditions for eligibility for admission. It provides, inter alia, that a candidate shall submit his application in such form and comply with such other formalities as may be prescribed. Section 7 provides that a list showing the total number of selected candidates with such particulars as specified is to be hung up on the notice board. Section 8 of the said Act provides that the decision of the Central Selection Board in the matter of selection and allotment of candidates or in the preparation of the waiting lists shall be final. By Section 11 of the said Act the State Government was given the power to make rules for the purpose of carrying out the purposes of this Act. Pursuant to the same, some Rules have been framed by the State Government which are known as West Bengal Medical and Dental College (Regulation of Admission) Rules, 1973 (hereinafter referred to as the said Rules). Rule 3 of the said Rules provides that a Joint Entrance Examination shall be held once in each year in the manner specified by the Board. Rule 4 provides that application for admission to any of the seats referred to in sub-sections (3), (6) and (7) of Section 5 shall be submitted to the Secretary of the Board in CSB Form No. 1 which is annexed to the said Rules. Sub-rule (2) of Rule 4 provides, inter alia, that the application shall be accompanied by a certificate of Scheduled Castes and Scheduled Tribes in CSB Form No. 1-B. Sub-rule (4) specifies the authorities who shall issue the certificate of Scheduled Castes and Scheduled Tribes. This includes the Chief Presidency Magistrate (now Chief Metropolitan Magistrate). Rule 5 provides for the age limit for candidates for admission to the Pre-Medical Course. Rule 6 provides for the minimum educational qualification for candidates for admission to the Pre-Medical Course. Rule 7 provides for nationality and citizenship of the candidates. There are some other Rules relating to some other matters with which we are not concerned.

13. As already stated the form of application, being CSB Form No. 1, has been prescribed by the said Rules. Item No. 15 thereof provides as follows:—

"15. Whether belongs to Scheduled Caste (SC)/Scheduled Tribe (ST)

(Strike out portion not applicable)

N.B. — If belong to SC/ST attach attested copy of SC/ST certificate from appropriate authority in CSB Form No. 1-B."

In the present case the petitioner had stated against Item No. 15 that she belonged to Scheduled Caste and she attached the Certificate of the Chief Metropolitan Magistrate to that effect. Item No. 24 is a very important item which has been set out hereinbelow:—

"24. Declaration by the applicant and Father/Guardian.

We declare that all foregoing statements are true to the best of our belief and knowledge. Any statement made in the application form, if found incorrect on scrutiny, will render the application liable to rejection and admission, if granted on the basis of such incorrect statement, will stand cancelled.

(Signature of father/guardian)	Signature of applicant)
Date.....	Date....."

On the question as to who are the members of Scheduled Caste, it is necessary to mention that Article 341 of the Constitution of India confers power on the President of India to specify by public notification the castes or part of or groups within castes which shall for the purpose of the Constitution be deemed to be Scheduled Castes. Pursuant to above, on the 10th of August, 1950, the President of India passed the Constitution (Scheduled Castes) Order 1950 setting out in its Schedule the various castes which were declared Scheduled Castes (hereinafter referred to as 1950 Order). It is agreed that at the relevant time Item 40 of Part 13 of the Schedule to the 1950 Order which set out which were Scheduled Castes in West Bengal stood "Sunri excluding Saha".

14. From the Declaration in the Form it is quite clear that one of the conditions of the permission given to the candidates, including the petitioner, for admission into the Pre-Medical Course, was that if any of the statements was found incorrect on scrutiny, admission, if granted on the basis of such incorrect statements, will stand cancelled. In this particular case upon such scrutiny it has

been found that the petitioner did not belong to the Scheduled Caste. Accordingly, it rendered the application liable to rejection and the admission being cancelled. It is quite clear that some time is obviously taken to scrutinise the statements made in the application. If permission is to be granted only after such scrutiny, then some valuable time would be wasted causing unnecessary harassment to all concerned including the innocent candidates. Therefore, the procedure which is very properly followed is to act on the basis of the statements made by the applicants being correct and later on to make an enquiry. This is not only permissible and lawful but also very convenient for all concerned. In this particular case the statement of the petitioner to the effect that she belongs to Scheduled Caste has been found to be incorrect. The admission of the petitioner was granted on the basis of such incorrect statements. She was selected against seats reserved for candidates belonging to Scheduled Castes under sub-section (3) of Section 5 of the said Act referred to above. Accordingly in my opinion it was open to the Board to declare that the admission of the petitioner to the Pre-Medical Course leading to M. B. B. S. Course stood cancelled after such scrutiny.

15. It is also to be noted in this context that for the very same reason the petitioner was given an intimation card which specifically mentions that the petitioner has been provisionally selected for admission to the Pre-Medical Course for the session 1973-74. By the said intimation the petitioner was also directed to bring all the original documents including the certificate of Scheduled Caste. The show cause notice dated 23rd March 1974 also mentions that the petitioner was provisionally selected for admission against reserved seats for Scheduled Castes. It was also similarly mentioned in the impugned order. Therefore such selection was merely a provisional one subject to scrutiny. Accordingly, it is not open to the petitioner to contend that under the said Act or the Rules the authority concerned could not cancel her admission or act in the manner as they did. She had acquired no right on the basis of the permission given to her for admission in the Pre-Medical Course. This was provisional subject to scrutiny. Upon scrutiny an action has been taken which has been found necessary in the facts of the case. Accordingly the question of the absence of any specific provision in the

Act or the Rule cannot and does not arise. In any event, Section 8 of the said Act confers powers upon the Board to allot candidates to different colleges. This includes the power to cancel such allotment. For the aforesaid reasons, I reject the first contention of Mr. Dutta. I hold that the authority concerned had power to cancel the admission of the petitioner to Pre-Medical Course leading to M.B.B.S. Course.

16. Regarding the second submission of Mr. Dutta that in any event, the Chairman had no power to take action, there is no merit in this contention. Under Section 4 it is the function of the Board to hold the joint Entrance Examination and allot candidates to different Medical and Dental Colleges. Under Section 8, the decision of the Board in the matter of selection and allotment of candidates is final. Under Rule 4 of the said Rules the application for admission is to be made before the Board. Accordingly, I reject this contention of Mr. Dutta.

17. The third submission of Mr. Dutta was to the effect that the impugned order was made in violation of the principle of natural justice. It is true that the petitioner was not given any notice of the enquiry and the enquiry was not held in her presence. It was further admitted that the copy of the Enquiry Report was not given to her. But principle of natural justice is not a rigid or fixed principle. It all depends on the particular facts and circumstances of each case. In this case after the report of the Welfare Department, the petitioner was served with a Notice wherein it was specifically stated that the said Welfare Department had, on enquiry, found that she did not belong to any community of the Scheduled Caste and she was asked to show cause. Pursuant to such notice she made various representations and placed various materials before the authority concerned. Accordingly, it cannot be said that the petitioner did not get adequate opportunity for making a representation or that the order was made in violation of the principle of natural justice. It is true that copy of the said Report of the Welfare Department was not furnished to the petitioner. In my opinion, the same did not prejudicially affect the petitioner's case. The petitioner was quite satisfied in making representation in the absence of such Report. She never complained

about non-supply of such copy. She never asked for any copy of such Report. Without such Report she was willing to make her representation which she did. Accordingly, I hold that the principles of natural justice have not been violated in the facts of this case. Accordingly I reject this contention of Mr. Dutt.

18. The fourth submission of Mr. Dutt was to the effect that by relying on the report of the Welfare Department the authority concerned had acted on extraneous matter because such Enquiry or Report was not contemplated by the said Act or the Rules. I have already held that in the facts and circumstances of this case and having regard to the provisions of the said Act and the Rules, the authorities concerned were entitled to cause an enquiry to be made to scrutinise the correctness of the statements made in the application submitted by the petitioner. Power to scrutinise implies power to make enquiries. Whether such enquiry is to be made by the Board or some other agency is entirely a matter for the Board to consider. It was open to the Board to employ such other agency as it thought fit. It is not required that the Board should go out and hold an enquiry by itself. Further, in the facts and circumstances of the case it appears that the said Welfare Department was the appropriate body for holding an enquiry of this nature. As long as the Board had properly applied its independent mind before making the order, its order or decision cannot be challenged to be illegal merely because an enquiry was caused to be made by some other agency.

19. Regarding the fifth submission of Mr. Dutt, in the facts of this case Mr. Dutt very strenuously contended that this Court must hold that the petitioner belonged to Scheduled Caste being a member of the family of Sunris. In this connection Mr. Dutt strenuously relied on various materials and also the decision of the Supreme Court referred to above. In my opinion, this contention of Mr. Dutt is misconceived. This Court in its Constitutional Writ Jurisdiction is not a Court of facts. This Court does not sit in appeal over the decision of an authority whose order is challenged in this proceeding. This Court can only see whether the authority concerned has acted with or without jurisdiction. This Court can also act when there is an error of law apparent on the face of the record. This Court can also interfere with such decision where there is no legal evidence be-

fore the authority concerned or where the decision of the authority concerned is held to be perverse, i.e., a decision which no reasonable man could have arrived at on the basis of materials before it. Subject to this, this Court cannot interfere with any other decision of any other authority, far less, in a case where it is a question of alleged error of facts. Mr. Dutt has really invited this Court to weigh or assess the materials which this Court is unable to do. The sufficiency of the evidence before an authority cannot be a subject-matter of a scrutiny by this Court in its Constitutional Writ Jurisdiction. This Court is not an Appellate Court. There was ample material before the authority concerned from which it could have come to a conclusion as it did. Some other body or authority or even this Court in some other jurisdiction might or might not have decided otherwise; but that is not a ground for setting aside such order in the Constitutional Writ Jurisdiction of this Court. The decision of the authority concerned cannot also be challenged as perverse. Regarding the decision cited by Mr. Dutt, the same has no application in the facts of this case. At the outset it is to be pointed out that the decision in the case of Abhoy Pada Saha (AIR 1967 SC 115) (supra) arises out of an appeal in connection with an election to a seat in the West Bengal Legislative Assembly. It was not a writ petition. The contestants of this election were Abhoy Pada Saha and Sudhir Kumar Mondal, the appellant and respondent respectively to the Supreme Court. Sudhir was admittedly a member of a Scheduled Caste. Abhoy Pada described himself in the nomination paper as "a member of the Sunri caste which is a Scheduled Caste". Sudhir objected to this nomination contending that Abhoy Pada did not belong to any Scheduled Caste. The objection was rejected by the Returning Officer. At the election Abhoy Pada secured the highest votes and he was declared elected. Sudhir then filed a petition challenging the validity of Abhoy Pada's election before the Election Tribunal on the ground that Abhoy Pada was a member of the Saha caste and not a member of a Scheduled Caste. The Election Tribunal rejected the contention and dismissed the petition. The Tribunal held Abhoy Pada to be a Sunri and a person belonging to Scheduled Caste stipulated in Item 40 of the Schedule to the 1950 Order. The Tribunal was of the view that Sahas formed a distinct caste

wholly outside Sunri caste and that they had been specifically excluded in Item 40 for greater safety to prevent them from claiming to be Sunris by reason of their origin. Sudhir then appealed to the High Court at Calcutta which reversed the decision of the Tribunal. The election of Abhoy Pada was held to be invalid and the same was declared to be set aside on the ground that he did not belong to a Scheduled Caste. The High Court was of the view that the effect of the Item was to exclude from Sunri Caste those who belonged to that caste but bore the surname Saha. From this Abhoy Pada preferred an appeal before the Supreme Court. The Supreme Court rejected the reasonings of both the Tribunal and the High Court. The Supreme Court held that when Item 40 excluded Sahas from Sunris, since Sunri is a caste group, Sahas must equally be another caste group. The Supreme Court held that the correct interpretation of the Item is that it includes men of Sunri Caste but not those within that caste who formed the smaller caste group of the Sahas. The Supreme Court did not also agree with the interpretation given by the High Court that the Sahas excluded were those Sunris who bore the surname Saha. The Supreme Court decided the case on the basis as to whether the respondent had established that the appellant belonged to a smaller caste called Sahas within the Sunri caste. On the basis of the facts before the Supreme Court the appeal was allowed and it was held that the appellant was a Sunri by caste and that it had not been proved that he belonged to the smaller caste group of Sahas. The facts of this case before us are totally different. The question involved in this case is not the same. In this case the reason why the petitioner's admission has been cancelled is on the ground that she belonged to Baishya Saha community which is not regarded as Scheduled Caste. Therefore, this decision cited by Mr. Dutt is of no assistance to him.

20. The sixth contention of Mr. Dutt was that the materials placed before the authority concerned were not taken into consideration by the Board. This submission is being made because the order does not make any reference to the materials and contentions relied upon by the petitioner. There is no merit in this contention. The Board has given its decision with reasons after giving an opportunity. It is not required to give de-

tailed reasons or set out the different materials and contentions like an ordinary Court of law. Accordingly, merely because no reference was made to such materials and contentions, it cannot be said that the same was not taken into consideration by the Chairman before making this order. Accordingly, I reject this contention.

21. Regarding the seventh submission of Mr. Dutt, the mere fact that the memorandum annexed to the affidavit-in-opposition may not contemplate any enquiry regarding the correctness of the materials stated in the application, does not and cannot, in my opinion, make any difference. For that reason alone it cannot be said that no such enquiry could be held. For the reasons stated hereinabove, I have already held that it was competent for the authority concerned to hold such enquiry. Accordingly, I reject this contention.

22. The last contention of Mr. Dutt does not merit any serious consideration. Merely because there is no affidavit by the Officer of the Welfare Department who conducted the enquiry and submitted the Report or by the Chairman, it cannot indicate that there has been non-application of mind on the part of the authority concerned. The competency of the persons who have affirmed the affidavits-in-opposition cannot be challenged. There is no allegation of mala fide against the Chairman or the Inspector personally. Accordingly, mere non-filing of any affidavit by them individually and separately cannot, in my opinion, invalidate the said order. Accordingly, I reject this contention.

23. All the contentions of Mr. Dutt fail. Accordingly, I dismiss this application and discharge the Rule. All interim orders are vacated. There will be no order as to costs. On the prayer of the petitioner's learned Advocate the operation of this order is stayed for a period of one week from this date.

Petition dismissed.

AIR 1976 CALCUTTA 371**SACHINDRA KUMAR BHATTACHARYA
AND ARUNKUMAR JANAH, JJ.****Moni Mohan Modak and others, Appellants v. Sm. Swarnalata Dasi, Respondent.**Letters Patent Appeal No. 97 of 1972,
D/- 10-12-1975.***(A) Civil P. C. (1908), Sections 144, 151 — Restitution — Inherent power to order — Sale in execution of decree — Decree declared fraudulent and void in subsequent suit — Order for restitution against purchaser under inherent power in valid.**

A Court has ample power under Section 151 to order restitution in cases not falling within Section 144 of the Code, where it is necessary for doing justice to the parties. AIR 1931 Cal 42 and AIR 1922 Cal 28, Rel. on. (Para 4)

Fraud vitiates the entire proceedings and no litigant should be allowed to retain any benefit obtained by him as a result of fraud practised by him. (1887) ILR 10 All 166 (PC) and AIR 1966 SC 948, Rel. on; AIR 1973 Cal 140, Affirmed. (Para 5)

(B) Civil P. C. (1908), Section 151 — Appeal from order under is incompetent — Order in such appeal reversing order of lower Court is ineffective and the order of the first Court will stand.

(Para 4)

Cases Referred: Chronological Paras
AIR 1966 SC 948 = (1966) 3 SCR 24 5
AIR 1965 SC 1477 = (1965) 2 SCR 436 4
AIR 1948 Cal 37 = 51 Cal WN 302 4
AIR 1931 Cal 42 = 34 Cal WN 746 4
AIR 1931 Cal 779 (2) = 35 Cal WN 105 4
AIR 1927 Cal 285 = 31 Cal WN 290 4
AIR 1922 Cal 28 = 26 Cal WN 408 4
(1887) ILR 10 All 166 = 15 Ind App 12 5
(PC)

R. P. Bagchi and D. K. Das, for Appellants; D. N. Chakraborty and Ashim Kumar Mukherjee, for Respondent.

JANAH, J.:— This appeal is from a decision of A. K. Mukherji, J., in S. A. No. 1195 of 1962.†

2. The facts giving rise to this appeal are briefly as follows:— The respondent No. 1 Swarnalata Dasi filed an application under Sections 144, 151 and 47 of the Code of Civil Procedure for

*(Against Judgment of A. K. Mukherji, J., reported in AIR 1973 Cal 140.)

†Reported in AIR 1973 Cal 140.

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restitution of a certain property which was sold in execution and was taken possession of by the appellants. Krishnadhan Modak, the husband of Swarnalata Dasi purchased the said property in the name of Swarnalata. For non-payment of rent the disputed property was sold in Rent Execution Case No. 836 of 1952 of the Second Court of Munsif, Baruipore. In the said Rent Execution Case the property was purchased by the appellants who are brothers of Krishnadhan. After the sale was confirmed the appellants took possession of the property through court. Thereafter Swarnalata filed Title Suit No. 173 of 1958 in the Court of Munsif, Baruipur for a declaration that the rent suit and the sale held in execution of the decree passed therein were all fraudulent and were void and that her title was not affected by the said sale. There was a prayer for permanent injunction but that prayer was refused and the suit was decreed in part declaring the sale to be fraudulent and null and void. After obtaining that decree the respondent No. 1 Swarnalata filed the aforesaid application under Sections 144, 151 and 47 of the Code of Civil Procedure for restitution of the said property.

3. The trial court allowed her application and ordered restitution. Against the said order the appellants preferred an appeal. This appeal was registered as a Title Appeal although it ought to have been registered as a Miscellaneous Appeal, inasmuch as, it was an appeal against an order passed in a miscellaneous case. The appeal was allowed by the learned Subordinate Judge upon the view that as the decree in execution of which possession was taken by the present appellants had not been reversed or varied in appeal the remedy by way of restitution was not available to the respondent No. 1. Against the said decision the respondent No. 1 preferred an appeal to this Court and the same was registered as S. A. No. 1195 of 1962. This appeal was allowed by A. K. Mukherjee, J. It is the correctness of this decision which is under challenge in this Letters Patent Appeal.

4. Mr. Bagchi, learned Advocate for the appellants, has contended before us that the provisions of Section 144 of the Code is not applicable in the present case, as the decree in execution of which his clients had obtained possession had not been reversed or varied in appeal. The respondent No. 1 on the other hand obtained a declaratory decree in the sub-

sequent suit. That decree, according to Mr. Bagchi, was incapable of being executed and therefore, the respondent No. 1 was not entitled to get restitution. In support of this contention Mr. Bagchi relied on the observations of the Supreme Court in Mahijibhai Mohanbhai Barot v. Patel Monibhai Gokalbhai, AIR 1965 SC 1477, where the Supreme Court observed that an application for restitution under Section 144 CPC is an application for execution of a decree. In that case the question arose in connection with the period of limitation for filing an application under Section 144. In the present case even assuming that the provisions of Section 144 of the Code do not apply in terms the court undoubtedly had ample power to pass an order for restitution under Section 151 of the Code. In Ramnath Karmarkar v. Shaikh Asanulla, 34 Cal WN 746 = (AIR 1931 Cal 42), a Division Bench of this Court held that an order similar to the one which has been passed in the present case is a proper order under Section 151 for the purpose of doing justice between the parties. A similar view was taken by another Division Bench of this Court in the case of Raicharan Bhuiya v. Debi Prosad Bhakat, 26 Cal WN 408 = (AIR 1922 Cal 28). In so far as The Court's power to grant restitution under Section 151 of the Code is concerned Mr. Bagchi submitted that if restitution is allowed under Section 151 then there is no right of appeal and the remedy of the aggrieved party would be by way of revision only. Apart from the fact that this point is covered by a number of decisions of this Court, vide — Maharaja Sashikant Acharjee v. Jalil Baksha Munshi, 35 Cal WN 105 = (AIR 1931 Cal 779 (2)) Gopal Laskar v. Harihar Mukherjee, AIR 1948 Cal 37; Gnanada Sundari Majumdar v. Chandra Kumar Dev, 31 Cal WN 290 = (AIR 1927 Cal 285), the submission made by Mr. Bagchi does not help his client in any way. In the present case the court of first instance allowed the prayer for restitution, the appellants went up in appeal against the said order. If no appeal lay then the appeal before the first appellate court was incompetent and the result will be that the order of the court of the first instance ordering restitution in favour of the respondent No. 1 will stand.

5. There is also another important aspect in this case which has to be taken into consideration. It appears from the certified copy of the judgment of Title Suit No. 173 of 1958 which was filed

by Swarnalata against the present appellants and which has been marked as Exhibit 2, that the learned Munsif came to the clear findings that the rent suit and all subsequent proceedings thereto were fraudulent and collusive and the present appellants fraudulently manipulated everything and caused the property to be sold and they themselves purchased the property. No appeal was preferred against that decision of the Trial Court and these findings of the learned Munsif stand. The appellants, therefore, were not bona fide third party purchasers and therefore no question arises regarding the protection of their interest. Fraud vitiates the entire proceedings and no litigant should be allowed to retain any benefit obtained by him as a result of fraud practised by him. This view is supported by the decision of the Privy Council in Zain-ul-Abdin Khan v. Muhammad Asgar Ali Khan, reported in (1887) ILR 10 All 166 (PC). A similar view was taken by the Supreme Court in Binayak Swain v. Ramesh Chandra Panigrahi, AIR 1966 SC 948.

6. For the reasons mentioned above, we are of the view that the second appeal was rightly allowed by A. K. Mukherjee, J. This appeal is accordingly dismissed but in the circumstances of the case there will be no order as to costs.

S. K. BHATTACHARYA, J.:— I agree.

Appeal dismissed.

AIR 1976 CALCUTTA 372

M. M. DUTT AND R. K. SHARMA, JJ.

Baidyanath Bayen, Appellant v. Berhampore Bank Ltd. (In Liquidation) Represented by the Officer Liquidator and another, Respondents.

A. F. O. D. No. 577 of 1962, D/- 3-10-1975.

(A) Banking Regulation Act, (1949), Section 45-B — Jurisdiction of High Court — Claims for compensation under Land Acquisition Act made by or against Banking Company which is being wound up — Forum — Expression "Exclusive" signifies overriding jurisdiction over all Courts and Tribunals by implication. (Land Acquisition Act (1894), Sections 3 (d) and 18).

The definition of word "Court" in Section 3 (d) of Land Acquisition Act no

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doubt indicates that it is a Court of Special jurisdiction, but Section 45-B of Banking Companies Act is very wide in scope and confers on the High Court the exclusive jurisdiction to entertain and decide any claim made by or against a Banking Company which is being wound up. It does not limit the jurisdiction of the High Court to any particular claim or claims made by or against a banking company. It follows, therefore, that whatever may be the nature of the claims, when such claim is made by or against a banking company the High Court will have the exclusive jurisdiction to decide the same. The word "exclusive" is very significant for it overrides the jurisdiction of all other courts and Tribunals by necessary implication. AIR 1956 SC 614, Rel. on; AIR 1972 SC 878, Distinguished. (Para 8)

(B) Banking Companies (Amendment) Act (1953), Section 45-C (1) — Expression Civil Court — Refers to all courts excepting High Court and Supreme Court. (Para 10)

(C) Land Acquisition Act (1894), Section 18 — Single application for apportionment and enhancement of the amount of compensation by Banking Company — Claim cannot be split up — The claim has to be decided by the winding up Court that is High Court in its entirety. (Banking Regulations Act (1949), Section 45-B.)

Section 18 contemplates one application that is one proceeding before the District Judge or the Land Acquisition Judge. When there is a claim for apportionment and also for the enhancement of the amount of compensation in an application under Section 18, that application is generally heard in two instances. Firstly the claim for apportionment is disposed of and thereafter the question of enhancement of compensation is taken up for consideration. But it cannot be said that these two stages are two different and independent proceedings. The same cannot be split up into two applications or two proceedings so that the claim for the enhancement of compensation may be decided by the District Judge and the claim for apportionment of compensation may be decided by the High Court in view of Section 45-B of Banking Regulation Act. Therefore the application under Section 18 of Land Acquisition Act will have to be decided by the winding up Court that is High Court in its entirety. (Para 12)

Cases Referred: Chronological Paras
AIR 1972 SC 878 = 1972 Tax LR 435 9
AIR 1956 SC 614 = 1956 SCR 603 8

Sudhis Das Gupta and Shibdas Ghosal, for Appellant; Prasanta Kumar Ghose, for Respondents.

M. M. DUTT, J.:— This appeal is at the instance of the referring claimant Baidya Nath Bayen and it is directed against the order of the District Judge, Murshidabad holding that in view of Sections 45-A and 45-B of the Banking Regulation Act, 1949, he has no jurisdiction to entertain and dispose of the reference cases under Section 18 of the Land Acquisition Act, 1894.

2. The disputed land measuring 4.10 acres appertains to C. S. Plot No. 1523, Khatian No. 469, Mouza Boargachhi, in the District of Murshidabad. It was acquired by the Government of West Bengal under the provisions of the West Bengal Land Development Planning Act on or about June 28, 1951. The respondent Berhampore Bank Limited was the mortgagee in respect of a portion of the disputed land. By an order of this Court dated November 18, 1949, this Court directed the winding up of the respondent Bank. After the disputed land was acquired, a final mortgage decree was passed in favour of the respondent Bank by the High Court on August 7, 1956. On March 25, 1958, the Collector made an award of compensation in the joint names of the appellant and the respondent. The appellant, who was a tenant in respect of the disputed land, claims that he is entitled to the whole of the amount of compensation, while the respondent who, as aforesaid, was the mortgagee makes a similar claim. Both of them not being satisfied with the award of the Collector made two separate applications under Section 18 of the Land Acquisition Act before the learned District Judge, Murshidabad, each claiming the entire amount of compensation and enhancement of the same. The application of the respondent Bank was numbered as L. A. case No. 34 of 1961 and that of the appellant as L. A. Case No. 36 of 1961. In this appeal, we are concerned with L. A. Case No. 36 of 1961.

3. The learned District Judge took the view that in view of Sections 45-A and 45-B of the Banking Companies Act, 1949 as amended in 1953 and renamed as the Banking Regulation Act, 1949 by the Banking Laws (Application to Co-operative Societies) Act, 1965, the High Court

alone has jurisdiction to dispose of the reference cases and that, he has no jurisdiction in the matter. He has disposed of the said reference cases by the aforesaid finding without any direction as to the return of the applications under Section 18 for presentation to the High Court.

4. The only question that is involved in this appeal is whether the application under Section 18 of the Land Acquisition Act filed by the appellant is barred by the provisions of Sections 45-A and 45-B of the Banking Regulation Act. Sections 45-A and 45-B are as follows:

"45-A. Part III-A to override other laws. — The provisions of this Part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Companies Act, 1956 or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1898, or any other law for the time being in force or any instrument having effect by virtue of any such law; but the provisions of any such law or instrument in so far as the same are not varied by, or inconsistent with the provisions of this Part or rules made thereunder shall apply to all proceedings under this Part.

45-B. Power of High Court to decide all claims in respect of banking companies. — The High Court shall, save as otherwise expressly provided in Section 45-C, have exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up including claims by or against any of its branches in India or any application made under Section 391 of the Companies Act, 1956, by or in respect of a banking company or any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953"

5. By S. 45-B exclusive jurisdiction has been conferred on the High Court to decide — (i) any claim made by or against a Banking Company which is being wound up, (ii) any application made under Section 391 of the Companies Act, 1956, (iii) any question of priorities, (iv) any other question whether of law or fact,

which may relate to or arise in the course of the winding up of a Banking Company.

6. The object of the provisions of Sections 45-A and 45-B is for the expeditious disposal of the winding up of the Banking Company and to allow the liquidator to proceed with all proceedings in one court, that is, the High Court.

7. In order to attract Section 45-B one of the conditions to be fulfilled is that there is a claim by or against the Banking Company in liquidation. In the instant case, the appellant claims that he is alone entitled to the whole of the compensation money. On the other hand, the respondent Bank opposes the claim of the appellant and, according to it, it is alone entitled to the whole of the compensation money. It is said on behalf of the appellant that he has not made any claim against the respondent Bank, but his claim is against the Government who is responsible for the payment of the compensation for the acquired land. Even assuming that the appellant has not, by filing the application under Section 18, made any claim against the respondent Bank, there is a claim by the respondent Bank to the whole of the compensation money. Section 45-B will be attracted when there is a claim made by or against a banking company. In the instant case, there is a positive claim of the respondent Bank in liquidation and prima facie Section 45-B is attracted. It is true that the claim made by the appellant is not directly against the respondent Bank, but indirectly it is a claim against the respondent Bank. In these circumstances, we are of the view that Section 45-B applies in terms.

8. Mr. Sudhis Das Gupta, learned Advocate appearing on behalf of the appellant has urged that the Land Acquisition Court exercising jurisdiction under the provisions of the Land Acquisition Act is not a full-fledged Civil Court, but it is a special court of exclusive jurisdiction to decide the disputes raised under Section 18 of the Land Acquisition Act. He submits that Sections 45-A and 45-B read with Section 45-C do not confer jurisdiction on the High Court to decide the questions under Section 18 which are within the special jurisdiction of the Land Acquisition Court. He has drawn attention to Sec. 3 (d) of the Land Acquisition Act, as amended by West Bengal. Under Section 3 (d) the expression 'Court' means a principal Civil

Court of original jurisdiction, and includes the Court of any Additional District Judge, Subordinate Judge or Munsif whom the State Government may appoint, by name or by virtue of his office, to perform, concurrently with any such principal Civil Court, all or any of the functions of the Court under the Act within any specified local limits and, in the case of a Munsif, up to the limits of the pecuniary jurisdiction with which he is vested under Section 19 of the Bengal, Agra and Assam Civil Courts Act, 1887. The definition of the word 'Court' no doubt indicates that it is a Court of Special jurisdiction, but the question is whether Section 45-B vests in the High Court, the jurisdiction to decide the Land Acquisition cases. Section 45-B is very wide and confers on the High Court the exclusive jurisdiction to entertain and decide any claim made by or against a banking company which is being wound up. It does not limit the jurisdiction of the High Court to any particular claim or claims made by or against a banking company. It follows, therefore, that whatever may be the nature of the claim, when such claim is made by or against a banking company the High Court will have the exclusive jurisdiction to decide the same. The word 'exclusive' is very significant for, in our view, it overrides the jurisdiction of all other courts and tribunals by necessary implication. In *Shri Ram Narain v. The Simla Banking and Industrial Co. Ltd.*, AIR 1956 SC 614, it has been held by the Supreme Court that having regard to the wide and comprehensive language of Sections 45-A and 45-B of the Banking Companies Act, it is clear that a proceeding to execute the decree obtained by a displaced creditor from the Tribunal under the Displaced Persons (Debts Adjustment) Act, 1951, against a Bank and all other incidental matters arising therefrom, such as attachment are matters within the exclusive jurisdiction of the Court that has directed winding up proceedings of the Bank. The said decision was made by the Supreme Court in spite of the fact that Section 3 of Displaced Persons (Debt Adjustment) Act, 1951, provided for the overriding effect of the provisions of the Act and of the rules and orders made thereunder notwithstanding anything inconsistent therewith contained in any other law for the time being in force, or in any decree or order of a Court, or in any contract between the parties.

9. Mr. Das Gupta, however, has strongly relied on a subsequent decision of the Supreme Court in *S. V. Kondaskar v. V. M. Deshpande*, AIR 1972 SC 878. In that case, the Supreme Court had to consider the question as to whether the Income-tax assessment proceedings would be held to be such other legal proceedings within the meaning of Section 446 (2) of the Companies Act, 1956. In this connection, it may be stated that though Section 446 (2) is to some extent similar to Section 45-B of the Banking Regulation Act, yet Section 45-B is much wider in scope than Section 446 (2) of the Companies Act. Be that as it may, the Supreme Court held that the assessment proceedings for computing the amount of tax were not such other legal proceedings within the meaning of Section 446 (2). It was observed that the language of Section 446 must be construed as to eliminate such startling consequences as investing the winding up court with the power of an Income-tax Officer conferred on him by the Income-tax Act, because the legislature could not have intended such a result. That observation was made by the Supreme Court on a construction of Section 446 (2) of the Companies Act. But as stated already, Section 45-B of the Banking Regulation Act is much wider in scope than Section 446 (2) of the Companies Act. The Supreme Court's decision in *Kondaskar's* case does not lend support to the contention of Mr. Das Gupta.

10. Section 45-C of the Banking Regulation Act provides for transfer of suits or other legal proceedings to the High Court pending in any other Court immediately before the commencement of the Banking Companies (Amendment) Act, 1953, or the date of the order for the winding up of the banking company, whichever is later. Section 45-C does not apply to the instant case, for the proceeding before the learned District Judge under Section 18 of the Land Acquisition Act were started long after the date of the winding up order or the commencement of the Banking Companies (Amendment) Act, 1953. It is, however, argued on behalf of the appellant that the word 'Court' referred to in Section 45-C (i), means 'Civil Court', and as the Land Acquisition Judge is not a Civil Court, Section 45-B does not contemplate to confer jurisdiction on the High Court to decide claims made by or against a Banking Company in liquidation, which are to be decided by a Court other than a Civil Court. This contention is without any

substance. Even assuming that the Land Acquisition Court is not a Civil Court, it is difficult to hold that Section 45-C refers only to Civil Courts. In our opinion, the word 'Court' in Section 45-C (1) refers to all courts, excepting the High Court and the Supreme Court.

11. Lastly, Mr. Das Gupta has placed reliance on the object and reasons of the Banking Companies (Amendment) Act, 1953. It has been inter alia stated in the object of the said Amendment Act that a Bank has a far larger number of debtors than a Joint Stock Company of a comparable size, and the necessity to pursue legal proceedings against each debtor, quite frequently in different courts, involves considerable expenditure and immense delay. It is contended that Section 45-B read with the object of the said Amendment Act by which Sections 45-A and 45-B were incorporated in Part III-A of the Banking Companies Act, 1949 (Now Banking Regulation Act, 1949) contemplates cases by or against the debtors of the Banking Company in liquidation and not cases like the instant one. We are unable to accept this contention. In the first place, Sections 45-A and 45-B are clear and, as such, there is no necessity for referring to the object and reasons of the said Amendment Act by which the said sections were inserted in Part III-A of the Act. It has been already noticed that Section 45-B is wide enough to include any kind of claim by or against a Banking Company in liquidation. In these circumstances, we are unable to limit the scope of Section 45-B with reference to the said object of the Amendment Act. It is not that the High Court will dispose of the reference cases or the disputes under Section 18 of the Land Acquisition Act de hors the provisions of the said Act. The provisions of the said Act will apply in so far as the same are not varied by, or inconsistent with, the provisions of Part III-A or rules made thereunder, as provided in Section 45-A.

12. It is argued on behalf of the appellant that when the District Judge decides the market value of the acquired land, he does not thereby decide any claim by or against any party. It is contended that at least the District Judge has jurisdiction to decide the case of both the parties as to the enhancement of the amount of compensation. It may be that the decision on the question of the market value of the land is not a decision of

a claim by or against the Banking Company and that, the District Judge will have jurisdiction to decide the same. But there is one difficulty about the same. Section 18 contemplates one application, that is, one proceeding before the District Judge or the Land Acquisition Judge. The said proceeding may be regarding apportionment of the compensation, measurement of the area or enhancement of the amount of compensation. When there is a claim for apportionment and also for the enhancement of the amount of compensation in an application under Section 18, that application is generally heard on two instances; firstly, the claim for apportionment is disposed of and, thereafter, the question of enhancement of compensation is taken up for consideration. These two steps are in the same proceeding arising out of one application. It is difficult to split up the application under Section 18 into two applications or the proceeding started thereby into two separate proceedings. For the purpose of convenience of considering the question as to apportionment and enhancement of compensation the above procedure is generally adopted by the Land Acquisition Courts, but, for that, it cannot be said that the two stages are two different and independent proceedings. Accordingly, the claim having been made by one application giving rise to a single proceeding, the same cannot be split up into two applications or two proceedings, so that the claim for the enhancement of compensation may be decided by the District Judge and the claim for apportionment of compensation may be decided by the High Court in view of Section 45-B. In these circumstances, we are of the view that the application under Section 18 of the Land Acquisition Act will have to be decided by the winding up court, that is, the High Court, in its entirety.

13. Our attention has been drawn to a certified copy of the application filed on behalf of the respondent Bank before the Collector of Murshidabad in Project case No. 28 of 1950-51 on or about 22-3-1958. It appears from the application that in the acquired plot being the said plot No. 1523, the respondent was a mortgagee in respect of only .10 acre thereof. If that be so, the High Court will have jurisdiction to decide the claim made by or against the respondent Bank in respect of only .10 acre of plot No. 1523 and the claim of the appellant to the compensation money in respect of the rest of the said plot or such portion

thereof to which he had interest would be disposed of by the learned District Judge. The learned District Judge will, in that case, return the application of the respondent Bank under Section 18 for presentation to the High Court. The appellant will be entitled to file a fresh application under Section 18 to the High Court laying his claim to compensation money in respect of the said .10 acre of the acquired plot, if it is considered necessary. If, however, the learned District Judge finds that the claim of the appellant and that of the respondent Bank to the compensation money are in respect of the same quantity of the acquired plot, he will return both the applications under Section 18 out of which L. A. Case Nos. 34 of 1961 and 36 of 1961 arise, for presentation to the High Court.

14. The appeal is disposed of as above, but in view of the facts and circumstances of the case, there will be no order for costs.

SHARMA, J.:— I agree.
Order accordingly.

AIR 1976 CALCUTTA 377
PRADYOT KUMAR BANERJEE AND
SHARMA, JJ.

Susama Bala Devi and others, Petitioners v. Anath Nath Tarafdar and others, Opposite Parties

A. F. O. D. No. 293 of 1967, D/- 25-6-1976.

(A) Evidence Act (1872), Sections 67, 68, 45 and 47 — Proof of will — Onus is on propounder — Existence of suspicious circumstances surrounding the will — Onus to explain such circumstances lies upon the propounder — Allegations of fraud, undue influence and coercion—Onus lies on caveator — Appreciation of evidence. (Succession Act (1925), Sections 59 and 63).

The initial onus of proving the will rests upon the propounder and the will has to be proved like any other document under the provisions of the Evidence Act besides proving the attestation of the execution by witnesses. In the event there are suspicious circumstances surrounding the execution of the will, the onus of explaining the circumstances which look suspicious and of removing the suspicion from the mind of the Court rests squarely upon the propounder. If any fraud,

undue influence and coercion is alleged by the caveator, then it is for the caveator to prove the allegation of fraud, undue influence and coercion. If it is shown that the propounder has taken a prominent part in the execution of the will under which he has been conferred substantial benefit, that in itself is generally treated as a suspicious, circumstance surrounding the execution of the will and the propounder is required to remove the suspicion by clear and satisfactory evidence. In the matter of appreciation of evidence for deciding material questions of fact arising from the application for probate or in actions on will, hard and fast and inflexible rules cannot be laid down and proof depends upon facts and circumstances of each case. AIR 1959 SC 443 and AIR 1962 SC 567 and AIR 1964 SC 529 and AIR 1968 SC 1332, Rel. on.

(Para 8)

(B) Succession Act (1925), Section 59 — Will — Execution — Undue influence — All canvassings by propounder do not amount to undue influence — Propounders taking part may arouse suspicion of undue influence only. AIR 1955 SC 363, Rel. on.

(Para 16)

(C) Succession Act (1925), Section 222 — Application for probate — Delay by itself is not a ground for refusing grant of probate.

Although delay by itself cannot be a ground for refusing grant of probate but "delay by itself" is a term pregnant with meaning. It shows that there should not be anything else to obstruct the grant of probate except an objection on the score of delay. Held on facts that suspicious circumstances were pointed out one after another and delay of fifteen years in not probating the will coupled with equally long silence, in the circumstances of the instant case, created a good deal of suspicion and unfortunately for the propounders of the will this suspicion had not been fully removed. AIR 1972 Cal 210, Rel. on.

(Para 19)

(D) Succession Act (1925), Sections 59 and 63 — Will — Evidence and proof — Suspicious circumstances — Untrue statement — Inequitous disposition — Will cannot be invalidated on these grounds.

Untrue statement contained in a will by itself constitutes no ground to hold the will invalid or unreal if its due execution is otherwise proved and there be no other unexplained suspicious circumstances. Similarly inequity of disposition by itself is no ground to hold the will in-

valid. But all these things will have to be considered along with other suspicious circumstances surrounding the execution of the will. If other suspicious circumstances are there which are unexplained then inequitable disposition and untrue statements contained in the will would go to add further volume to the suspicious circumstances that the will is not a genuine document. AIR 1946 Pat 415, Rel. on.

(Para 21)

Cases Referred: Chronological Paras

AIR 1972 Cal 210 18

AIR 1968 SC 1332 = (1968) 3 SCR 473 8, 15

AIR 1964 SC 529 8

AIR 1962 SC 567 = (1962) 3 SCR 195 8

AIR 1959 SC 443 = 1959 Supp (1) SCR 426 8

AIR 1955 SC 363 = 1955 SCA 360 16, 20

AIR 1946 Pat 415 = 27 Pat LT 263 20

(1868) 1 P. & D. 481 = 37 LJ P & M 40 20

Shyama Charan Mitter and Shyama Prasanna Roy Chowdhury, for Petitioners; B. C. Dutta, Ashutosh Ganguly and Rabindra Kr. Mukherjee, for Opposite Parties.

SHARMA, J.: Sambhunath Tarafdar and his mother Sushamabala Devi applied for probate in respect of a will left by Nisi Kanta Tarafdar father of the first applicant and husband of the second. The grant of probate prayed for was opposed by Anathnath Tarafdar and Bhabanath Tarafdar, the first two of the three sons of Nisi Kanta Tarafdar and Sushamabala Devi, and this conflict gave rise to Original Suit No. 14 of 1961, in the Additional Court of District Judge, hence this appeal.

2. Stated in short plaintiff-appellants' case reveals that Nishi Kanta Tarafdar on his death on August 8, 1945, left behind a number of properties which have been set out in 28 lots in the schedule of properties attached to the petition filed by the plaintiff-appellants. He also left behind him his aforementioned wife and three sons besides four daughters: Jayantibala Devi, wife of Bagalaprassanna Roy Choudhury, Prativasundari Devi, wife of Dr. Pragnath Banerjee, Banalata Devi and Shohalata Devi (the last two being unmarried at the time of his death). The appellants' case is that sometime before his death Nisi Kanta Tarafdar had been ailing from various illnesses. Apprehending that his end was coming he made in his own hand writing a draft will of his own which he got approved by a lawyer.

3. Later on, after incorporating some changes in the terms of the draft, he executed his last will and testament. Under the will he made provisions for the marriage of his unmarried daughters and also charged some immovable properties with the expenses of their marriage; but in case the properties were not required to be sold for defraying the expenses of their marriage, those properties were to go under the will to his youngest son Sambhunath Tarafdar who was staying at home and had no ostensible means of livelihood. Under the will nothing was left for other sons, the defendant-respondents, except the testator's good-will, because they were well settled in life. Nothing was also left to the two married daughters. The rest of the property was left to his widow Sushamabala Devi. Though the will was executed on November 12, 1944, and its existence was all along known, application for probate was filed only on March 11, 1961, that is, after fifteen years from the date of demise of the testator.

4. The suit was contested by the two elder sons on the ground inter alia that at the time of death Nisi Kanta Tarafdar had no mental and physical capacity to make the will and the alleged will was a forged one and the same was executed under undue influence and the same was not properly executed or legally attested. It was also contended that various circumstances surrounding the execution of the will and long disregard for it including the delay of fifteen years in applying for probate, were highly suspicious and so the plaintiffs were not entitled to a grant of probate prayed for.

5. On the basis of these pleadings the learned Additional District Judge, Nadia, raised issues and tried the suit. After considering various documentary evidence on record as well as oral testimony of the witnesses given in the suit, the learned Court below found that there were many suspicious circumstances surrounding the execution of the will and the circumstances seen and noticed were not removed from the mind of the Court by the propounders. Taking this view of the matter the learned court below dismissed the suit and refused the probate prayed for.

6. The suspicious circumstances which led the court below to doubt the genuineness of the will may now be noticed. The learned Judge was of the opinion that the circumstances which preceded and followed the alleged date of

the execution of the will militated against the fact of such execution. He was of the opinion that the letters written by the testator to his sons Anath Nath Tarafdar and Bhabanath Tarafdar did not show any unfavourable disposition towards them and so the allegation contained in paragraph 1 of the alleged will could not have emanated from the testator. The learned Judge further found that reference to succession certificate made in the letter written by Bagala Prasanna Roy Choudhury, one of the attesting witnesses, to Anath Nath Tarafdar arouses suspicion because Bagala Prasanna having knowledge of the existence of the will could not have or would not have raised the question regarding succession certificate had the will been in existence. The learned Judge in the next place was of opinion that the inexplicable delay in bringing the Will to light following the death of the testator was a factor which created a great suspicion about the existence of the will. The propounders having waited for 15 years before applying for probate contributed to the suspicion and having failed to give cogent reasons to explain the delay, strengthened the suspicion further. The learned Court below observed that two contemporaneous letters Exts. A/1 and A/1/1 have not been explained by the propounders. The learned Court further found that in Exts. A and A/2 the testator was accusing his youngest son Sambhu Nath Tarafdar, one of the propounders of the will, and also his own wife Sushamabala Devi, the other propounder, of indifference and callousness towards him. From the letters it appeared that the testator was, the learned Judge observed, despaired of his wife and his youngest son at a time when he was in ailing health and advancing slowly towards his death. The learned Judge held that the suspicions created by his letters render it highly improbable that the testator created a will of the type in question in favour of the persons against whom he had a number of grievances to ventilate. Therefore, the learned Judge held that in spite of the existence of the draft, even if it existed, the suspicious circumstances surrounding the execution of the will Ext. 1 remained unexplained. Consequently the learned Judge found that the propounders having failed to remove the suspicion from the mind of the Court, were not entitled to the grant of probate applied for.

7. In this Court on the one hand the appellants have tried to explain the circumstances surrounding the execution of that will, and on the other, the respondents (of whom only Anath Nath is contesting) have tried to highlight further the alleged suspicious circumstances surrounding the execution of the will. Now we shall proceed to consider those circumstances along with the explanations given by the appellants.

8. In order to buttress up their arguments the learned Advocates have drawn our attention to a number of decisions with a view to guide the Court in the matter of appraisal of evidence regarding the execution of the will and the alleged suspicious circumstances surrounding such execution. The first case that has been brought to our notice to provide us unnecessary guidance is reported in AIR 1959 SC 443, *H. Venkatachala Iyengar v. B. N. Thimmajamma*. In this case speaking for the Bench P. B. Gajendragadkar, J. (as he then was) elaborately discussed the relevant provisions of the Indian Evidence Act as to the manner of proving the will, as a document. He also discussed the onus of removing the suspicious circumstances surrounding the execution of the will, and the fact that if propounders themselves take a prominent part in the execution of the will and take benefit under it that itself would constitute a suspicious circumstance. Paragraphs 19, 20, 21 and 22 of the judgment are very much instructive on this point. The views expressed therein (if we may respectfully say so, a legacy from the past) have been followed in cases after cases. To establish this, our attention has been drawn by the learned Advocates to cases reported in AIR 1962 SC 567, *Rani Purnima Debi v. Kumar Khagendra Narayan Deb*, AIR 1964 SC 529, *Shashi Kumar Banerjee v. Subodh Kumar Banerjee* (since deceased and after him his legal representatives). In the above two cases Wanchoo, J., speaking for the Bench has reiterated the views which had already been formulated in AIR 1959 SC 443 (*supra*). From these decisions we find that the initial onus of proving the execution of the will rests upon the propounder and the will has to be proved like any other document under the provisions of the Indian Evidence Act besides proving the attestation of the execution by the witnesses. In the event there are suspicious circumstances surrounding the execution of the will, we find, the onus of explaining the circum-

stances which look suspicious and removing the suspicion from the mind of the Court rests squarely upon the propounder. If any fraud, undue influence and coercion is alleged by the caveator then it is for the caveator to prove the allegation of fraud, undue influence and coercion. If it is shown that the propounder has taken a prominent part in the execution of the will under which he has been conferred substantial benefit, that in itself is generally treated as a suspicious circumstance surrounding the execution of the will and the propounder is required to remove the suspicion by clear and satisfactory evidence (vide also AIR 1968 SC 1332, *Gorantla Thatatah v. Thotakura*). We also find from the decisions referred to above that in the matter of appreciation of evidence for deciding material questions of fact arising from the application for probate or in actions on will, hard, fast and inflexible rules cannot be laid down and proof depends upon facts and circumstances of each case. Therefore bearing in mind all these essential, albeit elementary considerations, we shall now proceed to examine the contentions raised by the rival sides before us.

9. The first contention regarding the suspicious circumstances surrounding the execution of the will raised before us relates to the place where the Will was executed. The evidence is that the Will Ex. 1 was executed in a house of the testator situate in Krishnanagar. Mr. Dutta appearing for the respondents Anath Nath Tarafdar contends that the will could not have been executed in Krishnanagar because at the time the Will was allegedly executed that house was under the occupation of a tenant and the testator himself was not living there. It is not disputed that at about that time that house was under a tenant and the evidence does not show that there was any room kept apart from or outside of the tenancy for the use and occupation of the owner Nishikanta Tarafdar. Therefore, the question raised is a pertinent question as to exactly where the Will was executed in the house under somebody else's possession and occupation. Mr. Mitter appearing for the appellants submits that there is no evidence to show that on the exact date when the Will was executed that house was under the occupation of a tenant. Therefore, he contends, the Will could well have been executed at Krishnanagar

inside that house. From the evidence of P. W. 2, Gurudas Garguli it appears that the Will was written in a ground floor room. Then again it is seen from his evidence that it was written in the corridor abutting a room in the ground floor. Why use a corridor if a room is available? If room is not available because of tenancy why go there at all to be placed in a corridor? The evidence is halting and does not inspire confidence. Mr. Dutta raised a contention regarding the necessity of executing a Will at Krishnanagar at all instead of at the residential house of the testator. This necessity has not been fully explained. In our view there was no necessity for Nishikanta to have gone all the way to Krishnanagar to have the Will executed there. The evidence given by the propounder shows that Nishikanta was already armed with a draft which was approved by a lawyer of Krishnanagar. If he was so armed there was no further need for him to go to Krishnanagar, as if surreptitiously, for executing the Will. Since none of the persons with whom Nishikanta was residing in his house were left without benefit under the Will Ex. 1, there was reason for him to fear that the execution of the Will as proposed by him would find interference at the hands of his family members if he tried to execute the Will at his residence. The persons who were disinherited by the Will Ex. 1 were persons who were then not living with Nishikanta Tarafdar in his residential house. All of them were far away elsewhere; they being two elder sons, Anath Nath Tarafdar and Bhabanath Tarafdar, and two married daughters, Jayantibala Devi and Prativasundari Devi. In the circumstances we do not see what was the necessity for Nishikanta to leave his hearth and home and go all the way to Krishnanagar house, which was then tenanted, and execute the Will there. The character of Nishikanta as revealed by his letters Exts. A and A/2 appears to be of sterner stuffs. In spite of opposition from his wife and younger son and younger daughters, he went with Nirapada to have Kaviraji treatment. This determination in the face of opposition shows that he was not a man who had to seek refuge away from his home to execute a Will. This was character which could face opposition, if any. So it is unlikely that he left his house to create a Will. Therefore, as satisfactory explanation is not to be had for all this suspicion lingers, but by itself alone

this suspicion is not much because one cannot say that every act of a person can at all times be explained rationally and it should be capable of providing an explanation on consideration of the requirement of necessity alone. However some suspicion is aroused.

10. The next point that was raised by Mr. Dutta is regarding the witness. He submits that the witnesses are more or less chance witnesses and points to P. W. 2, Gurudas Ganguly a practising Advocate of Krishnanagar Court. According to the propounders Nishikanta Babu visited the house of Gurudas in order to call his father to be an attesting witness to the Will but as his father was not in the house Nishikanta requested him to act as an attesting witness and so he went to Nishikanta Babu's house at Krishnanagar and in a room or in the corridor abutting a room in the ground floor the body of the Will was written and it was executed. Mr. Dutta contends that this witness is a chance witness because Nishikanta never wanted to call him as an attesting witness but he happened to go there in the place of his father. Mr. Mitter contends that Gurudas Ganguly was not a chance witness because he went there on the invitation of Nishikanta who had visited his house. He submits that Nishikanta might have visited the house of Gurudas to call Gurudas's father but finding his father absent and thinking that the job could equally be performed by the son he called Gurudas to be an attesting witness, so there was hardly anything to treat this witness as a chance witness. In our opinion on this question the explanation given by Mr. Mitter is quite cogent. Mr. Mitter contends that the explanations given by the propounder should not be approached with the attitude of total disbelief but it should be approached with an open mind and if the explanation is plausible there should be no reason to hold it unacceptable. This proposition of law is no doubt indisputable. In this case we find that Mr. Mitter has given cogent explanation. Therefore, in the circumstances alleged there is no reason to hold that Gurudas Ganguly can be dubbed a chance witness.

11. Mr. Dutta contends that the scribe who is one of the attesting witnesses gave out a wrong address and that is a circumstance which creates suspicion. Mr. Mitter submits that it was not a very solemn or serious act and as the witness was then there writing he might

have given that as temporary address. From the evidence it is clear that the scribe did give a wrong address and there was no cogent reason for him to give a wrong address except for creating a false impression that he was a local man there; and this fact of giving a wrong address with some motive behind it also arouses some slight suspicion and this suspicion is not totally removed by the explanation given by the witness and by Mr. Mitter. However, on its own alone this suspicion is not strong enough to throw the Will into a cauldron of doubt entirely.

12. Next point urged before us by Mr. Dutta is that a son-in-law of the testator was a witness and that son-in-law was not a straightforward person because he was capable of managing things. In this connection he points out from the evidence Ext. A (1) (i) to show that this witness admittedly passed off a signature as that of Anath Nath knowing well that the signature was not of Anath and had been specifically procured for the purpose of deception by himself. Mr. Mitter submits that that son-in-law Bagala Prasanna Roy Choudhury was not a man of the sort described as insinuated by Mr. Dutta, but he was a man who did not conceal anything and whatever he did, though out of the way and better not done, was done not in his own interest but in the interest of his in-laws. He submits that there is no reason not to rely upon the testimony of this witness. About this we shall have something to say later on. Suffice it to say here that his previous deed, though well meant may be, has shaken his credibility. Implicit trust cannot be put on his words alone. Another point urged before us is that there was no reason why Nishikanta should have requisitioned the services of Basanta Kr. Pramanick who was not a professional Muhuri for scribing the Will. According to this scribe witness Nishikanta Babu visited the District Court of Krishnanagar a day or two previous to the date of the execution of the Will and requested him to visit his house at 68, Mohitosh Biswas Street, Krishnanagar, for writing the Will. Mr. Dutta contends that if Nishikanta in spite of ill health visited the District Court to procure a scribe for writing out the body of the Will, there was no reason for him to call of all persons Basanta Kr. Pramanick who was neither a professional deed-writer nor a Muhari. The person visiting court for the purpose of engaging a scribe to write a Will would naturally approach a Muhuri or a profes-

sional deed-writer rather than approach a man who looks after the litigation of a Zamindari estate. Mr. Dutta contends that if Nishikanta visited the District Court itself then there was no reason for him not to have the Will written out and executed there in the court premises itself. There is some force in this argument. The Will itself is a small document and contains around 1000 words. This short Will with no schedule of properties demised could well have been executed in the court premises itself where lawyers would undoubtedly be available. Even if Nishikanta wanted the Will to be executed in his house at Krishnanagar he could well have called upon the services of a deed-writer or a Muhari if not a lawyer. Therefore some suspicion is aroused as to why this Basanta Kumar Pramanick, an employee of a Zamindar, whose duty was to look after the litigation concerning the Zamindari estate should be called as a scribe. Mr. Mitter on the other hand sees nothing wrong in it. He submits that as Basanta Kumar Pramanick could do the job, there was no reason why he should not have been called. This is a suave explanation no doubt, but this explanation does not satisfy our mind deep down. It is not usual or natural for a person who visits a Court and wants to have a document scribed not to approach a professional man. Therefore the appearance of this non-professional scribe in the scene where a will was allegedly executed raises some suspicion because even by profession this man seems to be a tadbirkar for litigations not his own. Here is a man who although not a lawyer or a lawyer's clerk thrives in the atmosphere of others' litigation. His legal quackery allegedly fetched him some fees. He is a suspicious figure in the circumstances of the case. More so as he gave his address incorrectly. This suspicion by itself would not have amounted to much but when we consider the totality of the effect produced by the suspicious circumstances emerging here and there and not adequately explained, this circumstance would also add some volume to that totality.

13. Another contention raised by Mr. Dutta rests on the question whether the draft Will Ext. 2/1 introduced at a late stage and proved by Bagala Prasanna Roy Choudhury is really in the handwriting of Nishikanta or not. Witness Bagala Prasanna Roy Choudhury, being the son-in-law of Nishikanta, is expected

to know the handwriting of his father-in-law. Therefore his competency to prove the writing of Nishikanta cannot be doubted. The respondents before us also utilised the services of Bagala Prasanna Roy Choudhury in proving some of their documents written by Nishikanta through this witness. For example Exts. A and A/2 and A/3 were proved by him. This shows that the respondents acknowledged the competency of Bagala Prasanna Roy Choudhury to recognise the handwriting of Nishikanta by sight. Therefore it cannot lie in the mouth of the respondents to say that Bagala Prasanna could not prove the handwriting of Nishikanta in the draft Will. No doubt, deposing as a witness, respondent Anath Nath Tarafdar, son of Nishikanta, has doubted the draft Will to be in the handwriting of Nishikanta wholly or partially. But he has not specified which portion, if any, is not in the handwriting of Nishikanta. Nor was the challenge from the side of the respondents so vehement as to call for the opinion of a handwriting expert in evidence. Therefore, taking all these into consideration we are of opinion that the respondents have not succeeded in creating a doubt on the score of the draft being in the handwriting of Nishikanta. The next attack launched upon this draft as a document of suspicious character relates to the state in which the draft exists today. When this draft will was produced in Court through a petition it was stated therein that the draft was in a mutilated stage and so it was not filed initially; but strangely enough no evidence was adduced by the propounders of the will to show how the mutilation of the draft came about. Nowhere, it is stated that when the draft came into the hands of the propounders it was found torn; nor has it been stated anywhere that the draft got torn while it was in the custody of the propounders. The propounders are silent about it. This lack of explanation from the propounders on the point of mutilation of the draft will does raise some suspicion as contended by Mr. Dutta that it might have been torn deliberately so that the portion which does not harmonise with the terms of the Will Ext. 1 may not see the light of day. Mr. Mitter however seeks to explain this mutilation by saying that it might have been torn while being handled in the Serishta of the lawyer. If that were so, this explanation could have found expression in the petition through which Ext. 2/1 was introduced. Since

this explanation did not find expression in the petition aforesaid it is difficult for us to accept the explanation now given at the bar. Therefore in our opinion the suspicion that has been aroused by the production of the mutilated draft stands undisputed from our mind. Mutilation was accidental and not intentional, mutilation was not for the purpose of concealing some portions, are matters the propounders had to establish which they did not.

14. Next contention raised by Mr. Dutta is regarding the necessity of the draft being approved by a lawyer of Krishnanagar Court. Mr. Dutta contends that there was no reason for Nishikanta to draft a Will himself and have it approved by a lawyer. He contends that Nishikanta could have as well asked the lawyer to draft a Will. Mr. Mitter submits that the explanation is simple here. Nishikanta being a layman drafted a Will in his own way and considered it advisable to have it approved, so there was nothing unusual in the step taken by Nishikanta. This is undoubtedly an explanation and tolerably a good explanation. We see no reason to discard this explanation altogether and hold it unreasonable. However, there is also some force in the contention of Mr. Dutta that too cannot be denied. Anyway, the suspicion sought to be raised on this point by Mr. Dutta is not of any great significance. Mr. Dutta again contends that the word 'approved' written by the lawyer on the margin of the draft Ext. 2/1 arouses some suspicions. The word 'approved' has been misspelt there. Instead of using two 'ps' only one 'P' has been used in the word 'approved'. Mr. Dutta contends that a senior lawyer could not have made such a mistake. Mr. Mitter contends that probably the learned lawyer was in a hurry and unwittingly used one 'P' where two 'ps' were needed. He submits that it so happened due to oversight and hastiness on the part of the lawyer; therefore on the basis of this small evidence it cannot be said that the draft was not shown to a lawyer to get his approval. In this case the signature and writing of the lawyer has been proved by Jnan Chandra Mukherjee, a member of the Bar, who has been examined as P. W. 2. It appears that Mr. Mukherjee was 75 years old when his services were utilised to prove the signature and handwriting of Bakkeswar Bandyopadhyay. It is difficult to see why the service of an old lawyer whose sight may

not have been of the best was utilised to prove the signature of Bakkeswar Babu and his handwriting as well. But since there was no challenge about the ability of P. W. 2 to prove the handwriting and signature of Bakkeswar Babu, there is no reason to doubt his veracity. It is true that a senior lawyer does not commonly make a mistake in writing the word approved, this being a word which frequently comes into use in legal circles; but then it is said that occasionally even Homer nods. Mr. Dutta contends that whenever Homer nods it is a suspicious circumstance by itself. That may be so, but in this case as the ability of P. W. 2 to prove the handwriting and signature of Bakkeswar Babu was not seriously challenged it ceased to be a suspicious circumstance when some plausible explanation has been offered. But since the draft is mutilated it is difficult to say what was in the mutilated portion of the draft and whether the draft consisted of only one page and consequently it is difficult to say what exactly was approved by Bakkeswar Babu.

15. The next point raised before us by Mr. Dutta is that the Will sought to be probated does not conform to the draft. It is quite true that the draft being mutilated that part of the Will Ext. 1 which makes disposition of property is not to be found in the draft. In that view of the matter it can be said that the draft and the Will are at variance; but we have already stated that mutilation of the draft having not been properly explained that has given rise to an undisputed suspicious circumstance. From the draft one cannot say that the disposition of property made in the draft was just the same as is found in the Will. The Will confers substantial benefit upon the propounders and one cannot say whether the draft in its un mutilated state did so also. In this connection Mr. Dutta draws our attention to the case reported in AIR 1968 SC 1332, (Gorantla Thataiah v. Thotakura Venkata) and submits that whatever the Will confers substantial benefit on the propounder that itself is a suspicious circumstance if the said propounder has taken a prominent part in execution of the Will. Mr. Dutta submits that in this case the draft of the will does not tally with the finished product, the propounders have taken benefit under the Will, and Sushamabala one of the propounders did take a prominent part, so the circumstances present here create

a suspicion regarding the genuineness of the Will. There is no doubt that the propounders before us are substantially benefited by the Will. There is also evidence coming from Sushamabala herself which shows that she had taken some part in the execution of the Will inasmuch as she had advised Nishikanta Tarafdar to change some of the terms of the Will and which advice according to her had been accepted. Therefore in the circumstances it is for the propounders to remove all the suspicious circumstances. But the propounders in this case have not been able to explain properly why the draft was found in a mutilated condition. Therefore, the suspicion remains as to whether it would have harmonised with the terms of the Will had the draft remained in an un mutilated state.

16. But on the question of propounders taking prominent part, there is no evidence that Sushamabala did any canvassing for herself. Indeed all canvassings do not amount to undue influence (vide 1955 SCA 360 = (AIR 1955 SC 363), Naresh Charan v. Parash Charan). Propounders taking part may arouse suspicion of undue influence only. Here undue influence is not pleaded nor proved. So in the result Sushamabala's alleged advice to her husband in the matter of disposition of some property does not sprout any suspicion of noxious character.

17. Something is really missing or amiss is also brought home because in the draft there is mention of a "Schedule below". In the Will also the same thing is true. But not only in the mutilated draft but also in the Will Ex. 1, there is no schedule attached. There is no cogent explanation forthcoming for this omission. If Bakkeswar Babu approved the draft, he cannot be expected to have approved an incomplete draft. Therefore, there must have been a schedule (तपसील) in the draft. The Will also speaks of (निम्न तपसील) but the schedule is simply not there. Therefore, this unexplained incongruity remains an unexplained suspicious circumstance intrinsically inscribed in the will itself. (In this connection, it is necessary to point out that the English renderings of the Bengali documents Exs. 1 and 2/1 have bypassed the word (तपसील)).

18. The next point urged by Mr. Dutta is on the question of delay in applying for probate. Mr. Mitter draws

our attention to a judgment delivered by Masud, J., and reported in AIR 1972 Cal 210, Rajlakshmi v. Krishna Chaitannya, and submits that delay by itself cannot be a ground for refusing grant of probate. He also relies upon this decision and submits that if suspicious circumstances be given a possible explanation the Court should not refuse grant of probate, when the attesting witnesses have otherwise proved voluntary execution of the Will and testamentary capacity of the testators. In this case there has been a delay of about fifteen years in applying for probate. This delay has not been, we think, properly explained. Mr. Mitter however submits that as there was no call to probate the Will the propounders did not probate it, and when it was found that the Will was required to be probated to protect the interest of the legacies the propounders came forward with their application. This explanation however does not appear to be quite satisfactory. We find from the evidence on record that some difficulty was faced by Bagala Prasanna Roy Choudhury when he had to dispose of the Government Promissory Notes left behind by Nishikanta that was a time when a probate would have been of use. This is also seen from the letter of Bagala Prasanna Roy Choudhury written to Anath Nath (vide Ex. A (4)) where he speaks of Succession Certificate which Anath Nath seems to have promised to send him to facilitate the disposal of G. P. Notes. The need for probate had also been felt it appears when a Power of Attorney to manage the property was sought for by Sambhurath Tarafdar, one of the propounders from his brother Anath Nath Tarafdar. Therefore it cannot be said that previously there was no necessity for probate and so the Will was not probated. Furthermore, it is seen from the Khatians Ext. D series that properties bequeathed under the Will to Sushamabala were being recorded in the names of her three sons as well. This also shows that necessity for probate had arisen before but no Will was sought to be probated then. It is true that delay by itself cannot be a ground for refusing grant of probate as has been observed in AIR 1972 Cal 210 (Supra) but "delay by itself" is a term pregnant with meaning. It shows that there should not be anything else to obstruct the grant of probate except an objection on the score of delay. In that case when attesting witnesses prove voluntary execution of the Will and testamentary capacity of the

a general manner that the Deputy Secretary had not the delegated powers of the Central Government. In reply thereto, it was averred in paras. 8, 9 (h) and 10 of the Written Statement filed on behalf of the Union of India (defendant 1) that the order under Section 33 was rightly made, that the Deputy Secretary rightly exercised his power in dismissing the revision under Section 33, and that the officer who passed the order was fully competent to do so. The Office Order (Exhibit P-18) appears to have been produced and marked on behalf of the plaintiff Kishan Chand. He also got marked another order, Exhibit P-20, passed by Shri Prasada in another case under Section 33 of the Act. Yet, the objection that the authority was only by an Office Order and not by a Gazette notification was not raised or urged in the trial Court and consequently the same was not considered by the learned Subordinate Judge in his judgment. If the aforesaid objection had been specifically put forward at the earliest stage in the trial Court, the Opposite Party would have had the opportunity to adduce necessary evidence and meet the objection. It was raised in the grounds of appeal but does not appear to have been urged before the lower appellate Court. It is an established principle that objection as to competency or jurisdiction of an officer or a court should be specifically put forward at the earliest stage in the proceedings so that the opposite party would be able to explain or rectify the defect, if any. Raising it at the appellate stage would place the opposite party at a disadvantage, and courts do not permit the same in the interest of justice and fair play to the opposite party. The plea that there was no gazette notification is not entirely one of law, but involves an inquiry into the fact as to whether there was such notification or not. In the circumstances, the learned counsel for the appellant cannot be permitted to plead that the authorization of Shri Prasada was not by a Gazette Notification.

21. The ninth contention was that for the purposes of transfer, the first floor and the ground floor should have been valued separately. This plea was not urged in the lower courts. Even otherwise, in view of the finding that the house was indivisible for purposes of transfer, the aforesaid contention does not arise.

22. The tenth contention on behalf of the appellant was that notice

ought to have been given to the appellant before the valuation of the property was determined, and that no such notice was given to him. This contention has no force. As pointed out by the lower courts, the appellant had not challenged in any manner the quantum or the validity of the valuation before the Departmental authorities under the Act. Even if the valuation had been fixed without notice to the parties concerned, there was nothing to prevent the appellant from questioning the valuation before the authorities if he had any objection thereto. But, he did not do so. Apparently, he was satisfied with the valuation fixed by the authorities and, therefore, the objection that no prior notice was given to the parties has no significance or bearing on the ultimate decision of his case as pointed out by the lower courts.

23. The eleventh contention was that the order (Exhibit P-6) of Shri Lalwani in the revision filed under Section 24 (1) of the Act rejecting the said revision as barred by time was erroneous inasmuch as Rule 104 of the Rules does not apply to revisions filed under Section 24 (1) of the Act as held by the Full Bench of this Court in *Union of India v. M/s. Navin Bharat*, 1972-74 Pun LR (Delhi) 203. The Full Bench held in the said case that the period of limitation of 30 days prescribed by Rule 104 (1) does not apply to an application for revision presented under Section 24 (1) at all, but applies only to an application for revision filed under Section 24 (4). In view of the said decision, the order of Shri Lalwani (Exhibit P-6), dated December 28, 1959, whereby he rejected the revision filed by Kishan Chand under Section 24 (1) of the Act, was incorrect and erroneous. However, even if the order (Exhibit P-6) of Shri Lalwani is bad, it does not help the appellant Kishan Chand, because he preferred a revision against that order to the Central Government, which, by its order (Exhibit P-17), dated May 6, 1960, rejected the said revision filed by Kishan Chand under Section 33. The order (Exhibit P-17) of the Central Government was made under Section 33. The said section empowers the Central Government to call for the record of any proceedings under the Act at any time and pass such order in relation thereto as in its opinion the circumstances of the case require and is not inconsistent with any of the provisions contained in the Act or of any rules or orders made thereunder. As pointed out by the Full Bench refer-

red to above, even though Section 33 empowers the Central Government to act suo motu, in actual practice, the knowledge that some order of the officers under the Act has to be reviewed or revised would be obtained only from some interested person, and the usual method by which the information would be given by such a person would be by way of an application. Thus, the revision application filed by Kishan Chand under Section 33 was only by way of furnishing information that the orders of the lower officers under the Act required to be revised. On receiving information in that manner under Section 33, the Central Government considers the entire case on merits and passes such order as it thinks fit in the circumstances of the case. Its scrutiny is not limited to the correctness or validity of the order of the officer immediately below, namely, the order in the revision under Section 24 (1). Its order is made on a scrutiny of the entire case and not merely the order made under Section 24 (1). It, therefore, follows that even if the order (Exhibit P-6) passed by Shri Lalwani in the revision under Section 24 (1) was bad, the order (Ext. P-17) of the Central Government in the revision under Section 33 does not fall with it, but continues to hold good between the parties.

24. The twelfth contention was that the order of the Central Government (Exhibit P-17) did not give any reasons and was, therefore, invalid. There is no force in this contention. The orders of the Managing Officer, the Additional Settlement Commissioner, and the Settlement Commissioner, were all in favour of Shrimati Attar Kaur and upheld her claim for transfer of the entire house to her. The Central Government confirmed the same. The orders of the Managing Officer (Exhibit P-30) and the Additional Settlement Commissioner (Exhibit P-5) contained the reasons for which they upheld the claim of Shrimati Attar Kaur and rejected the claim of Kishan Chand. The Central Government affirmed the same by rejecting the revision presumably accepting those reasons. In the case of such affirmation, there was no need for the Central Government to repeat the reasons in its order. As pointed out by the Supreme Court in *Bhagat Raja v. Union of India*, AIR 1967 SC 1606, paragraph 10, if detailed reasons had been given in the orders of the lower officers, the higher authority which accepts those reasons may affirm the orders of the

lower officers without repeating the reasons. There is thus no force in the contention of the learned counsel.

25. The thirteenth and the last contention on behalf of the appellant was that in any event the entire house should not have been directed to be transferred to Shrimati Attar Kaur as Kishan Chand was entitled to the first floor in view of the provision in Rule 30 of the Rules. This contention has to be considered on the basis of the following findings of fact. Both Kishan Chand and Shrimati Attar Kaur are holders of verified claims and are allottees of the first floor and the ground floor respectively. The house in question has been found to be indivisible. Its value was determined at Rs. 6,727/-, i.e. less than rupees ten thousand. It is thus acquired evacuee property, the value of which does not exceed ten thousand rupees and hence ordinarily allottable and not saleable within the meaning of Rule 22 (1) (a). The balance of compensation due at the relevant time to Kishan Chand was Rs. 2,630/8/-, while the balance of compensation due to Shrimati Attar Kaur was Rs. 5,629/-. Rule 30 is the rule which deals with payment of compensation where an acquired evacuee property which is an allottable property is in occupation of more than one person as in the present case. It reads as follows:—

"30. Payment of compensation where an acquired evacuee property which is an allottable property, is in occupation of more than one person—

If more persons than one holding verified claims are in occupation of any acquired evacuee property which is an allottable property, the property shall be offered to the person whose net compensation is nearest to the value of the property and the other persons may be allotted such other acquired evacuee property which is allottable as may be available.

Provided that where any such property can suitably be partitioned, the Settlement Commissioner shall partition the property and allot to each such person a portion of the property so partitioned having regard to the amount of net compensation payable to him.

Explanation I. The provisions of the rule shall also apply where some of the persons in occupation of any acquired evacuee property which is an allottable property hold verified claims and some do not hold such claims.

Explanation II.—If any acquired evacuee property has been allotted to a member of a family as defined in sub-rule (3) of Rule 7 who does not hold any verified claim and if another member of the family holding a verified claim is in occupation of such property, the compensation payable to such other member of the family may be adjusted against the value of the property.”

26. The rule consists of the main part, a proviso and two Explanations. The two Explanations are clearly not applicable to the present case, and we need consider only the main part and the proviso. The main part provides that if more persons than one holding verified claims are in occupation of any acquired evacuee property which is an allotable property, it should be offered to the person whose net compensation is nearest to the value of the property, and the other persons may be allotted such other allotable acquired evacuee property as may be available. The proviso deals with a situation where such property can suitably be partitioned, and states that such property should be partitioned and a portion allotted to each of the occupants having regard to the net compensation payable to him. In the present case, the house in question has been held to be indivisible, and so the proviso is not attracted.

27. Shri Nijhawan pointed out that Shri Oberoi, Managing Officer, who was examined as D. W. 7, had stated in examination-in-chief that the house was not divisible, but it was elicited from him in cross-examination that there were separate kitchens and lavatories in the two floors and that the two occupants were paying separate rents, and then contended that the house should in view of the said evidence be held to be suitably partible and that the proviso was, therefore, applicable. As stated earlier by us in dealing with the second contention, the two lower Courts accepted the view taken by the Rehabilitation Authorities that the house was indivisible. The said concurrent finding of fact is binding in second appeal, and it is not open to the appellant to ask for a reassessment of the evidence relating to the said concurrent finding of fact. In view of the said finding the contention of the learned counsel for the appellant that the proviso to Rule 30 is attracted cannot, therefore, be accepted.

28. We are thus left with the main part of the rule which squarely applies to the facts of the present case. More than one person, namely, Kishan

Chand and Shrimati Attar Kaur, are in occupation of the house which is an acquired evacuee property and is also an allotable property. Both of them hold verified claims. The balance of compensation due to Shrimati Attar Kaur (Rs. 5,629/-) is nearer to the value of the property (Rs. 6,727/-) than the balance of compensation due to Kishan Chand (Rs. 2,630/8/-). Consequently, the house has to be offered to Shrimati Attar Kaur as required by the main part of the rule. This is exactly what had been done by the Managing Officer, and the same had been affirmed by the Additional Settlement Commissioner, the Settlement Commissioner, and the Central Government. The contention of the learned counsel that the entire house should not have been directed to be transferred to Shrimati Attar Kaur cannot be accepted.

29. For the foregoing reasons, the Second Appeal fails and is dismissed. In the circumstances of the case, we direct the parties to bear their own costs.

Appeal dismissed.

AIR 1976 DELHI 275

DALIP K. KAPUR, J.

Smt. Vidyavati Bai, Plaintiff v. Smt. Parkash Vati Devi and another, Defendants.

I. A. No. 37 of 1976, D/- 12-1-1976.*

(A) Civil P. C. (1908), Section 152 — Accidental slip or omission — Whether can be corrected if it is not due to an error of the Court.

The nature of the mistake and the nature of the prejudice caused to the parties by having the omission corrected has a large bearing on the way in which the Court is to exercise jurisdiction under Section 152, Civil P. C. Undoubtedly, the power to amend is uncontrolled. There is nothing in Section 152 indicating that the error must be one committed by the Court itself and not one which has been brought about due to some other reason. The jurisdiction arises as soon as the Court is satisfied that there has been an accidental slip or omission. It is a different matter, when the Court having found that there is a mistake, may still refrain from correcting it in certain circumstances (for instance, where a suit is brought for

* (Against Judgment of this Court in Suit No. 252 of 1968, D/- 2-5-1975).

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Rs. 1,500/- when actually it was worth Rs. 15,000/-). AIR 1952 Cal 86 and AIR 1957 All 133, Relied on. (Para 6)

In the present case, the accidental slip or omission occurred first in the application seeking leave to enter into the compromise on behalf of minor-defendants, inasmuch as in that application minors' father defendant was described as guardian-ad-litem of the minors. (The mother was appointed as guardian-ad-litem by the Court). That accidental slip or omission was repeated in the order of the Court inasmuch as the father was recorded there also as being the guardian-ad-litem of the minors. Whatever way one looks at it, it was an accidental slip or omission and, therefore, amenable to the jurisdiction under Section 152.

(Para 7)

(B) Civil P. C. (1908), Section 153 — "Any proceeding in a suit" — Application to enter into compromise — If can be allowed to be amended after suit was decided by compromise.

The mother-defendant was appointed by the Court as guardian-ad-litem of minor-defendants. The application to enter into compromise was signed by the father-defendant (in his personal capacity and as guardian for minors) and the mother in her personal capacity but not as guardian-ad-litem. After the permission to enter into compromise was granted, judgment on it was passed and decree in terms of compromise was ordered to be passed, the original application to enter into compromise was sought to be amended. In the circumstances, the amendment was allowed in order to remove the accidental slip or omission so as to prevent any future misunderstanding as to the scope of the compromise. (Para 8)

Cases Referred: Chronological Paras

AIR 1957 All 133 = 1956 All LJ 691 5
AIR 1952 Cal 86 = 88 Cal LJ 40 5
AIR 1946 Cal 336 = 225 Ind Cas 623 5
AIR 1919 All 264 = 51 Ind Cas 55 5

C. M. Bhandare, with A. N. Goyal, for Plaintiff; R. L. Tandon and M. L. Bhargava, for Defendants.

JUDGMENT:— The present application is under Sections 151, 152 and 153 of the Code of Civil Procedure. The application has been filed on 6th January, 1976, and is concerned with a suit which was decided by compromise on 2nd May, 1975. The suit was for partition and other reliefs instituted by the plaintiff, Shrimati Vidyavati Bai against Shrimati Parkash Vati Devi and others. The plaintiff was

the first wife of the late Kanwar Krishna Chandra and the first defendant was the second wife. In the array of parties, Shri Mahesh Chandra son of the late Kanwar Krishna Chandra was shown as defendant No. 2 and Shrimati Usha Mahesh Chandra, his wife was shown as defendant No. 3. Defendants Nos. 4 and 5, namely, Kumari Vanita and Kunwar Raghav Chandra, the minor son and daughter of defendants Nos. 2 and 3 were shown as defendants Nos. 4 and 5 respectively. The parties proposed a settlement by which the entire suit was compromised, but there being minor defendants, the leave of the Court was sought on behalf of the minor defendants. The application moved in this behalf was signed by the plaintiff herself and her counsel Mr. A. N. Goyal, Advocate, by defendants Nos. 1, 2 and 3 and also by the Advocate for the defendants, Mr. R. L. Tandon, Advocate. It was also signed by one Shri Madho Pershad as guarantor. Unfortunately, this application was signed by Shri Mahesh Chandra in his personal capacity and as guardian for minor defendants 4 and 5. It was not signed by Shrimati Usha Mahesh Chandra in her capacity as guardian-ad-litem. Undoubtedly, Shri Mahesh Chandra, defendant No. 2 was the natural guardian of his minor children and he rightly signed the application in this capacity, but, Shrimati Usha Mahesh Chandra did not sign the application in her capacity as guardian-ad-litem. In the application itself, in paragraph No. 1, it was stated that defendant No. 2 was the natural guardian, father and guardian-ad-litem of defendants Nos. 4 and 5. There was apparently an accidental slip or omission by the parties inasmuch as they were under an erroneous impression that defendant No. 2 was also guardian-ad-litem of defendants Nos. 4 and 5 in addition to their being natural guardian. The Court record shows that there was an order passed by P. N. Khanna, J. on 15th July, 1959, whereby he had appointed defendant No. 3 as guardian-ad-litem of defendants Nos. 4 and 5.

2. On the aforementioned application, I. A. No. 1162/75 an order was passed by myself on 2nd May, 1975, granting defendant No. 2 leave to compromise the suit on behalf of the minor defendants. In that order, I stated:—

"I have gone through the terms of the compromise and I find that those terms are to the benefit of the minors and are also beneficial to the other parties."

I had noted before the quotation that the compromise was to the benefit of the minors, because two wills dated 24th April, 1965 and 25th February, 1966 were in question in the suit. In view of the fact that many transactions were under challenge in the suit, it seemed to be in the interest of the minors that the suit should be compromised. This largely was the ground on which the leave was granted. It is clearly apparent that the leave was granted to Shri Mahesh Chandra the natural guardian and not to Shrimati Usha Mahesh Chandra, guardian-ad-litem. Acting on the order, the parties then proceeded to accept the terms of the compromise and a judgment dated 2nd May, 1975, was passed by myself accepting the compromise and directing a decree to be passed in terms thereof as noted in the aforementioned judgment. I am informed that the decree has in fact not been drawn up yet.

3. The present application, I. A. No. 37/76 has been moved to make necessary amendment in the orders and judgment passed on 2nd May, 1975, with a view to making them effective in respect of defendants Nos. 4 and 5 after permission had been granted to the guardian-ad-litem of those minor defendants. For the purpose of determining whether there has been any accidental slip or omission, I have recorded the statement of Mr. M. L. Bhargava, Advocate for defendant No. 3 and the statements of the counsel for the plaintiff as well as the counsel for defendants Nos. 1 and 2. They are all agreed that there has been an accidental slip or omission. It is also otherwise obvious, that there has been an accidental slip or omission, because there was an order of the Court appointing defendant No. 3 as guardian-ad-litem. The leave has been given to defendant No. 2 to enter into the compromise. In fact, defendant No. 2 being the natural guardian of defendants Nos. 4 and 5 was, in Hindu Law, entitled to seek such leave but, as defendant No. 3 had been appointed guardian-ad-litem, it was also necessary for her to seek the leave of the Court. The omission has now been brought to the notice of the Court, the previous application was also signed by defendant No. 3 in her personal capacity and the present application has been signed in her personal capacity and also as guardian-ad-litem of defendants Nos. 4 and 5. It has been stated on her behalf that but for the accidental slip or omission, she would certainly have signed the original application on behalf of defen-

dants Nos. 4 and 5 in her personal capacity and also as their guardian-ad-litem along with the other parties. She was strongly of the view that the compromise was in the interest of the minors. In fact, in my own order, I have recorded that the compromise was obviously to the benefit of the said minor defendants. Thus, from the circumstances, it is plain that there was an accidental slip or omission in the matter of moving an application for seeking the leave of the Court to enter into the compromise on behalf of the said minor defendants Nos. 4 and 5, being the minor children of defendants Nos. 2 and 3.

4. The question that remains to be decided is: What is the jurisdiction of the Court in this matter? It is plain that the accidental slip or omission is one that has taken place in the application itself. It is not one which was due to any accidental slip or omission by the Court itself. Yet, plainly, when one reads the order dated 2nd May, 1975, whereby permission was granted to defendant No. 2 to enter into the compromise on behalf of the minor defendants, he is shown therein as the guardian-ad-litem of defendants Nos. 4 and 5. For instance, it is stated in that order as follows:—

"The application is in substance an application for compromising the subject-matter of the suit. Two of the defendants, namely, defendants 4 and 5 are minors, and defendant No. 2 is their natural guardian being their father and guardian-ad-litem. The second defendant seeks permission of the Court to grant leave to him to enter into the compromise on behalf of the said minor defendants 4 and 5."

It is obvious from this passage, that the Court itself has taken defendant No. 2 to be the guardian-ad-litem of defendants Nos. 4 and 5. Obviously, this accidental slip or omission has crept in as a result of the application but, nevertheless, it is an accidental slip or omission being contrary to the orders of P. N. Khanna, J. passed on 15th July, 1969, about six years earlier. It, therefore, seems that there should be no reason why this accidental slip or omission should not be corrected under Section 152 of the Code of Civil Procedure.

5. There is some conflict in the judgments brought to my notice concerning, whether an accidental slip or omission can be corrected if it is not due to an error of the Court. It has been held in *Bela Debi v. Bon Behary Roy*, AIR 1952 Cal 86 as follows:—

"I am not in favour of giving a narrow construction to Section 152. I do not agree that Section 152 must necessarily refer to an 'accidental slip or omission' of the Court itself, or its ministerial officers. It does not say so in the section itself, and should not be interpreted as such."

The learned Judge then proceeded to give reasons why the wider meaning should be given. A similar view has been expressed in *Shahzad Khan v. Pt. Sheo Kumar*, AIR 1957 All 133, where it was held:—

"The Court can under Section 152 amend a clerical error in a decree although the error may have occurred on account of a mistake of the parties themselves in their pleadings and this mistake in the decree was on account of its being copied from the plaint."

A somewhat different view has been expressed in *Hamiduddin Ahmad v. Moyeruddin Mondal*, AIR 1946 Cal 336 and *L. Ram Chander Sarup v. Mazhar Hussain*, AIR 1919 All 264, wherein it has been held that if the mistake is due to the failure of a party, then the procedure under Section 152 of the Code of Civil Procedure is not available. In fact, in the Calcutta case just quoted, it was stated that the proper procedure was to have the decree set aside and to apply for retrial.

6. I think, that the result has largely to depend on the nature of the mistake. If the mistake is an accidental mistake, i.e., an accidental slip or omission in which, for instance, the plaintiff misdescribes the property claimed in the suit and thereafter gets a decree, it may be open to the defendant to say that if the description was correct, he would have taken a different defence. Therefore, the nature of the mistake and the nature of the prejudice caused to the parties by having the omission corrected has a large bearing on the way in which the Court is to exercise jurisdiction under Section 152 of the Code of Civil Procedure. Undoubtedly, I must note that the power to amend is uncontrolled. There is nothing in the Section indicating that the error must be one committed by the Court itself and not one which has been brought about due to some other reason. It is a different matter, when the Court having found that there is a mistake, may still refrain from correcting it in certain circumstances. For instance, if a plaintiff brings a suit mentioning the sum

claimed in the suit as Rs. 1,500/- and then later claims that the suit was really for Rs. 15,000/-, the Court may say that this sort of mistake cannot be rectified under Section 152 of the Code, even though the Court may find that in fact it was a mistake.

7. I do not, however, agree at all with the view that the mistake, error or omission giving rise to the exercise of jurisdiction under Section 152 of the Code of Civil Procedure must necessarily be one committed by the Court itself. The jurisdiction arises as soon as the Court is satisfied that there has been an accidental slip or omission. In the present case, there is obviously an accidental slip or omission. That accidental slip or omission had occurred first in the application seeking leave to enter into the compromise on behalf of defendants Nos. 4 and 5, inasmuch as in that application, defendant No. 2 was described as guardian-ad-litem of defendants Nos. 4 and 5. That accidental slip or omission has been repeated in the order of the Court inasmuch as defendant No. 2 has there also been recorded as being the guardian-ad-litem of defendants Nos. 4 and 5. Whatever way one looks at it, it is an accidental slip or omission and, therefore, amenable to the jurisdiction under Section 152 of the Code of Civil Procedure. I, therefore, proceed to correct the error in the proceedings and accordingly correct the order passed in I. A. No. 1162/75 on 2nd May, 1975. The result of the correction will be that leave will be deemed to have been given to both defendants Nos. 2 and 3 to enter into the compromise on behalf of the minor defendants Nos. 4 and 5. Defendant No. 2 has already been given leave and it will be deemed to have been given to him in his capacity as natural guardian and permission will be deemed to have been given to defendant No. 3 in her capacity as the guardian-ad-litem of defendants Nos. 4 and 5.

8. All the parties have joined together in this application and it has also been urged before me that the original application may be allowed to be amended. I am a bit doubtful whether the application can be allowed to be amended after the suit has been decided. Furthermore, the cases show that the correction has to be made in the proceedings, i.e., in the judgment, decree or orders passed by the Court and need not be made in the original proceedings. For instance, if there is an accidental slip or omission in the proceedings, it may lead to an acci-

dental slip or omission in the judgment or decree passed by the Court. Once the order, judgment or decree has been passed and the accidental slip or omission is brought to the notice of the Court. It is sufficient for the order or judgment or decree to be corrected with a view to removing the accidental slip or omission. However, the present case is somewhat unusual, because in this case, permission was granted to enter into a compromise and thereafter a compromise was entered into. The judgment on the compromise was passed on 2nd May, 1975, soon after the permission was given and a decree was ordered to be passed in terms of the compromise. The compromise itself is a part of I. A. No. 1162/75. If the original document is not allowed to be amended and the accidental slip or omission occurring therein not removed, there may be no proper decree and further complications may arise. I accordingly have to allow an amendment under Section 153 of the Code in the original application to remove the accidental slip or omission so as to prevent any future misunderstanding as to the scope of the compromise. The correction permitted to be made in I. A. No. 1162/75 is as follows: In paragraph No. 1, there will be a correction in the beginning to read as follows:—

"That defendants Nos. 4 and 5 are minors and defendant No. 2 is their natural guardian and father and defendant No. 3 is the guardian-ad-litem."

Further, it will be said therein that 'defendants Nos. 2 and 3 being the guardians etc., instead of 'defendant No. 2 being the guardian'. In the prayer clause, the words will be: 'Defendants Nos. 2 and 3 being the guardians etc., instead of that defendant No. 2 being the guardian'. And, finally, under the signatures of defendant No. 3, it will be recorded: 'that she has signed in her personal capacity and as guardian-ad-litem for defendants Nos. 4 and 5'. The learned counsel for the parties have all agreed that these necessary changes may be made, before the Deputy Registrar, in the original application, I. A. No. 1162/75, and for this purpose, the parties will appear before the Deputy Registrar on 14th January, 1976 and corrections made accordingly.

9. As a result of this discussion, the application is allowed. The accidental slip or omission occurring in I. A. No. 1162/75 is permitted to be corrected in the manner just indicated. The order passed in I. A. No. 1162/75 on 2nd May,

1975, itself is hereby corrected to the extent indicated above. As the parties are agreed on this order there will be no order as to costs.

Application allowed.

AIR 1976 DELHI 279

B. C. MISRA, J.

Suraj Parkash Vaid, Petitioner v. Union of India and others, Respondents.

C. R. No. 169 of 1975, D/- 12-1-1976.*

(A) Civil P. C. (1908), O. 12, Rr. 2, 3-A — Word 'document' — Meaning of — Costs of proving the documents.

The word 'document' occurring in Order 12 and as indicated by the form of notice, has a reference to a proper document produced before the Court, on which the Court can legally act and which can be adduced in evidence. The opposite party cannot be called upon to take the trouble of admitting and/or denying the documents, which are not proper and which by their very nature cannot be acted upon or be legally adduced in evidence without such admission and/or denial (since the admission or denial is not a matter of routine, but is to be performed with the responsibility of a litigant assisting in the administration of justice and with the penal consequences attached to erroneous refusal to admit). (Para 8)

The costs that are sought to be saved under the aforesaid provision for admission and/or denial are those which are incurred in proving the document. The costs that a party has to incur in procuring the document on the Court file are not covered by the provisions specified in Rule 2 of Order 12 of the Code, although the same may or may not form the general costs in the suit. (Para 7)

Where the documents in dispute are contained in the file of another suit the law prohibits production of any copy except certified copy as secondary evidence of the original and so the petitioner cannot call upon the opposite party to admit or deny any other kind of secondary evidence. Each party must bear the initial cost of procuring the proper document and producing it before the Court and then alone it can call upon the opposite party to admit and/or deny the same and thereby attempt to save the

*(From order of R. C. Jain, Sub. J. 1st Class, Delhi, D/- 15-10-1974).

costs of proving the documents. Where a party refuses to admit and/or deny an improper document, which cannot be adduced in evidence the Court cannot call upon it to do so at the peril of facing the consequences. (Para 13)

Cases Referred: Chronological Paras
AIR 1958 SC 414 = 1958 SCR 1275 =
1958 Cri LJ 809 11

D. N. Nijhawan, for Petitioner; A. B. Saharya, for Respondents.

ORDER:— This revision petition has been filed by the plaintiff under Sec. 115 of the Code of Civil Procedure, against the order of the Sub-Judge, 1st Class dated 15th October, 1974, by which he has declined the request of the plaintiff to order the defendants to admit and/or deny the documents under Order 12, Rule 2 of the Code while the learned Judge has directed the plaintiff to produce their certified copies.

2. The petitioner has instituted the suit giving rise to the revision against the Union of India, the Registrar of the Supreme Court and the Chief Justice of India for recovery of Rs. 6,000/- as damages for wrongful reduction in rank in the employment of the petitioner in the Supreme Court. The petitioner was reduced in rank and then finally removed from service. Another suit was instituted by the petitioner attacking the aforesaid two orders. I am told that the Court of first instance dismissed the said suit, but the lower appellate Court held that the removal from service was valid, while the reduction in rank was legally infirm. I am also informed that feeling aggrieved by the said decree, the plaintiff petitioner has instituted a second appeal in this Court in which he has challenged the decree upholding his removal from service. In view of these circumstances, the present suit has been instituted on 30th September, 1970 claiming damages for wrongful reduction in rank while the other appeal is still pending.

3. It appears that a number of documents were filed in the aforesaid suit (which is pending in second appeal in this Court). The petitioner in the instant suit has filed unsigned copies of a number of documents from the said file and has moved two applications before the Court below praying that under Order 12, Rules 2, 3-A of the Code, the defendants be called upon to admit and/or deny the documents. The applications also appeared to be headed under Order 12, Rule 4 and Order 17, Rule 3, but the

counsel for the petitioner is unable to state if the said provisions of law have got any relevance to the subject-matter raised in the revision.

4. The applications were opposed by the defendants and it was averred that the documents filed were neither originals nor certified copies nor did the defendants possess them (with a few exception), and so they could not be put to the defendants for the purpose of admission and/or denial. With regard to production of documents, it was contended that the proper procedure for discovery and inspection had not been followed. On the merits, it was urged that the defendants had very few letters of plaintiff in their possession, which they could admit or deny; then the Court ordered the defendants to produce documents, they possessed.

5. With regard to admission and/or denial of the unsigned copies of the documents, the Court upheld the objection of the defendants-respondents that the documents filed must be certified copies from the records of the other suit before the defendants could be called upon to admit and/or deny them and under the circumstances the Court gave another opportunity to the plaintiff to file authenticated copies of the documents, but it did not finally dispose of the applications pending the filing of the said documents.

6. Mr. Nijhawan has relied upon the provisions of Order 12, Rules 2 and 3-A of the Code in support of his contention and he has urged that the documents, which the opposite party can be called upon to admit and/or deny need not be a certified copy and if the party admits the same, the document will be read in evidence and if the party denies the document the costs will be borne by the opposite party.

7. Order 12, Rule 2 of the Code of Civil Procedure reads as follows:—

"2. Either party may call upon the other party to admit any document saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense." Rule 3-A has been inserted by the amending Act, 66 of 1956 and the same reads as follows:

"3-A. Notwithstanding that no notice to admit documents has been given under Rule 2, the Court may, at any stage of the proceedings before it, of its own motion, call upon any party to admit any document and shall, in such a case, record whether the party admits or refuses or neglects to admit such document". Rule 3 of Order 12 has prescribed a form, in which notice is to be served on the opposite party. The form is No. 9 contained in Appendix C, the material portion of which reads as follows:

"Take notice that the plaintiff (or defendant) in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff) his pleader or agent, at on between the hours of; and the defendant (or the plaintiff) is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said document as are specified to be originals were respectively written, signed, or executed, they purport respectively to have been; to such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit." A perusal of the provision of law shows that notice is to be given to the opposite party or in case provided by Rule 3-A without such notice calling upon it to admit or deny such documents. The penalty provided is that in case of refusal or neglect to admit the document, the cost of proving it are to be borne by the negligent party irrespective of the result of the suit. There is, however, a fallacy in the submission of the learned counsel. The costs that are sought to be saved under the aforesaid provision for admission and/or denial are those which are incurred in proving the document. The costs that a party has to incur in procuring the document on the Court file are not covered by the provisions specified in Rule 2 of Order 12 of the Code, although the same may or may not form the general costs in the suit.

8. In my opinion, the word 'document' occurring in Order 12 and as indicated by the form of notice, has a reference to a proper document produced before the Court, on which the Court can legally act and which can be adduced in evidence. The opposite party cannot be

called upon to take the trouble of admitting and/or denying the documents, which are not proper and which by their very nature cannot be acted upon or be legally adduced in evidence without such admission and/or denial (since the admission or denial is not a matter of routine, but is to be performed with the responsibility of a litigant assisting in the administration of justice and with the penal consequences attached to erroneous refusal to admit.), Mr. Nijhawan, submits that the word 'document' is defined in S. 3 of the Evidence Act in wide terms. It is difficult to appreciate if the definition of document contained in the Evidence Act has any relevance, but I have found that the 'document' is also defined by Section 3 of the General Clauses Act, 10 of 1897, as including 'any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.' This definition of document is more or less the same as given in the Evidence Act, but is rather wider as it is inclusive and in any event the definition as given in the General Clauses Act would apply to the expression "document" occurring in the Code of Civil Procedure and all other statutes unless a contrary intention be expressed.

9. The question that is raised before me is not whether the piece of paper which contained unsigned copy of some letter is or is not a document. It is certainly a document within the expression occurring in the General Clauses Act, but that is not sufficient to clothe the plaintiff with a right to call upon the opposite party to admit and/or deny the same at the peril of costs. As observed earlier, the document in this context, means a proper document on which the Court can legally act and which can legally be adduced in evidence without any admission on the part of the opposite party. Supposing a document requiring stamp and registration is unstamped or unregistered, and cannot be brought on the file, no party is unless the defect is cured bound to admit or deny it, nor document the receipt of which by the Court is prohibited by law be put to the opposite party.

10. Incidentally, the documents in dispute are contained in the file of another suit. Therefore, the documents which are to be adduced in evidence in the present suit must be either primary

evidence or secondary evidence. Primary evidence will be the original documents taken out of the record of that suit and produced here, and the secondary evidence which is permissible in such cases is, in view of Section 65 of the Evidence Act, only a certified copy of the document and the statute provides that no other kind of secondary evidence would be admissible. The receipt of plain unsigned copy of such document is forbidden by law. The Court was, therefore, fully justified in not acting upon the unsigned plain copies of those documents which are on the judicial file of another Court and the plaintiff was, properly asked to produce the relevant certified copies. The plaintiff could also take steps to have the originals produced before the Court in accordance with the prescribed procedure. In any event, only when the documents on which the Court can legally act and which the plaintiff wished to adduce in evidence and the production of which is not forbidden have been produced before the Court, the opposite party can be called upon to admit and/or deny the same and if it refuses or neglects to admit them, then the costs of proving the documents, (as distinguished from costs of procuring or producing the document) will have to be borne in accordance with Order 12, Rule 2 of the Code of Civil Procedure.

11. Mr. Nijhawan has lastly submitted that by giving this interpretation, some words are being added to statute. This submission of the learned counsel is not tenable. In *State of U. P. v. C. Tobit*, (1958) SCR 1275 = (AIR 1958 SC 414) the Supreme Court, was construing the expression 'copy' of the judgment or order under appeal occurring in Section 419 of the Code of Criminal Procedure, as was applicable then. The words in the statute were to the effect "every appeal shall be accompanied by a copy of the judgment or order appealed against". The contention raised before the Court was that the party was entitled to file a plain copy of the judgment, since the expression 'certified' or 'authenticated copy' did not occur in the statute. The Supreme Court repelled the contention and observed that the intention of the provisions was that the copy filed before the Court of appeal must be an authenticated copy under Section 76 of the Act and, therefore, the expression 'copy' meant a certified copy which ipso facto and ex facie assured the appellate Court of its correctness.

12. In this decision, the Supreme Court observed on page 1278 that the rule of law laid down in Maxwell's Interpretation of Statutes, 10th Edition page 52, was that "the words of statute, when there is doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the subject to be attained."

13. Applying the aforesaid rule to the question raised before me, I am of the view that the documents which the party can call upon the opposite party to admit and/or deny must be the proper documents the production of which is by its very nature not forbidden and on which a Court can legally act and which can legally be adduced in evidence. In the instant case, the law prohibits production of any copy except certified copy as secondary evidence of the original and so the petitioner cannot call upon the opposite party to admit or deny any other kind of secondary evidence. Each party must bear the initial cost of procuring the proper document and producing it before the Court and then alone it can call upon the opposite party to admit and/or deny the same and thereby attempt to save the costs of proving the documents. Should the opposite party have some original document in its possession, it is open to a party even to produce its true copy and ask for its admission. However, in a case where the original is not in the possession of either of the parties and the copy produced is neither authenticated nor legally admissible as secondary evidence, the opposite party can, if it objects, not be called upon to admit and/or deny the document which cannot be adduced in evidence. Should a party instead of objecting, consent to admit and admit the document, the Court may be enabled to act upon it. But, this is a special procedure adopted in civil cases in the interests of justice, where consent of the parties cures the irregularities but not illegalities. However, where a party refuses to admit and/or deny any such improper document, which cannot be adduced in evidence, the Court cannot call upon it to do so at the peril of facing the consequences. The application made by the party under O. 12, R. 2 or R. 3-A must, therefore, be dismissed. In the instant case, I do not find

any jurisdictional or legal error in the impugned order and the order calling upon the petitioner to file certified copies of the documents is, in my opinion, legal and valid and does not call for interference. The revision is accordingly dismissed. Costs of the revision will abide by the result of the suit.

Order accordingly.

AIR 1976 DELHI 283

T. V. R. TATACHARI, C. J. AND
M. R. A. ANSARI, J.

M/s. Eklera China Clay Works and others, Petitioners v. M/s. Ashwin & Co. and others, Respondents.

Letters Patent Appeals Nos. 49 and 55 of 1975, D/- 16-12-1975.*

(A) Mineral Concession Rules (1960), R. 54 — Revision — Petitioner challenging two orders rejecting his successive applications for mining lease — Order granting lease to opposite party not questioned — After receipt of comments of opposite parties, petitioner dying — Petition if any how far abates. (See Ibid, R. 13) (Civil P. C. (1908), O. 22, R. 6). (Mines and Minerals (Regulation and Development) Act (1957), S. 30).

Rule 13 deals only with death of an applicant for grant of prospecting licence. Regarding death of an applicant for grant of mining lease or revision petitioner there is no provision. (Para 20)

Order 22, Civil P. C. is applicable only to suits or appeals within the meaning of that Code and therefore does not govern proceedings under the Mines and Minerals (Regulation and Development) Act or Rules thereunder which are a self-contained Code. However the principle underlying Order 22, Civil P. C. being a general one will apply to such proceedings in the absence of any provision of law to the contrary. (Para 21)

Thus when two successive applications of an applicant for mining lease were dismissed the first for being premature and the second because the lease was granted to the opposite party and in the revision against those two orders the petitioner dies after the comments of all the parties have been received, the peti-

* (Against judgment of H. L. Anand, J., in Civil Writ Petn. No. 1087 of 1974, D/- 27-2-1975).

tion abates on his death. The claim to grant of the lease is personal and does not survive on the death of the applicant. It cannot however be said that there is no abatement since his death was after the receipt of the comments of the opposite parties. Neither Order 22, Rule 6, Civil P. C. nor the principle thereunder can be invoked because there is no provision for "hearing" under the Mines and Minerals (Regulation and Development) Act or the Rules as prescribed in Civil P. C. Hearing of the revision by the Central Government cannot therefore be said to be over on the receipt of those comments. It can be said to continue till the Central Government decides to pass an order because till then further comments can be called for or personal hearing may be given. AIR 1972 SC 1324 and AIR 1973 SC 678, Followed; AIR 1953 Raj 169 (FB), AIR 1958 Punj 171, AIR 1963 Punj 206, AIR 1971 Delhi 65 and AIR 1970 SC 1, Distinguished. (Paras 23 and 24)

When in that revision, the order granting the lease to the opposite party has not been challenged but the Central Government sets aside the grant, it cannot be questioned on the ground that the abatement is entire. The rejection of the application of the petitioner and grant of the lease to the opposite party are connected as well as distinct. Under the Mines and Minerals (Regulation and Development) Act and the Rules all applications are to be considered before choosing the grantee. On making the grant necessarily the other applications have to be rejected. Thus the granting and rejecting orders are inter-connected. When the petitioner in revision challenged the order rejecting his application it is implicit that he has sought the setting aside of the granting order. Therefore his challenging only the rejecting order is immaterial. (Para 43)

The two orders are however distinct and operate separately for the respective applicants. When a revision is filed by only one applicant each applicant will be in the position of the petitioner and their claims are separate to be considered as such. Therefore when the petition abates on the death of the petitioner, the rejecting order challenged therein need not be considered. But the claims of the others including the grantee have to be decided. The Central Government has suo motu power of revision under Section 30 of the Mines and Minerals (Regulation and Development) Act and therefore even if the abatement is entire, the Central Gov-

ernment can consider the granting order.
(Paras 44 and 45)

Even if the Central Government in its dismissal order does not expressly state it to be suo motu under that Section 30 since it has such power that order has to be upheld and cannot be struck down as illegal for omission to mention its power. Civil Writ Petn. No. 1087 of 1974, D/- 27-2-1975 (Delhi), Affirmed.

(Para 46)

(B) Mineral Concession Rules (1949), Rule 67 — Availability of areas for regrant — “Notified in Official Gazette at least 30 days in advance” — Meaning — Notification D/- 11-1-1960 announcing date of availability of area as 18-2-1960 published on 21-1-1960 — Corrigendum made on 17-2-1960 changing date of availability to 22-2-1960 — Corrigendum if and how far illegal. (See Ibid, Rr. 33, 20 (18), 68, 62-A) (Mineral Concession Rules (1960), Rule 54). (Letters Patent (Delhi), Clause 10).

Rule 67 has to be read with Rr. 33 and 20 (18) from which it will be clear that date of availability of an area for regrant as mining lease should be stated in the entry in the standard register. The words “thirty days in advance” in the second part of Rule 67 refer to the notification in the Official Gazette and not to the entry in the standard register. They mean 30 days in advance of the date from which the area shall be treated as available.
(Paras 29 and 33)

The two parts of the Rule are distinct and the Rule has to be read with Rule 68 (dealing with premature applications). If the Gazette publication should always be made after the entry in the standard register there will never be premature applications and Rule 68 will be superfluous. An interpretation rendering a provision superfluous should be avoided. Therefore it is clear that it is immaterial whether the entry is made in the standard register before or after the Gazette publication and both will be compliance with Rule 67.
(Para 31)

Thus when notification dated 11-1-1960 was published on 21-1-1960 giving the date of availability of the area as 18-2-1960 and a corrigendum was published on 17-2-1960 modifying the date of availability as 22-2-1960, Rule 67 is fully satisfied.
(Para 33)

Since the notification dated 11-1-1960 was published only on 21-1-1960 the requirement of 30 days between the date of publication and the date of availability of the area is not satisfied. Therefore on

the day of corrigendum dated 17-2-1960 there was an error on the face of the earlier notification requiring to be rectified under Rule 62-A (giving power for such rectification). The corrigendum as such is valid.
(Para 40)

When such question of error on the face of the original notification was not raised either in the revision against dismissal of an application for mining lease or in the writ petition challenging the revision order it cannot be raised in a Letters Patent Appeal. Civil Writ Petn. No. 1087 of 1974, D/- 27-2-1975 (Delhi), Affirmed.
(Para 40)

(C) Letters Patent (Delhi), Cl. 10 — Appeal — Original order dismissing application under Mines and Minerals (Regulation and Development) Act for mining lease held in revision to be not speaking even in the absence of such objection — In writ remand made — If and when illegal. (Constitution of India, Article 226). (Mineral Concession Rules (1960), R. 54).

When in a revision against dismissal of an application for mining lease under Mines and Minerals (Regulation and Development) Act no plea was raised as to whether the dismissal order was not speaking but the revisional authority had decided that point on its own without giving any opportunity to the opposite party, the High Court is justified in not deciding that point itself in a writ petition against the revisional order and in remanding the case to the revisional authority. When the revisional authority wanted to rest its order inter alia on that point, it should have given an opportunity to the opposite party as well as the State Government (which had passed the original dismissal order). The revisional order therefore was in violation of principles of natural justice and was vitiated. A writ could therefore issue. Moreover when a ground in the writ petition was that the revisional authority had no jurisdiction to allow the revision petition since the petition had already abated, a writ could be issued and it cannot be said that there was no ground for interference under Art. 226 of the Constitution. AIR 1964 SC 477, Followed; AIR 1953 Mad 476, AIR 1963 SC 1895, AIR 1967 SC 1606, AIR 1967 Delhi 121 and AIR 1971 SC 862. Referred; Civil Writ Petn. No. 1087 of 1974, D/- 27-2-1975 (Delhi), Affirmed.

(Paras 36, 37 and 39)

(D) Letters Patent (Delhi) Clause 10 — Mineral Concession Rules (1949), Rule 32 (2) — Approval under — Plea of failure to take it — Not raised in revision

against order dismissing application under Mines and Minerals (Regulation and Development) Act and in writ against revisional order — Plea not permissible in Letters Patent Appeal. (Para 38)

Cases Referred: Chronological Paras

AIR 1973 SC 678 = (1973) 3 SCR 169 20
AIR 1972 SC 1324 = (1972) 3 SCR 665 24

AIR 1971 SC 862 = (1970) 3 SCR 40 35

AIR 1971 Delhi 65 22

AIR 1970 SC 1 = (1970) 1 SCR 322 22

AIR 1967 SC 1606 = (1967) 3 SCR 302 35

AIR 1967 Delhi 121 = 1967 Cri LJ 1497 35

AIR 1964 SC 477 = (1964) 5 SCR 64 39

AIR 1963 SC 1895 = 1963 Supp 2 SCR 570 35

AIR 1963 Punj 206 = ILR (1961) 2 Punj 507 22

AIR 1958 Punj 171 = 60 Pun LR 415 22

AIR 1953 Mad 476 = 1953 Cri LJ 917 35

AIR 1953 Raj 169 = 1953 Raj LW 514 (FB) 22

R. M. Mehta, Senior Advocate, S. K. Dholakia, Subash Cberoi, for Petitioners; Arun H. Mehta, I. N. Shroff, Senior Advocates, Mrs. K. Mehta, R. P. Kapur for Respondent No. 1; Mrs. Urmila Kapur, Mrs. Urmila Sirur for Respondent No. 3; S. S. Dalal for Respondent No. 2; Nemo for Respondent No. 4.

T. V. R. TATACHARI, C. J.:— These two Letters Patent Appeals Nos. 49 and 55 of 1975 are cross-appeals. Both have been filed against the Judgment of a learned Single Judge of this Court, H. L. Anand J. dated February 27, 1975, in Civil Writ Petition No. 1087 of 1974, whereby the learned single Judge allowed the Writ Petition, quashed an order of the Central Government, dated August 3, 1974, which was impugned in the Writ Petition, and remanded the matter to the Central Government with a direction that the Central Government should decide the matter afresh in the light of the judgment after giving an opportunity to the petitioner in the Writ Petition and to such other person or persons as the Central Government may consider necessary of making a representation.

2. The appellants in Letters Patent Appeal No. 49 of 1975 are (1) M/s. Eklara China Clay Works through its partner, Shri Krishna Lal Ishwarlal Patel, (2) Shantilal Ishwarlal Patel, (3) Amratlal Ishwarlal Patel, and (4) Gordhanbhai Ishwarlal Patel. The respondents in the

aforesaid Letters Patent Appeal are (1) M/s. Ashwin & Co., a registered firm having its office at Bombay, (2) The State of Gujarat through the Secretary to the Government of Gujarat, (3) The Union of India through the Secretary to the Government of India, Ministry of Steel and Mines, and (4) Krishnalal Ishwarlal Patel. The aforesaid appellants were respondents 3, 5, 6 and 7 in the writ petition. Respondent 1 in the appeal was the petitioner in the writ petition and respondents 2, 3 and 4 were respondents 1, 2 and 4 in the writ petition.

3. Letters Patent Appeal No. 55 of 1975 was filed by M/s. Ashwin and Co., the petitioner in the writ petition, against the judgment of the learned single Judge in so far as the same was against it. The respondents in the said appeal are the same as the respondents in the writ petition.

4. For a proper appreciation of the contentions of the parties in the two appeals, it is necessary to state the various facts which led to the filing of the writ petition by M/s. Ashwin & Co. One Ishwarlal Jesinghbhai Patel was working in the registered firm M/s. Eklara China Clay Works situated at Ahmedabad. On April 16, 1937, Idar State gave a mining lease of certain lands in village Eklara inclusive of survey numbers 626, 629 and river-bed to Ishwarlal Jesinghbhai Patel for a period of twenty one years. The said State gave a mining lease of certain lands in village Arsodia on May 22, 1939, to M/s. Somnath B. Bhatt, & Co. (hereinafter referred to as the S. B. B. & Co.). We are, however, not concerned with the said lands in village Arsodia.

In 1941, Idar State cancelled the lease granted to Ishwarlal Jesinghbhai Patel on the ground that the mining operations were not being properly carried out. On a representation by Ishwarlal Jesinghbhai Patel, Idar State by Order No. 659, dated February 16, 1941, allowed him to continue the operations, but restricting the lease to an area known as "A" to "M" which did not include survey Nos. 626 and 629 and river-bed. On March 3, 1941, the Mining Engineer, Idar, prepared a map showing the area A to M granted to Ishwarlal Jesinghbhai Patel, and the remaining area which was taken away from the earlier lease of Ishwarlal Jesinghbhai Patel was granted to S. B. B. and Co.

5. On June 10, 1948, Idar State was merged with Bombay State. The

Government of Bombay informed Ishwarlal Jesinghbhai Patel that the lease of the area A to M granted to him by Idar State was not binding on it, and on December 30, 1950, the Government of Bombay cancelled the said lease. The Government of Bombay, however, changed its mind subsequently and wrote to Ishwarlal Jesinghbhai Patel on April 7, 1951, proposing to grant him a revised fresh lease under certain terms and conditions under the Mineral Concession Rules, 1949, and suggesting that he might apply for a fresh lease, if he so desired. Ishwarlal Jesinghbhai Patel, however, applied on July 27, 1951, for a fresh mining lease for all the lands in Eklara Village including the area granted to S. B. B. & Co. But, on April 15, 1955, the Government of Bombay granted a mining lease to Ishwarlal Jesinghbhai Patel in respect of only a smaller area in Eklara village excluding the area granted to S. B. B. & Co. in that village. Ishwarlal Jesinghbhai Patel did not like the same and executed no lease deed. As the lease was to be executed within six months from April 15, 1955, and no such lease was executed, the grant was to be deemed to have been revoked under Rule 28-A of the Mineral Concession Rules, 1949.

6. S. B. B. & Co. had been doing mining business under the name of M/s. Sabar Valley Koaline and Starch Industries (Ltd.) Co. In 1952, the said company was ordered to be wound up, and its assets were purchased on July 1, 1955, by M/s. Ashwin & Co., a registered firm having its office at Bombay. On September 30, 1959, the lease given to M/s. S. B. B. & Co. expired, and on January 11, 1960, the Government of Bombay issued a notification (which was published in the Gazette on January 18, 1960) under Rule 67 of the Mineral Concession Rules, 1949, regarding the lands of S. B. B. and Co. which included survey numbers 626 and 629 and river-bed, declaring that the said lands became available for re-grant with effect from February 18, 1960. Thereupon, Ishwarlal Jesinghbhai Patel applied for a lease of the said lands on January 15, 1960. An entry to the effect that the lands were available for re-grant was made in the standard register on February 1, 1960. Subsequently, on February 15, 1960, the Government of Bombay issued a corrigendum correcting the notification so as to read that the lands were available for re-grant with effect from February 22, 1960, instead of February 18, 1960. An entry as per the

corrigendum was made in the standard register sometime between February 18, 1960, and February 20, 1960.

7. On February 22, 1960, several parties, including Ishwarlal Jesinghbhai Patel and M/s. Ashwin & Co. applied for mining lease in respect of the said lands. Reports were sent by the Collector to the State Government regarding the various applications. On March 16, 1960, the Government of Bombay passed an order rejecting the application of Ishwarlal Jesinghbhai Patel, dated January 15, 1960, as being premature according to the provision in Rule 68 of the Mineral Concession Rules, 1949, inasmuch as the entry had not been made in the standard register by that date, but had been made subsequently on February 1, 1960. On April 8, 1960, the Government passed an order granting a mining lease to M/s. Ashwin and Co. in respect of the said lands in pursuance of its application filed on February 22, 1960. The Government sent a letter to Ishwarlal Jesinghbhai Patel on April 18, 1960, informing him about the rejection of his application filed on February 22, 1960, on the ground that the lease had been granted to another party.

8. Ishwarlal Jesinghbhai Patel thereupon filed a writ petition, Spl. C. A. No. 542 of 1960, in the High Court of Bombay on April 22, 1960, challenging the aforesaid orders of the Government of Bombay. Subsequently, on the bifurcation of Bombay and Gujarat, the said writ petition was transferred to the High Court of Gujarat and was re-numbered as Spl. C. A. No. 273 of 1960. On January 9, 1963, the High Court of Gujarat dismissed the writ petition, but granted leave to appeal to the Supreme Court on June 30, 1964. The appeal was numbered as C. A. No. 583 of 1965 in the Supreme Court and the same was, however, dismissed on March 19, 1968, on the ground that Ishwarlal Jesinghbhai Patel had not pursued the remedy of revision to the Central Government available to him under the Mines and Minerals (Regulation and Development) Act, 1957 and the Mineral Concession Rules, 1960.

9. Ishwarlal Jesinghbhai Patel, thereupon filed a review application on May 13, 1968, before the Central Government under Rule 57 of the Mineral Concession Rules, 1949; but the said application was returned by the Central Government on the ground that it was not in the prescribed form. Ishwarlal Jesinghbhai Patel then filed a revision application before the Central Government in the pres-

cribed form on June 18, 1968, under R. 54 of the Mineral Concession Rules, 1960. This revision was directed against the two orders of the Government of Bombay, dated March 16, 1960, and April 18, 1960, whereby his two applications for mining lease had been rejected. The Central Government sent notices to all concerned parties including M/s. Ashwin and Co. and the Government of Gujarat for their comments on the revision application of Ishwarlal Jesinghbhai Patel. The notice to M/s. Ashwin and Co. was sent on June 28, 1968, and it submitted its comments on October 4, 1968. It is common ground that the comments of other parties also were received sometime in 1968.

10. While the matter was thus pending, Ishwarlal Jesinghbhai Patel died on January 28, 1972. His legal representatives (1) Shantilal Ishwarlal Patel, (2) Amratlal Ishwarlal Patel, (3) Gordhanbhai Ishwarlal Patel and (4) Niranjanlal Krishnalal Patel, applied on March 28, 1972, for the grant of a certificate of approval under Rule 4 of the Mineral Concession Rules, 1960, and the certificate was granted to them on April 1, 1972, by the Government of Gujarat. The said legal representatives then wrote a letter to the Central Government on April 21, 1972, making an inquiry about the revision application filed by Ishwarlal Jesinghbhai Patel, and informing the Government that their father had expired, and that they were the legal heirs of the deceased. It may be stated here that the aforesaid legal representatives Nos. 1 to 3 are the sons of the deceased Ishwarlal Jesinghbhai Patel, and legal representative No. 4 is the son of another son of Ishwarlal Jesinghbhai Patel, Krishnalal Ishwarlal Patel, who is stated to have not been given any right or interest in the estate of late Shri Ishwarlal Jesinghbhai Patel under a will said to have been executed by Ishwarlal Jesinghbhai Patel. They also requested in that letter that the decision in the revision may be communicated in their names. They wrote another letter on March 24, 1973, restricting their claim for mining lease to Survey Nos. 626, 629 and river-bed for the reason that their factory was dependent upon the raw material from those areas.

11. Then on August 3, 1974, the Central Government passed an order on the revision application of Ishwarlal Jesinghbhai Patel holding (1) that R. 67 of the Mineral Concession Rules, 1949,

had not been properly followed by the State Government as the notification regarding the area being available for regrant was not made thirty days in advance; (2) that the State Government did not consider the matter taking into consideration the matters specified in Section 11 (3) of the 1957 Act; and (3) that the order of the State Government, dated April 18, 1960, did not indicate the reasons which prompted the State Government to pass that order. In view of those infirmities, the Central Government set aside the order, dated April 18, 1960, as well as the order, dated April 8, 1960, granting lease to M/s. Ashwin & Co. only in so far as it pertained to Survey Nos. 626, 629 and river-bed, and directed the State Government to reconsider the matter in accordance with law and pass a speaking order on merits. It added that while doing so the State Government should take into consideration all the relevant material put forth by the contesting applicants including M/s. Ashwin & Co. as well as the petitioner in the revision with regard to their preferential claims for grant of the lease.

12. Thereupon, M/s. Ashwin and Co. filed Writ Petition No. 1087 of 1974 in this High Court out of which the present Letters Patent Appeals have arisen. The Writ Petition came up for hearing before H. L. Anand, J. Three contentions were urged before him on behalf of the petitioner, M/s. Ashwin & Co.

13. The first contention was that the claim of Ishwarlal Jesinghbhai Patel for the grant of a mining lease was based on his personal qualifications, experience and resources, that it did not constitute an enforceable or heritable right and merely held out a prospect of an eventual grant of a lease in his favour, that his claim as well as his application for a mining lease, therefore, died with him, and his legal representatives could not be impleaded either on the principle embodied in Order 22 of the Code of Civil Procedure or under the Act of 1957 or the Rules of 1960, that the said submission derived support from the fact that no provision has been made in the Act or in the rules with regard to substitution of legal representatives in the place of a deceased applicant, that the application of Ishwarlal Jesinghbhai Patel for the grant of a mining lease as well as the proceeding before the Central Government in the revision petition which was only a continuation of the original pro-

ceeding stood abated, and that there was thus no subsisting proceeding before the Central Government in which it could exercise its authority or jurisdiction and pass the impugned order.

14. In answer thereto, it was contended on behalf of the Union of India and the other respondents in the Writ Petition that neither the application nor the revision petition abated on the death of Ishwarlal Jesinghbhai Patel, that his legal representatives could be impleaded under Rule 13 of the Mineral Concession Rules, 1960, as amended in February, 1971, that the substitution of the legal representatives had been made by the State Government on the grant of a certificate of approval in their favour, that on the said substitution, the legal representatives had to be deemed to have made the revision application, that in any case since Ishwar Lal Jesinghbhai Patel died after the proceedings in the revision had been concluded, but before the decision could be made, the abatement, if any, was saved by Rule 6 of Order 22 of the Code of Civil Procedure or by the principle analogous thereof, and that, in any event, the Central Government, which was already seized of the matter on the filing of the revision petition, was entitled to exercise suo motu powers of revision under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957, and even if it was assumed that in making the impugned order such suo motu power had not specifically been invoked by the Central Government, it would be futile to quash the order on that ground because the same order could be validly made again by the Central Government expressly invoking its jurisdiction on its own motion under Section 30 of the aforesaid Act.

15. The second contention was that Rule 67 of the Mineral Concession Rules, 1949, which were then applicable, had been fully, or at least substantially, complied with in granting the licence in favour of M/s. Ashwin & Co., and that the proceedings leading to the grant by the State Government were not vitiated for non-compliance with the provisions of the said Rule as has been held by the Central Government in the impugned order.

16. The third contention was that the impugned order of the Central Government, in so far as it was based on the ground that the order of the State Government sanctioning the grant of the lease in favour of M/s. Ashwin & Co. was not a

speaking order, was not justifiable because, even though it was a fact that the State Government did not give any reason in its order, the petitioner, M/s. Ashwin & Co., had not been given by the Central Government an opportunity of being heard with reference to the said contention, and if it had been so given, it would have been open to it to justify the order of the State Government either on its own terms or with reference to the two reports of the Collector and the comments of the State Government on the revision application of Ishwarlal Jesinghbhai Patel.

17. The learned Judge, by his judgment, dated February 27, 1975, held—

(1) that on the death of Ishwarlal Jesinghbhai Patel, his claim or application for the grant of a mining lease as well as his revision application in so far as it sought for the grant of a mining lease to him died with him and abated, and the legal representatives of the deceased could not be substituted for him or be allowed to press the claim for the grant of a mining lease in the place of the deceased;

(2) that there was, however, no abatement of the revision application in so far as it sought for the setting aside of the order of the State Government granting the lease in favour of M/s. Ashwin and Co., and the Central Government was, therefore, competent to deal with that order;

(3) that the requirement of Rule 67 of the Mineral Concession Rules, 1949, had been fully satisfied and the proceedings were not vitiated; and

(4) that the contention that the order of the State Government was not a speaking order had not been raised before the Central Government by any of the parties at any stage of the proceedings, and none of the parties before the Central Government had, therefore, an opportunity to make their submissions in that behalf, for the consideration of the Central Government, that M/s. Ashwin and Co. was, therefore, fully justified in its grievance that the Central Government had arrived at a conclusion on a point which was never raised before it and in respect of which M/s. Ashwin & Co. had no opportunity to make its submissions before the Central Government, and that if it had been given an opportunity, it would perhaps have been able to satisfy the Central Government either that the order of the State Government did not

AIR 1976 GUJARAT 145°

S. H. SHETH J.

Tulsidas Narsidas, Petitioner v. Special Land Acquisition Officer, Ahmedabad, Opponent.

Civil Revn. Appln. No. 700 of 1973, D/- 16-12-1974°°.

(A) Civil P. C. (1908), Section 151 — Inherent power, if it can be exercised to get over bar of limitation.

The Court cannot exercise its inherent power under Section 151 of Civil P. C. in order to get over the bar of limitation laid down by proviso to Section 43 (1) of Bombay Court-fees Act for application for refund of Court-fees. Inherent power of a Court cannot be exercised to defeat a legislation or to get over the bar of limitation. AIR 1943 Bom 50 and AIR 1955 Bom 332 Distinguished.

(Para 9)

Cases Referred: Chronological Paras
AIR 1955 Bom 332 = 57 Bom LR 394 8
AIR 1943 Bom 50 = 44 Bom LR 912 7

M. F. Thakkar, for Petitioner; R. K. Abichandani, Asst. Govt. Pleader, for Opponent.

ORDER:— This Revision Application is directed against the order of Taxing Officer recorded on 27th February 1973 under the Bombay Court-fees Act, 1959. The facts of the case, briefly stated, are as under. The appellant filed in this Court First Appeal No. 97 of 1965 against the award of compensation made by the City Civil Court at Ahmedabad in respect of the land acquired under the Land Acquisition Act. That appeal was admitted. Thereafter the appeal came up for final hearing on 9th November 1970. On that day it was withdrawn by the appellant.

2. Thereafter the appellant made an application to this Court on 22nd November 1972 under Section 43 of the Bombay Court-fees Act, 1959 for refund of half the Court-fees. The Taxing Officer rejected that application on the ground that it was barred by time.

3. It is that order of the Taxing Officer which is challenged by the appellant in this Civil Revision Application.

4. Section 43 of the Bombay Court-fees Act provides for cases in which a part of the Court-fee can be refunded to the

°(Only Portions approved for reporting by High Court are reported here).

°°(To set aside the order of Taxing Officer, H. C. of Gujarat, Ahmedabad in F. A. No. 97 of 1965 D/- 27-2-1973).

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appellant. Proviso to sub-section (1) of Section 43 states as follows:—

“Provided that no such fee shall be repaid if the amount of fee paid does not exceed five rupees or the claim for repayment is not made within one year from the date on which the suit, appeal or cross objection was settled by agreement.”

5. In view of the language used in the proviso to sub-section (1) of Sec. 43 it is quite clear that application for refund of Court-fees under sub-section (1) of Section 43 has got to be made within one year from the date on which the appeal was settled or brought to a termination without any effective hearing. In the instant case, the appeal was withdrawn on 9th November 1970 and the application for refund was made on 22nd November 1972. It was clearly time-barred. The Taxing Officer was, therefore, justified in rejecting that application.

6. Mr. Thakkar has invited my attention to two decisions of the High Court of Bombay and asked me to exercise my inherent power to refund the Court-fees to the appellant.

7. In Ahmed Ebrahim Vorajee v. The Government of the Province of Bombay, 44 Bom LR 912 = (AIR 1943 Bom 50) it has been held that the Court has the inherent power under Section 151 of the Civil Procedure Code to order refund of Court-fee paid by a party by mistake or inadvertence. It was a case in which the applicant had applied for a Succession Certificate in respect of certain shares and securities after payment of the requisite Court-fee. The Succession Certificate was granted to him. It was later on found that some of the shares were of a Company which had its Head Office in England and that in England the Succession Certificate granted by the Court in India could not operate. The applicant, in that case, therefore, prayed for refund of Court-fees on the ground that he had paid it in respect of a Succession Certificate which could not operate outside the territories of India. The High Court of Bombay under those circumstances held that if a party has paid by mistake or inadvertence Court-fee the Court had inherent power to refund it under Section 151 of the Code of Civil Procedure.

8. In Sawaldas Madhavdas v. Arath Cotton Mills Ltd. 57 Bom LR 394 = (AIR 1955 Bom 332) the facts of the case were that when the plaintiff filed the suit the Court-fees Act of 1870 was in force and he, therefore, paid in respect of the claim made by him ad valorem Court-fee under the Court-fees Act, 1870. After the suit was decided against him, he filed an appeal against

the decree. At that time a new scale of Court-fees was prescribed by the Legislature. On the Memorandum of appeal he, therefore, paid Court-fee according to the new scale. It was later on found that even on the Memorandum of appeal he was liable to pay Court-fee only under the old scale. He, therefore, applied to the Court of appeal for refund of the excess of Court-fee paid by him. It was held by the High Court of Bombay under the aforesaid circumstances that the plaintiff-appellant in that case was entitled to refund of the excess Court-fee paid by him and that the Court had inherent jurisdiction to direct refund thereof to him.

9. These two decisions do not help the appellant in the present case. What the appellant asks me to do is to exercise my inherent power under Section 151 in order to get over the bar of limitation laid down by proviso to sub-section (1) of Section 43. Inherent power of a Court cannot be exercised to defeat a legislation or to get over the bar of limitation. In the instant case, if I exercise the inherent power under Section 151 I shall be defeating the bar of limitation which the legislature has enacted in the proviso to sub-section (1) of Section 43. To accede to the argument raised by Mr. Thakkar is to grossly abuse the inherent power of the Court. I am, therefore, unable to uphold the argument which he has raised before me. In this view of the matter, I see no reason to interfere with the order made by the Taxing Officer. I, therefore, uphold it.

x x x x x x
Rule discharged.

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B. J. Divan C. J. AND T. U. MEHTA JJ.

Keshavlal Pragji and others, Petitioners v. The Gujarat Revenue Tribunal and another, Respondents.

Special Civil Appln. No. 1366 of 1970
D/- 27-11-1974.*

(A) Bombay Tenancy and Agricultural Lands Act (67 of 1948), Ss. 74 (1) (a), 70 (b) and 4 — Finding of Mamlatdar under Section 70 (b) that a person is a tenant — Appeal against order is competent under Section 74 (1) (a). (1970) 11 Guj LR 821, Overruled.

Though Section 74 of the Act does not specifically provide for an appeal against the order passed by the Mamlatdar, under Section 70 (b) of the Act, the said appeal is by necessary implication

*Against judgment of Bakshi J. in S. C. A. No. 93 of 1962, D/- 29-4-1964.

provided for in Section 74 (1) (a) which refers to an order under Sec. 4 of the Act. Section 4 of the Act, deals with the cases wherein persons are deemed to be tenants. (1970) 11 Guj LR 821 Overruled. Sp. C. A. No. 93 of 1962 D/- 29-4-1964 (Guj) Affirmed. (Para 8)

Section 4 of the Act covers the cases of a tenant, a permanent tenant or a protected tenant inasmuch as it also covers the cases of deemed tenants. If this is so, whenever a Mamlatdar gives his decision with regard to a particular person that he is a tenant, he virtually does so under the provisions of Sec. 4. Even otherwise if a person is found to be deemed tenant under the provisions of Sec. 4 he is covered by the definition of the word "tenant" given in Cl. (18) of Sec. 2. Therefore whenever a Mamlatdar holds that a particular person is a deemed tenant under Sec. 4 there is implicit in that decision a finding that he is a tenant. If that be so, every decision of the Mamlatdar on the question whether a particular person is a tenant or not, is the decision which is covered by Sec. 4 and is as such appealable under Sec. 74 (1) (a) of the Act. (Para 8)

(B) Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 76-A — Appeal filed before Prant Officer — Prant Officer can be held to have heard it under revisional power.

Section 76-A invests the Collector with revisional powers and these powers can be invoked either suo motu or on a reference made by the State Government. Thus when the Prant Officer, heard the appeal preferred by the respondent in this case, he can be presumed to have heard it, if not under any appellate powers, then under the revisional powers vested in him by Sec. 76-A of the Act. (Para 11)

(C) Constitution of India, Art. 226 — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Section 76 — Tribunal interfering with findings of lower courts — Interference with order of Tribunal in writ jurisdiction.

The writ jurisdiction of the High Court for challenging the decision given by the Tribunal, can be successfully invoked by the petitioners only if it is shown that the Tribunal has committed any error which is apparent on the record. If the Tribunal is found to have interfered with the findings recorded by the lower authorities on the ground that they have committed error in appreciating important evidence and has there-

after put its own appreciation of the evidence recorded in the case, it cannot be said that the Tribunal has committed any error apparent on the record unless it is shown that the conclusions arrived at by the Tribunal are either perverse or had absolutely no justification from the recorded evidence. (Para 14)

Held, in the circumstances of the case the Mamlatdar and the Collector were both in error in appreciating important evidence and therefore the Tribunal was right in interfering with their decisions. (Para 13)

Cases Referred: Chronological Paras
(1970) 11 Guj LR 821 2, 5

Miss V. P. Shah for N. R. Oza, for Petitioners; B. C. Vakil, (for No. 2) and S. B. Vakil (for No. 3.) for Respondents.

T. U. MEHTA, J.:— This writ petition is directed against the order passed by the Gujarat Revenue Tribunal in revision application No. TEN 746/69 holding that the petitioners herein are not the tenants of the disputed fields which are situated in Dehen village of Olpad taluka in Surat district. The proceedings before the Tribunal arose out of the application filed by deceased Keshavlal Pragji, husband of petitioner No. 1 and father of petitioners Nos. 2 to 7 under Sec. 70 (b) of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as "the Act"), to obtain a decision that he is the tenant of the disputed lands. The Mamlatdar, Olpad, held that the petitioners are the tenants and this decision of the Mamlatdar was confirmed by the Prant Officer, Olpad in appeal preferred before him by the respondent herein. The Tribunal reversed the decision of the Prant Officer while acting under its revisional jurisdiction under Sec. 76 of the Act.

2. This matter initially came up for hearing before our learned brother S. H. Sheth J. before whom the petitioners raised the contention that the proceedings before the Tribunal were vitiated as no appeal against the findings of the Mamlatdar under Sec. 70 (b) that a particular person is a tenant, is provided by law and hence the appeal preferred by the respondent before the Prant Officer was incompetent. The contention was that if appeal before the Prant Officer was incompetent, even the revision application before the Tribunal against the order of the Prant Officer was

equally incompetent. For the proposition that the Act does not provide any appeal against the decision of the Mamlatdar under Sec. 70 (b) of the Act, the learned advocate of the petitioners relied upon the decision of our learned brother J. B. Mehta, J. in *Sureshchandra Dhirajlal Store v. K. K. Shrotriya*, (1970) 11 Guj LR 821. In this case Mehta J. has held that the legislature has failed to provide any appeal against adjudication as to whether a person was a tenant or a permanent tenant and when the Legislature keeps a lacuna, it is not open to the court to fill up the lacuna by any presumed intention of the Legislature and, therefore, the Deputy Collector has no appellate jurisdiction over the decision of the Mamlatdar that a particular person is a tenant or not under Sec. 74 (1) of the Act. The other side i. e. the respondent put reliance on the contrary decision given by Bakshi J. in *Spl. C. A. No. 93 of 1962* decided on 29-4-1964 (Guj) wherein the learned Judge has held that even though Section 74 of the Act does not specifically provide for an appeal against the order passed by the Mamlatdar, under Sec. 70 (b) of the Act, the said appeal is by necessary implication provided for in Sec. 74 (1) (a) which refers to an order under Sec. 4 of the Act. Section 4 of the Act, as will be presently seen, deals with the cases wherein persons are deemed to be tenants. In view of this conflict between the two decisions of this court, Sheth J. has referred this matter to a larger bench, and this is how this matter comes before us for decision.

3. Before touching the controversial points involved in this writ petition, it would be necessary to refer to some of the relevant provisions of the Act. Section 70 of the Act prescribes several duties of the Mamlatdar. Cl. (b) of this Section, as it stands at present, is in the following terms:

"(b) to decide whether a person is or was a tenant or protected tenant or a permanent tenant."

Section 74 of the Act provides for appeals and enumerates certain orders of the Mamlatdar against which an appeal can be filed to the Collector. The enumerated list of the orders which are covered by this section does not specifically refer to the order passed by the Mamlatdar under Sec. 70 (b) of the Act, but cl. (a) of Sec. 74 (1) is found to be in the following terms:

"(a) an order under Sec. 4."

It is thus apparent that an appeal against the order of Mamlatdar is specifically provided in Section 74, if the said order is "an order under Sec. 4." It is, therefore, necessary to refer to the provisions of Sec. 4. This section, as already stated above, refers to the persons who are deemed to be tenants, but since, in our opinion, this section is comprehensive enough to cover even the real tenancies, it would be necessary to quote the exact terms in which this section is enacted. It is as under:—

"A person lawfully cultivating any land belonging to another person, shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not:—

(a) a member of the owner's family; or

(b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or

(c) a mortgagee in possession.

Explanation (1):—

A person shall not be deemed to be a tenant under this section if such person has been on an application made by the owner of the land as provided under Sec. 2-A of the Bombay Tenancy Act, 1939, declared by a competent authority not to be a tenant.

Explanation II:—

Where any land is cultivated by a widow, a minor or a person who is subject to physical or mental disability or a serving member of the armed forces through a tenant then notwithstanding anything contained in Explanation I to cl. (6) of Sec. 2, such tenant shall be deemed to be a tenant within the meaning of this section."

Section 2 of the Act provides for several definitions in different clauses. Cl. (10-A) defines "permanent tenant" as under:

"(10-A) "permanent tenant" means a person—

(a) who immediately before the commencement of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955 (hereinafter called "the Amending Act, 1955").

(i) holds land as mulgenidar or mirasdar; or

(ii) by custom, agreement, or the decree or order of a court holds the land on lease permanently, or

(b) the commencement or duration of whose tenancy cannot satisfactorily be proved by reason of antiquity; and includes a tenant whose name or the name of whose predecessor-in-title has been entered in the record of rights or in any public record or in any other revenue record as a permanent tenant immediately before the amendment of the Amending Act, 1955."

Clause (14) defines "protected tenant" as under:

"14. "protected tenant" means a person who is recognised to be a protected tenant under Sec. 4-A."

Clause (15) defines "tenant" as under:

"18. "tenant" means a person who holds land on lease and includes:

(a) a person who is deemed to be a tenant under Section 4;

(b) a person who is a protected tenant; and

(c) a person who is a permanent tenant;

(d) a person who, after the surrender of his tenancy in respect of any land at any time after the appointed day but before the specified date has continued, or is deemed to have continued, to remain in actual possession, with or without the consent of the landlord, of such land till the specified date; and word "landlord" shall be construed accordingly."

4. From reference to the provisions of Sec. 74 it is apparent that, as this section stood at the relevant time, it did not refer specifically to the orders passed by the Mamlatdar under Sec. 70 (b) of the Act. However, it should be mentioned here that by Gujarat Act 19 of 1973, this section was amended and following clause was added to it.

"(ta) an order passed under (b) of Sec. 70."

It appears that this amendment was introduced in sec. 74 as a result of the decision given by J. B. Mehta, J. that, an order passed by the Mamlatdar holding that a particular person is a tenant or not, is not appealable under Sec. 74. However, the fact remains that at the relevant time this amendment was not there and therefore, the question which arises to be determined is whether in absence of this amendment it can be said that the decision of the Mamlatdar given on the question whether a particular person is a tenant or not, was appealable or not.

5. If a reference is made to the decision given by our learned brother

J. B. Mehta, J. in the above referred case of Sureshchandra, (1970-11 Guj LR 821) it will be found that he has recorded his conclusions on this point in the following words:

"In the present case there was no dispute about the respondents being tenants. The dispute was as to the nature of their tenancy whether they were permanent tenants or protected tenants. The Legislature has failed to provide any appeal against such adjudication as to whether a person was a permanent tenant or a protected tenant, which has been made under Sec. 70 (b) by the Mamlatdar. It is of course a lacuna as the Legislature would never have failed to provide an appeal on such a substantial adjudication. Where however, the Legislature keeps a lacuna, it is not open to this Court to fill up the lacuna on any assumed intention of the Legislature." It is found that the above referred judgment of Bakshi J. was not brought to the notice of Mehta, J. when he gave this decision:

6. But the question which thus arises to be considered is whether by not making a specific and pointed reference to the orders passed by the Mamlatdar under Sec. 70 (b) of the Act in the list of appealable orders contemplated by Sec. 71 (1) of the Act, the Legislature has kept a lacuna or whether the Legislature did so because the same was not found necessary in view of the fact that appeal against "an order under Sec. 4" of the Act was already provided. This brings us to the construction of the provisions contained in Sec. 4 of the Act.

7. While construing the provisions of Sec. 4 of the Act, one important fact which is to be borne in mind is that if the language of this section is closely read, it will be found that it is comprehensive enough to cover the cases of even those tenants who hold land on contractual lease hold rights. This becomes evident by reference to the opening words of the section which confer the status of a tenant on "a person lawfully cultivating any land belonging to another person." The section is designed to cover all persons "lawfully cultivating" the land irrespective of the question whether such persons are lawfully cultivating under a contract of lease or under a licence, custom, grant or otherwise. The primary requirement of this section is that a person should be "lawfully" cultivating the land in question.

It is true that the definition of the expressions "permanent tenant," "protected tenant" and "tenant" are separately provided by the Act in clauses (10-A), (14) and (18) of Sec. 2. But it appears that to make the protection granted by the Act complete, the Legislature has made the position of lawful cultivation doubly sure by enacting Sec. 4 in a more comprehensive manner which would cover all different modes of lawful cultivation. It cannot be gainsaid that a contractual tenant or a permanent tenant or a protected tenant is a person lawfully cultivating land in question and, therefore, the cases of even such tenants would be covered by Section 4. Of course, Sec. 4 speaks of "deemed" tenants but that is because of the fact that it also covers cases of those who are not actual tenants by virtue of contractual rights but who are required to be treated as tenants on account of the fact that they are lawfully cultivating the disputed land. This, however, does not mean that the operation of Sec. 4 is confined only to those persons who are required to be protected by the deeming fiction. The result, therefore, is that Sec. 4 cannot be confined in its operation only to those who are required to be protected by invoking the deeming fiction of the section. In our opinion, therefore, Sec. 4 is covering the cases of actual tenants, who are on the land by virtue of their contractual rights or otherwise as well as those who are required to be protected on account of their lawful cultivation by virtue of the deeming fiction contemplated by this section.

8. On further scrutiny of Section 4 it is found that it contemplates that the land in question should not be cultivated personally by the owner. This is another requirement of Sec. 4 and this requirement shows that the land must be in possession of the person who claims to be cultivating it lawfully. So far as this requirement is concerned, it is not found to be inconsistent with the spirit of the Act because if a further reference is made to the provisions contained in Sec. 14 of the Act, it will be found that under the provisions of that section, notwithstanding any law, agreement or usage or the decree or order of a court, the tenancy of any land shall not be determined unless the tenant has failed to cultivate the land personally. Therefore, even in case of a tenant who claims contractual lease hold rights over the land his tenancy is liable to be terminated and

put to an end if he is found to have failed to cultivate that land personally. Under the circumstances, personal cultivation of the land even by a contractual tenant is found to be an essence of the protection of his tenancy. This being the position, the requirement of Sec. 4 that the land in question should not be cultivated personally by the owner is found to be quite consistent with the spirit of the Act. Therefore we are of the opinion, that Sec. 4 covers the cases of a tenant, a permanent tenant or a protected tenant inasmuch as it also covers the cases of deemed tenants. If this is so, whenever a Mamlatdar gives his decision with regard to a particular person that he is a tenant, he virtually does so under the provisions of Sec. 4. Even otherwise if a person is found to be a deemed tenant under the provisions of Sec. 4 he is covered by the definition of the word "tenant" given in cl. (18) of Sec. 2. Therefore, whenever a Mamlatdar holds that a particular person is a deemed tenant under Sec. 4 there is implicit in that decision a finding that he is a tenant. If that be so, we are of the opinion that every decision of the Mamlatdar on the question whether a particular person is a tenant or not, is the decision which is covered by Sec. 4 and is as such appealable under Sec. 74 (1) (a) of the Act.

9. In this connection, it should be noted that though Section 74 (1) (a) refers to "an order under Sec. 4", Sec. 4 itself does not speak of an order nor does Sec. 70, which refers to the duties and functions of Mamlatdar, provide for any decision of the Mamlatdar under Sec. 4. This is probably because of the reason that the Legislature has enacted Sec. 4 in such a comprehensive manner that it would cover the cases of deemed tenants as well as the actual tenants.

10. Even otherwise, if we look to the real intention of the Legislature, the question which arises to be considered is, can it be said that the Legislature wanted to protect the cases of deemed tenants more than the cases wherein the Mamlatdar finds that a particular person is either a tenant or a permanent tenant or a protected tenant? Reference to the definition of the expression "permanent tenant" shows that it involves a good deal of evidence as regards customs, or agreement. In many cases the evidence as regards custom and agreement would be complicated. The question, therefore, is could the Legislature have ever intended

that such complicated questions which are decided by the Mamlatdar should be kept beyond the challenge of appeal, while the other questions which relate to deemed tenancy, should be made subject to appeal? We cannot attribute any such intention to the Legislature, and since we find that the Legislature has intentionally not provided a specific clause with regard to the appeal against the order passed under Sec. 70 (b) because of the comprehensive nature of Sec. 4. We do not find any substance in Miss Shah's contention that appeal preferred by the respondent before the Prant Officer was incompetent.

11. Now so far as the facts of this case are concerned, even presuming that the appeal which the respondent preferred before the Prant Officer was incompetent, we find that it makes no difference. Here we should make a reference to Sec. 76-A of the Act which says that where no appeal has been filed within the period provided for it, the Collector may, suo motu or on a reference made in this behalf by the State Government, at any time, call for the record of any inquiry or the proceedings of any Mamlatdar or Tribunal for the purpose of satisfying himself as to the legality or propriety of any order passed by and as to the regularity of the proceedings of, such Mamlatdar or Tribunal, as the case may be, and pass such order thereon as he deems fit. This provision of Sec. 76-A thus invests the Collector with revisional powers and these powers can be invoked either suo motu or on a reference made by the State Government. Thus when the Prant Officer, Olpad heard the appeal preferred by the respondent in this case, he can be presumed to have heard it, if not under any appellate powers, then under the revisional powers vested in him by Sec. 76-A of the Act.

12. The Tribunal while invoking its revisional jurisdiction under Sec. 76 is not fettered in its revisional powers because Sec. 76 provides that notwithstanding anything contained in the Bom. Revenue Tribunal Act, 1957, an application for revision may be made to the Tribunal against "any order" of Collector, on the grounds stated in the section. It is thus clear that the revisional jurisdiction of the Tribunal can be invoked against any order passed by the Collector. Therefore, it does not matter whether the Collector has passed a particular order under his appellate powers or un-

der his revisional powers. The Tribunal can exercise its revisional jurisdiction, provided any of the grounds mentioned in cls (a), (b) and (c) of Sec. 76 (1) are satisfied.

13. Under this situation, the real question which requires to be determined is whether the Tribunal was justified in interfering with the order passed by the Collector under any of the grounds mentioned in cls. (a), (b) and (c) of Sec. 76 (1). These grounds are as under:

"(a) that the order of the Collector was contrary to law,

(b) that the Collector failed to determine some material issue of law, or

(c) that there was a substantial defect in following the procedure provided by this Act or that there has been failure to take evidence or error in appreciating important evidence which has resulted in the miscarriage of justice."

Here, if a reference is made to the decision of the Tribunal, it becomes clear that the Tribunal found that the Mamlatdar as well as the Collector were both in error in appreciating important evidence. The Tribunal has elaborately discussed this particular point in its judgment and, we are satisfied that the Tribunal has rightly interfered with the decisions of the Mamlatdar and the Collector on the ground that both of them were in error in appreciating important evidence. This brings us to the merits of the case.

14. Before discussing the merits of the case, it should be mentioned that the writ jurisdiction of this court for challenging the decision given by the Tribunal, can be successfully invoked by the petitioners only if it is shown that the Tribunal has committed any error which is apparent on the record. If the Tribunal is found to have interfered with the findings recorded by the lower authorities on the ground that they have committed error in appreciating important evidence and has thereafter put its own appreciation of the evidence recorded in the case it cannot be said that the Tribunal has committed any error apparent on the record unless it is shown that the conclusions arrived at by the Tribunal are either perverse or had absolutely no justification from the recorded evidence.

15. The facts of the case show that the deceased Keshavbhai Pragji claimed tenancy rights over 9 fields bearing survey Nos. 210, 213, 238/2, 422, 523/2, 747/2, 750, 568/3 and 568/1. It does not

appear to be in dispute that before the year 1950 he was cultivating these lands as a tenant. The case of the respondent-landlord, however, is that in the year 1950 he surrendered his tenancy rights over these lands. The Tribunal has elaborately discussed this question of surrender in the year 1950 and has found that the mutation entry No. 1601 D/5-6-1960 which was produced before the lower authorities, was not properly appreciated by them. This mutation entry clearly reveals that out of these 9 survey numbers, which are mentioned above Keshavbhai Pragji surrendered his tenancy rights over six survey numbers which are 213, 238/2, 422, 523/2, 747/2 and 750. This entry specifically quotes Mamlatdar's case number and states that the lands were surrendered by Keshavbhai Pragji to Kalyanji, the then landlord who was thereafter shown as the occupant. In para 10 of its judgment, the Tribunal has shown how both the lower authorities have gone wrong in appreciating this entry. We find ourselves completely in agreement with the appreciation made by the Tribunal so far as this entry is concerned. Apart from these entries, the Tribunal has considered some previous statements made by Keshavbhai Pragji before the Revenue authorities. In these statements Keshavbhai Pragji has made clear admission of the fact that he was not holding any tenancy rights with regard to the disputed survey numbers and, therefore, his name should not be shown as a tenant with regard to these survey numbers. The Tribunal has discussed this aspect of the matter in para 16 of its judgment and after having done this, the Tribunal summarises its findings in para 19 of its judgment as under:

"Suffice it to say that both the authorities below have grossly erred in correctly and properly appreciating the evidence on record. The case of the applicant is proved firstly by the proposition about surrender elaborately discussed above. It is secondly proved by the two statements made by the alleged tenant before the Talati in 1955-56 that he was not a tenant of the lands. On the top of it, there come two more statements of the alleged tenant made in 1962 before the Agricultural Lands Tribunal in two separate inquiries under Sec. 320 relating to other lands held by him on lease from other landlords. In those inquiries he was required to mention all his leased holdings and he mentioned it to be 2 acres 7

gunthas only. He never mentioned all these lands as held by him on lease."

We have gone through copies of the statements which the Tribunal has referred to in the above excerpts and we are satisfied that the findings recorded by the Tribunal about the evidentiary value of the admissions made by Keshavbhai Pragji in these statements are unassailable.

16. In these circumstances, we find nothing in the judgment of the Tribunal which would induce us to believe either that there is any apparent error in that judgment or that, that judgment is perverse. The result, therefore, is that so far as these six survey numbers which are mentioned above, are concerned, there is satisfactory evidence to show that Keshavbhai Pragji had surrendered his tenancy rights over them in the year 1950. It is not the case of the petitioners that after this surrender new tenancy rights were created with regard to these lands in favour of Keshavbhai Pragji. Therefore, so far as these six survey numbers are concerned, we find no reason to interfere with the conclusions which are arrived at by the Tribunal.

17. However, the Tribunal is not found to have recorded any findings with regard to the remaining three survey numbers which are S. Nos. 210, 568/3 and 568/1. Throughout its judgment, the Tribunal has not recorded any finding with regard to these three survey numbers. The surrender which is found to have been made by Keshavbhai Pragji in the year 1950 is obviously with reference to the remaining six survey numbers. In these circumstances, we are of the opinion that there is an apparent error committed by the Tribunal in not recording any finding whatever on the question whether Keshavbhai Pragji has ever surrendered his tenancy rights, if any, over S. Nos. 210, 568/3 and 568/1. We are, therefore, of the opinion that for this limited purpose, the matter should go back before the Tribunal. The Tribunal shall after hearing the parties, record its findings whether with regard to S. Nos. 210, 568/3 and 568/1 Keshavbhai Pragji had any tenancy rights, and if so, whether he had surrendered the same prior to 1950 or at any subsequent time. After appreciating the evidence, the Tribunal shall record its findings whether Keshavbhai Pragji can be declared to be a tenant with regard to these three sur-

vay numbers under the application made by him. The rule issued in this matter is accordingly made absolute to the above stated limited extent without any order as to costs.

Order accordingly.

AIR 1976 GUJARAT 152

A. D. DESAI, J.

Kanji Hirjibhai Gondalia, Petitioner v. Jivaraj Dharamshi, Respondent.

Civil Revn. Appln. No. 574 of 1973, D/- 20-9-1974.*

(A) Civil P. C. (1903), S. 2 (2) — "Conclusively determines the rights of the parties" — Suit for possession and for arrears of rent — Finding only on issue of possession whether amounts to decree.

In a composite suit — being a suit for possession and for arrears of rent — the suit for possession was held as not competent and maintainable and the suit was directed to proceed only with regard to the claim for monetary relief.

Held, there was final adjudication on the issue of possession and this determination amounts to a decree. There is obvious difference between a simple finding and a finding which determines the suit. If a decree is not drawn up, it does not mean that the order of the court by which rights of the parties are finally adjudicated upon is not a decree. There can be more than one final decree in a suit where two or more causes of action are joined together. AIR 1931 Mad 471 and (1947) 2 Mad LJ 523 and AIR 1961 SC 832 and AIR 1957 Bom 59 and AIR 1946 Sind 58, Relied on. (Para 2)

Cases Referred: Chronological Paras
AIR 1961 SC 832 = (1961) 2 SCR 918 2
AIR 1957 Bom 59 = 59 Bom LR 74 2
(1947) 2 Mad LJ 523 = 1947 Mad WN 732 2

AIR 1946 Sind 58 = ILR (1945) Karachi 313 2

AIR 1931 Mad 471 = ILR 54 Mad 337 2

H. K. Gandhi, for Petitioner; Shyam H. Bhatt, for Respondent.

ORDER:— This revision application raises a short but interesting question. The pertinent facts are that the suit residential premises situated on Hathikhana Road, Rajkot belong to Rajkot Halari

*To Set aside order of K. K. Vasavada Jt. Civil J. (J. Divn.) Rajkot in Civil Suit No. 152 of 1970 D/- 19-1-1973.

AT/BT/A266/76/MBR

Vanand Community. The opponent is a tenant of the suit premises. Kanji Hirjibhai Gondaliya, as a manager of Halari Vanand Community filed Civil Suit No. 152 of 1970 in the Court of the Joint Civil Judge Junior Division, Rajkot for possession of the suit premises as well arrears of rent. The suit for possession was filed on the ground that the tenant was in arrears of rent. The tenant contested the suit and raised a plea that the notice for eviction was not valid. The learned trial Judge raised issue No. 1 which is as under:

"Whether the suit notice is valid and legal?"

The learned trial Judge tried this issue as preliminary issue since in his opinion a part of the suit could be disposed of by a finding on that issue. The learned trial Judge came to the conclusion that the notice of eviction was not legal. The learned Judge has observed in his judgment that before passing the final order he may clarify that the suit for possession could not proceed because of the defective notice, but there could be no hitch to the plaintiff's claim for rent. The learned trial Judge passed the following order:

"The suit notice (Exh. 4/1) is held to be not valid and legal and as such, the suit for recovery of possession of the suit premises is held incompetent and unmaintainable. The suit is, therefore, ordered to proceed only in respect of the claim for the monetary reliefs." Being aggrieved by the aforesaid judgment and order the petitioner has preferred Appeal No. 88 of 1972 in the District Court, Rajkot. However in that appeal a certified copy of decree of the Court has not been filed because the decree has not been drawn up in pursuance of the aforesaid judgment and order of the trial Court. According to the petitioner the appeal is likely to fail on the technical ground of its maintainability in absence of a decree. The petitioner, therefore, made an application to the trial Court to draw up a decree in pursuance of the judgment given by the learned trial Judge on the preliminary issue. The learned trial Judge by his order dated January 19, 1973, dismissed the application for drawing up a decree observing that the suit was not yet finally decided and only point so far decided was that the plaintiff's suit for possession was not

maintainable in law and the suit for other reliefs was yet to proceed on merits. It is this order of the learned trial Judge which is sought to be challenged in this revision application.

2. Now the question is whether the order of the Court on the preliminary issue amounts to a decree. Section 2 (2) of the Civil Procedure Code defines what a decree is. According to the said definition a decree is a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be, either preliminary or final. Now the learned trial Judge has held that the notice of eviction was defective and the plaintiff was not entitled to a relief for recovery of possession of the suit premises because of the defective notice. The learned Judge has held that the suit for eviction was not competent and maintainable. He further directed that the suit should proceed only with respect to the claim for monetary relief. Now so far the relief for possession is concerned there is a substantive decision or determination. The decision of the learned trial Judge on the point is clearly a final adjudication between the parties in respect of the suit for possession. The order of the learned trial Judge conclusively determines the rights of the parties on the question of eviction. The determination for the relief of possession is final and conclusive so far as the trial Court is concerned. The question whether the adjudication is a decree or not has to be determined with reference to the definition of decree given in Section 2 (2) of the Civil Procedure Code. The trial Court has undoubtedly adjudicated on the substantive rights of the parties with regard to the controversy for recovery of possession of the suit premises. The order of the trial Judge is clearly indicative of the fact that he has finally determined the issue relating to possession and there is formal expression of the said adjudication. It is true that the learned trial Judge has taken the view that only finding on the issue has been given by him and he has passed only a formal order and, therefore, no decree need be drawn as there had been no final disposal of the suit. There is obvious difference between a simple finding and a finding which terminates the suit. To determine the exact nature and extent of a

finding reference to the definition of decree given in S. 2 (2) of the Civil Procedure Code is essential. Merely because the trial Court heads his finding as an order is not determinative of its nature nor his conclusion to that effect is conclusive. The question whether an order passed by a Court amounts to a decree or not has to be determined with reference to the definition of decree given in Section 2 (2) of the Civil Procedure Code and the test to be applied is whether there is a formal expression of adjudication, which as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit. In the aforesaid view of mine I am supported by the decisions of the Madras High Court in *V. Adinarayan Chetti v. Kopparam Narasinha Chetti*, ILR 54 Mad 337 = (AIR 1931 Mad 471) and *Kasi v. Rm. A. R. M. V. Ramanathan Chettiar* (1947) 2 Mad LJ 523. Whether an order passed by a Court is a decree or not cannot depend on the drawing up of a decree by the Court as formal drawing up of a decree is the duty of the Court; vide *Jagat Dhish Bhargava v. Jawahar Lal Bhargava*, AIR 1961 SC 832 and *Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari*, AIR 1957 Bom 59. If a Court does not draw up a decree it cannot be said that the order of the Court by which rights of the parties are finally adjudicated upon is not a decree. There can be more than one final decree in a suit where two or more causes of action are joined together. There is no provision in the Civil Procedure Code which prevents the Court from passing two final decrees, if the circumstances of the case so require, vide *Fatmabai W/o Rasim v. Abubaker Tarmahmed*, AIR 1946 Sind 58. The present suit is a composite suit—being a suit for possession and a suit for arrears of rent; and the issue between the parties with regard to possession of the suit premises is finally decided by the trial Court. Thus there is final adjudication on the issue of possession and this determination amounts to a decree within the meaning of Section 2 (2) of the Civil Procedure Code. The impugned order of the learned trial Judge refusing to draw up a decree, therefore, is erroneous and the same is set aside. It is directed that the trial Court should draw up a decree in pursuance of the judgment and decision passed by it with respect to the claim for possession of the suit premises.

3. The result is the rule issued in this revision application is made absolute with no order as to costs.

Application allowed.

AIR 1976 GUJARAT 154*

J. B. MEHTA AND T. U. MEHTA JJ.

Keshavlal Laxmandas Patel, Appellant v. Narsinhbhai Kalidas Patel and another, Respondents.

First Appeal No. 793 of 1969 D/- 17-8-1974**

(A) Specific Relief Act (1963), Ss. 34, 38 —Contract to sell by A to B — A fraudulently getting the property mutated in C's favour — Suit by B for declaration of right under his contract and for injunction preventing A and C from breach of the obligation under the contract — B is not entitled to the declaration but is entitled to the injunction.

A agreed to sell certain property to B and subsequently got the property mutated in the name of C on the alleged partition which was found to be untrue. On the allegation that A and C were attempting to sell the properties to third persons, B filed a suit for a declaration of his right under the Contract and for an injunction against A and C from alienating the properties in favour of third persons.

Held:— In the case of an agreement to sell, the parties to the agreement are not entitled to legal character nor can it be said that a person, who has agreed to purchase has got 'any right to any property' for the simple reason that a mere agreement to sell, does not create any interest or any right in the property agreed to be purchased. Under these circumstances, it is not a case in which the plaintiff can obtain any declaratory decree under Section 34 of the Act.

(Para 9)

But B will be entitled to the relief of perpetual injunction claimed. A person who has agreed to sell his immovable property is more or less in the position of a trustee for the person to whom he has agreed to sell the property. F. A. 181 of 1964 decided on 14-7-1971 (Guj). Rel. on. (Para 10)

*(Only portions approved for reporting by High Court are reported here.)

**Against order of P. P. Patel, Jt. Civil J. (Sr. Divn) Baroda in S. C. S. No. 30 of 1968.

Even a person who has agreed to sell an immovable property stands in a sort of fiduciary relationship with the person who has agreed to purchase and, therefore, the former cannot commit any breach of his obligation and if he attempts to do so, he can be prevented from doing so by a suitable injunction under Section 38 of the Specific Relief Act.

(Para 10)

Cases Referred: Chronological Paras
(1971) F. A. No. 181 of 1964 D/- 14-7-1971 (Guj) 10

AIR 1967 SC 978 = (1967) 1 SCR 873 10

1916 AC 266 = 85 LJ PC 87 10

(1904) 1 Ch. D. 464 = 73 LJ Ch. 279 10

M. H. Chhatrapati, for Appellant;
Mrs. Kiran V. Desai, for Respondents
Nos. 1 and 2.

T. U. MEHTA, J.:— This Appeal arises out of the suit filed by the appellant-plaintiff for obtaining a decree for declaration that the agreement to sell the suit lands entered into between him and the respondent No. 1 on 9-1-1965 is still subsisting. The plaintiff has also claimed a permanent injunction restraining the defendants from transferring the suit lands to any other person. The said suit was filed in the court of the Civil Judge, S. D., Baroda, which was registered as Special Civil Suit No. 30/68. The learned trial Judge having dismissed the suit, the plaintiff has filed this First Appeal.

2. Short facts of the case are that the suit is with reference to agricultural land bearing S. No. 3/1 situated in the sim land of village Nagarwada near Baroda. On 9th January, 1965 the suit land was standing in the name of the defendant No. 1 in the revenue record. On that day the plaintiff and the defendant No. 1 entered into an agreement by virtue of which the defendant No. 1 agreed to sell the suit land to the plaintiff at the rate of Re. 0.75 per sq. ft. and also gave (received?) the earnest money of Rs. 150/-. At that time the suit land was cultivated by one Dahyabhai Ranchhodbhai as a tenant. The agreement to sell, therefore, stipulated that the document of sale should be executed and the remaining amount of consideration should be paid up by the plaintiff after vacant possession of the suit land was obtained by the defendant No. 1 from the tenant Dahyabhai Ranchhodbhai. This agreement is found at Ex. 28 in the record of the case.

3. Several months thereafter i. e. on 2nd December, 1965 the defendant

No. 1 got the land mutated to the name of the defendant No. 2, who is related to him as his mother. The mutation entry which is found at Ex. 39, shows that the land was eventually mutated to the name of the defendant No. 2 as it was alleged that the land was partitioned and had gone to the share of the defendant No. 2 as early as 17-5-1949. In proof of the said partition some document also seems to have been produced before the revenue authorities for the purpose of mutation. The case of the plaintiff is that he knew nothing about this mutation.

4. The plaintiff has alleged that thereafter tenancy case No. 58/67 was filed on 5-1-67 against the tenant Dahyabhai Ranchhodbhai, who is said to have agreed to surrender his tenancy rights voluntarily. The record of the case possesses at Ex. 30 the order of the Tenancy Mamlatdar dt. 30th June, 1967. The Tenancy Mamlatdar made a further order in the said case giving over the possession of the suit land to the defendant No. 2. This is evident from Ex. 31. The mutation entries found at Ex. 27 further reveal that possession from the tenant was ordered to be taken over on 14-8-67. Thereafter by his order dt. 22nd February, 1968 the Collector, Baroda, took, under Section 76-A of the Bombay Tenancy and Agricultural Lands Act, 1948, further proceedings in suo motu revision with a view to satisfy himself as to the regularity and the propriety of the above said orders passed by the Tenancy Mamlatdar. These proceedings before the Collector were pending when this suit was filed on 30th March, 1968.

5. The plaintiff's case is that since the defendants are trying to sell away the suit land at higher price in breach of the terms of the Banakhat, it has been necessary to file this suit for declaration that the Banakhat is still subsisting.

6. The suit has been resisted by the defendants on various grounds. The learned Judge framed several issues and kept some of these issues as preliminary issues. He gave finding on these preliminary issues in favour of the plaintiff but on issues which were on the merits of the case, he came to the conclusion that the suit land never belonged to defendant No. 1 and, therefore, the defendant No. 1 had no right, title or interest to execute this disputed Banakhat. In view of these findings on merits, the learned Judge dismissed the suit.

7 & 8. * * *

9. We thus find that the plaintiff is successful so far as the merits of the case are concerned. The question which, however, arises to be considered is whether the plaintiff can get any relief either of declaration or of injunction under any of the provisions of the Specific Relief Act. So far as the relief of declaration is concerned, the same is contemplated by Sec. 34 of the Specific Relief Act, which is in the following terms:

"34. Discretion of court as to declaration of status or right — Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so:

Explanation:— A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be trustee." Thus, this section postulates that only that person can avail of the remedy of obtaining a decree for declaration who is entitled to "any legal character" or who has any right as to any property." In case of an agreement to sell, parties to the agreement are not entitled to a "legal character" nor can it be said that a person, who has agreed to purchase has got "any right to any property" for the simple reason that a mere agreement to sell, does not create any interest or any right in the property agreed to be purchased. Under these circumstances, it is not a case in which the plaintiff can obtain any declaratory decree under Sec. 34 of the Act.

10. So far as the relief as to injunction is concerned, we would be guided by the provisions contained in Section 38, which is in the following terms:—"38 Perpetual injunction when granted:—

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication:

(2) When any such obligation arises from contract, the court shall be guided

by rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's rights to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:—

(a) Where the defendant is trustee of the property for the plaintiff;

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) Where the invasion is such that the compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings."

It is undoubtedly true that by entering into an agreement to sell the disputed property, the defendant No. 1 has incurred an obligation and from the facts of the case it can be said that he has committed a breach of the obligation which flows from the agreement to sell. Breach of such an obligation can be remedied by giving a perpetual injunction to the person committing the breach. Sub-sec. (2) of Sec. 38 says that when any such obligation arises from contract, the court shall be guided by rules and provisions contained in Chapter II of the Specific Relief Act. If a reference is made to Chapter II, it will be found that it refers to the cases in which specific performance of contracts is enforceable. These provisions further show that so far as the immoveable properties are concerned, specific performance would generally be a rule. Under the circumstances, if we are to be guided by the rules and provisions contained in Chapter II of the Specific Relief Act, it would follow that so far as the immoveable properties are concerned, the real remedy available to the party who has agreed to purchase a particular immoveable property is to obtain specific performance thereof. The question is why the court should not prevent the breach of an obligation to sell any immoveable property. We find that a person, who has agreed to sell his immoveable property is more or less in the position of a trustee for the person to whom he has agreed to sell the property. This particular point has been considered at length by a division Bench of this Court in F. A. 181/64 decided on July 14, 1971 (Guj) wherein my learned brother speaking for the Bench has made the

following observations which are very pertinent to the facts of the present case:

"The learned Advocate General vehemently argued that the position of such a purchaser who had agreed to this type of covenant was not that of a trustee or a person who had any obligation to maintain the machinery in working order so that it can be returned in the same state. The purchaser became the complete owner until the property was reconveyed by the legally executed reconveyance. Therefore, in such a context, looking to the absolute ownership of the defendants the "new machinery" must take in whatever was spent by the defendants on the machinery by way of renewal, whether by way of repairs, putting in spare parts or by way of replacement of worn out parts or by way of addition. This contention of the learned Advocate General is wholly misconceived. In *Plews v. Samuel*, 1904 (1) Ch. D. 464, Kekewich J. in terms considered the position of such a vendor in possession qua the person who had taken agreement for purchasing the property in question and the completion and purchase was delayed without any fault on the part of the purchaser so that the vendor who was in possession was in a sense a trustee and he was not entitled to treat the asset as his own so long as he had an obligation which can be specifically performed by reason of the contract which he had entered into with the purchaser. If he wilfully damaged or injured the property he was liable to the purchaser; more than that, he was liable if he did not take reasonable care. If, however, the contract was not specifically performed notwithstanding the fact that during the subsistence of the contract, the vendor was a trustee for the purchaser, the relation was altogether discharged and nothing could be said against the vendor as to neglect or even misfeasance. If, however, a judgment for specific performance was obtained, his liability remained as a trustee. Therefore, he was a trustee in a modified sense, not while he continued to remain in possession on his own right but from the time fixed for completion of sale when the purchaser was entitled to get specific performance. If, therefore, the vendor was a trustee in this modified sense, although not a full trustee, he held a fiduciary position and he owed a duty to the purchaser. There is clearly a case of conflict between interest and duty and where there is such a conflict in the case of a person occupying the position of a trustee, the settled

legal position is that the duty must prevail and so the Court would insist on the duty being performed. Therefore, Kekewich J. held that the duty prevailing, the vendors must be held to have received the rents for the purchaser to whom they belonged and while they were in possession, after the duty fixed for completion of the sale for no fault of the purchaser and they could not set up their own interest."

After observing as above, my learned brother has referred to the Privy Council decision in *Central Trust and Safe Deposit Company v. Snider*, 1916 A. C. 266 at p. 272 and ultimately to the decision given by the Supreme Court in *Soni Lalji Jetha v. Kalidas*, AIR 1967 SC 978 at page 981, wherein their Lordships of the Supreme Court have pointed out that a contract to sell an immoveable property creates an obligation which is recognised by Section 3 of the Specific Relief Act, 1877 and Section 91 of the Indian Trusts Act, 1882. The Supreme Court has further observed, after pointing out to these provisions of law, that the principle embodied in Sec. 91 of the Indian Trusts Act lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. It was contended before the division Bench, to distinguish the above said observations of the Supreme Court, that these observations are true so far as the transferee is concerned. But this contention was repelled by my learned brother observing as under:

"This contention of the learned Advocate General proceeded on a complete misconception because their Lordships have in terms laid down that even though a contract of sale does not create an interest in the property, such a covenant runs with the land in the sense that every transferee, without value or with notice would be bound by such a covenant. The obligation is one which is enforceable within the meaning of Sec. 3 of the Specific Relief Act, by creating a duty enforceable by law on the vendor. Sec. 91 of the Trust Act also creates a trust which can be enforced against any person with notice of this covenant by making the covenant run with the land. The fact that a transferee with notice

even could be asked to join in the conveyance and specific performance can be ordered against him as well shows that it is binding and enforceable not only against the covenantor but even subsequent transferee with notice. Both the covenantor as well as a transferee without value or with notice must hold the property in trust to the extent that it is necessary to give specific performance of the contract. That is why, illustration (g) of Sec. 3 of Specific Relief Act, in terms provides that the transferee is a trustee only within the meaning of the Act by emphasising the fact that the trusteeship is not in the full sense but in the modified sense in so far as it is necessary to enforce the contractual obligation which runs with the land." It is thus evident that even a person who has agreed to sell an immoveable property stands in a sort of fiduciary relationship with the person who has agreed to purchase and, therefore, the former cannot commit any breach of his obligation and if he does so, he can be prevented from doing so by a suitable injunction under Sec. 38 of the Specific Relief Act.

11. We therefore find that though the plaintiff in this case is not entitled to any decree for declaration he is found entitled to a decree for permanent injunction restraining the defendants from selling or transferring the land to any other person in breach of the agreement to sell which is found at Ex. 28. The plaintiff's suit succeeds and a decree for permanent injunction in terms stated above is ordered to be granted, in his favour. This appeal, therefore succeeds. It is further ordered that the plaintiff shall be entitled to the cost in this suit throughout, from the defendants.

Appeal allowed.

**AIR 1976 GUJARAT 158
SPECIAL BENCH**

**B. J. DIWAN, C. J., T. U. MEHTA AND
B. K. MEHTA, JJ.**

Laxmikant and another, Applicants
v. Collector & Asstt. Superintendent of
Stamps, Ahmedabad, Opponents.

Stamp Ref. Nos. 1 and 2 of 1971, D/-
16-12-1975.

**(A) Bombay Stamp Act (60 of 1958)
Section 2 (t) Sch. I, Arts. 4, 55 (A) (ii),
52 (b) — Person throwing movable pro-**

HT/HT/C452/76/DHZ

**erty in common hotch-potch —
Article applicable.**

Where a person executes a document by which he throws his movable property in the family hotch-potch and converts it from a separate property into a joint family property the document is not covered by Art. 55 (A) (ii) or by Art. 52 (b) but is covered by Art. 4. When the property belonging to the individual coparcener is thrown in the common hotch-potch, there is no "distribution" for the simple reason that coparcener throwing property continues to remain the joint owner of the property. The person distributing property does not remain the owner thereof and creates ownership in favour of some other persons. The disposition evidenced by the document is not covered even by cl. (ii) of Sec. 2 (t). It is obviously not covered by Cl. (iii). The document does not amount to a "settlement", and neither Art. 55 nor Art. 25 of the First Schedule of the Stamp Act is applicable. Release postulates that the claim is renounced in favour of a person, who has got some right in the property. Release also connotes that the person releasing his right does not retain any ownership right over it. Retention of joint ownership, and the fact that the other members of the family had, previous to the throwing of the property in the joint stock of the family, no right in the property, conclusively shows that the transaction does not amount even to a release as contemplated by Art. 52. The document is covered by Art. 4.

(Paras 7,8,9,10)

**Cases Referred: Chronological Paras
AIR 1970 SC 1722 = (1970) 76 ITR 675 6**

P. T. Acharya, for Applicants; J. R. Nanavati, Asst. P. P. with H. V. Chhatrapati of M/s. B. K. & G. for Opponents.

T. U. MEHTA, J.:— In both of these References the question involved is as to what is the proper Article of the First Schedule of the Bombay Stamp Act, 1958 applicable to the case wherein a person throws his moveable property in the family hotch-potch and converts it from a separate property into a joint family property.

2. The point involved in both the References is the same and, therefore, we shall refer only to the facts relating to Reference No. 1/71. The facts of this Reference are that one Laxmikant alias Arvindbhai Chandulal Parikh, possessed the cash amount of Rs. 20,000/-. He threw this amount in the Common stock

of the family consisting of himself, his wife and three minor sons by making a declaration in writing as found at Ann. 'B'. This declaration was made in a document bearing a stamp of Rs. 3/-. When it was presented for registration, the Collector and Assistant Superintendent of Stamps, Gujarat State found that it was chargeable with stamp duty of Rs. 800/- under Art. 55 (A) (ii) of the 1st Schedule of the Bombay Stamp Act 1958, (which is hereinafter referred to as "the Act"), and therefore, was chargeable under Art. 25 (a) of that Schedule as a conveyance. He therefore found that there was a deficit of stamp duty of Rs. 797/-. Under the circumstances, he made an order under Sec. 39 (b) of the Act, requiring the stamp duty of Rs. 797/- together with the penalty of like amount. He thus passed an order of recovery of the total amount of Rs. 1594/-, from the defaulter Laxmikant alias Arvindbhai Chandulal Parikh. The matter was thereafter taken to the Chief Controlling Revenue Authority, Gujarat State, who by his order D/- 11-11-1965 confirmed the view taken by the Collector. Thereafter a writ application was filed before this court in which the Chief Controlling Revenue Authority was directed by this court to make a Reference to this court under Sec. 54 (1) of the Act. Accordingly the present Reference is made and the following question is referred to us:

"Which is the proper article under which the document (Ann. B) dt. December 22, 1964 is chargeable with stamp duty under the Bombay Stamp Act, 1958. Article 55 (A) (ii) read with Article 25 (a)/Article 52 (b) read with Sec. 6 of Bombay Stamp Act, 1958 or Article 4 as claimed by the applicant or any other Article."

3. Article 55 of the First Schedule, under which the document in question is sought to be charged, speaks of a "settlement." Cl. (1) thereof speaks of the instrument by which the settlement is made for a religious or charitable purpose. For this Reference, we are not concerned with this clause. Cl. (ii) speaks of other cases and provides that the duty chargeable would be the same as leviable on a conveyance under cl. (a) or (b), as the case may be, of article 25, for a consideration equal to the amount or value of the property settled. Thus, if the case falls under cl. (ii) of Art. 55 (A), then the duty is to be charged as if the document in question is a conveyance and that charge should be made as provided

either in cl. (a) or (b) of Article 25. It is, therefore, necessary to see what the Article 25 provides. Art. 25 (a) provides for a conveyance other than a conveyance specified in cl. (b) not being a transfer charged or exempted under Article No. 59 and cl. (b) contemplates a conveyance not being a transfer charged or exempted under Article No. 59, so far as it relates to immoveable property situate within an urban area. This case is not covered by Art. 59 and, therefore, it is not necessary to refer to that article. The charge which is to be made on conveyance falling either in cl. (a) or (b) of Art. 25 is ad valorem and, according to the table given thereunder.

4. The alternative plea of the Revenue is that if it is found that the document in question does not fall within Article 55 of the First Schedule as a settlement, it should be treated as a release falling under Article 52. It is, therefore, necessary to mention what Article 52 provides. This article provides for a release, that is to say, any instrument (not being such a release as is provided for by Sec. 24) whereby a person renounces a claim upon another person or against any specified property. Therefore, we have to consider in the alternative, whether the document, which is presented for registration, amounts to 'release' within the meaning of this Article 52.

5. We shall first take up for our consideration the question whether the document in question can be treated as a "settlement" within the meaning of Art. 55. The word "settlement" is defined in cl. (t) of Sec. 2 of the Act. This definition is as under:

"(t) 'settlement' means any non-testamentary disposition in writing of moveable or immoveable property made,

(i) in consideration of marriage,

(ii) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependant on him, or

(iii) for any religious or charitable purpose, and includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing any instrument recording whether by way of declaration of trust or otherwise, the terms of any such disposition."

6. This definition of the word "settlement" shows that the document in

question must be found to be a disposition. The word "disposition" has been construed by Supreme Court in *Goli Eswariah v. Commr. of Gift Tax*, A. P. (1970) 76 ITR 675 = (AIR 1970 SC 1722). The question which arose in that case was whether the unilateral declaration of a Hindu coparcener, whereby he throws his self-acquired property into the common stock of joint family property, amounts to a transfer so as to attract the provisions of the Gift-tax Act, 1958. The Supreme Court considered the relevant provisions of the Gift-tax Act. The expression "transfer of property" is defined by Sec. 2 (xxiv) of that Act as meaning "any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property." The definition further proceed to include other transactions, with which we are not considered in this reference. But the above general definition of the expression "transfer of property" which is given in Section 2 (xxiv) of the Gift-tax Act, shows that the word "disposition" is used therein in conjunction with other transactions namely, "conveyance, assignments, settlement, delivery, payment or other alienation of property" suggesting a bilateral transaction. The Supreme Court, held that the word "disposition" is not a term of law and has no precise meaning. The Supreme Court therefore gathered this meaning in the context in which it is used and found that in the context in which this word is used, in Sec. 2 (xxiv), it cannot mean "to dispose of." It further held that since this word is used along with other words indicating bilateral transactions it should be held as not referring to any unilateral act of declaration.

7. Now so far as the definition of "settlement" as given by Sec. 2 (t) of the Stamp Act is concerned, it is found that the word "disposition" is not used in context of any other bilateral transactions. Therefore, there is some scope for the argument that the word "disposition" as used in Sec. 2 (t) should be given its natural meaning. But even if it is believed that the word is used in its natural dictionary meaning, the question which still remains to be considered is whether it is a "disposition" simpliciter which is contemplated by Sec. 2 (t) of the Act. We have already quoted the whole definition of the word "settlement" as given in Sec. 2 (t). That definition shows that "disposition" should be for any of the three purposes mentioned in cls. (i), (ii)

and (iii). Cl. (i) says that the disposition should be in consideration of marriage, cl. (ii) says that the disposition should be for the purpose of distributing property of the settler among his family or those for whom he desires to provide or for the purpose of providing for some person dependant on him and cl. (iii) says that disposition should be for a religious or charitable purpose. Therefore, unless the disposition evidenced by the document Ann. B falls within any of these three clauses, it cannot be said that it amounts to "a settlement" as defined by cl. (t) of Sec. 2 of the Act. The disposition evidenced by the document Ann. B is obviously not in consideration of marriage and it can also not be said that it is for the purpose of distribution of property among the family members or those for whom the executant wanted to provide for. When the property belonging to the individual coparcener is thrown in the common hotchpotch, there is no distribution for the simple reason that coparcener throwing property continues to remain the joint owner of the property. The word "distribution" connotes some thing quite different from the joint ownership of the property. The person distributing property does not remain the owner thereof and creates ownership in favour of some other persons. Under these circumstances, we find that the disposition evidenced by the document Ann. B, is not covered even by cl. (ii) of Sec. 2 (t) of the Act. It is obviously not covered by cl. (iii). That "disposition" simpliciter cannot amount to "settlement" is even otherwise clear because if the word "disposition" is used in its wider sense, then even the wasting a property or destroying a property, may amount to disposition, but such wastage or destruction of the property cannot be considered as a "settlement" within the meaning of cl. (t) of Sec. 2. We therefore, conclude that the document found at Ann. B does not amount to a "settlement", and if it does not amount to "settlement" neither Art. 55 nor Art. 25 of the First Schedule of the Stamp Act is applicable to the facts of the case.

8. Next contention, which is to be considered is the alternative contention of the revenue that the document falls within the Art. 52 which contemplates the transactions by which release is made. But here is no scope for holding that the document amounts to a release because, release postulates that the claim

fault, it must be implied *ex debito justitiae* that the party so prejudiced is entitled to apply for restoration of the proceedings. There are several instances where the party may, for no fault of his own and for reasons beyond his control, be unable to be present at the time when his case is called on for hearing. (Para 5)

Cases Referred: Chronological Paras

AIR 1970 Bom 132 = 71 Bom LR 537 3

AIR 1968 Mys 251 = (1967) 2 Mys LJ 412 4

AIR 1957 Mys 12 = ILR (1956) Mys 146 4

H. K. Bhardwaj, for Petitioner; The Advocate General andINDER Singh, for Respondents.

ORDER:— The petitioner prays for relief under Article 226 of the Constitution against an order dated November 26, 1973 of the Director, Consolidation of Holdings dismissing his petition.

2. The petitioner is a resident of village Saloh, Tehsil and District Una. Pursuant to a notification under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, consolidation operations were commenced in the area. After the pre-partition proceedings had been published the petitioner applied on January 12, 1971 for the reservation of land for the extension of his Abadi. The application was made under Section 42 of the Act to the Director, Consolidation of Holdings. It was recited that Khasra Nos. 10623/6564 and 11887/10626 were previously owned and possessed by the petitioner and his brother Hukam Singh, that the brother had applied to the Consolidation Officer for the allotment of the said khasra numbers for himself and the petitioner but the said khasra numbers had been allotted to the respondents Ranbir Singh and Harnam Singh contrary to law. The petition was dismissed on November 26, 1973 by the Director, Consolidation of Holdings on the merits. He pointed out that no application for reservation of land had been made by the petitioner; it had been made by his brother Harnam Singh only. In that application Harnam Singh had sought reservation of Khasra numbers 10626/6564 and 6565, that both the numbers had been allotted to the respondents, and that as regards khasra number 11887/10626 no application had been made by the petitioner or by his brother Harnam Singh during preparation of the scheme for reservation. On that, the Director said, the petitioner had no case on the merits.

3. In this writ petition, learned counsel for the petitioner contends that the Director was bound in law to have

dismissed the petitioner's petition in default and could not have dismissed it on the merits. The consequence of the petition being dismissed on the merits, learned counsel says, is that the petitioner is now debarred from having the petition re-determined on the merits. The second contention is that a number of respondents had not been served by the Director with notice of the petition and therefore the Director erred in disposing of the petition. As regards the first contention, learned counsel relies on Madho Narayan v. Ragho Niloo, AIR 1970 Bom 132. In that case, Rule 19 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Rules 1959 permitted the Tribunal, in the case of non-appearance of the parties, to dismiss the application or to decide it on merits after hearing the respondent. The Bombay High Court held that ordinarily, unless there was a compelling reason for the Tribunal to proceed with the disposing of the revision application on merits, the proper order was an order for dismissal in the absence of the parties, and that the passing of an order on merits without hearing the parties acted to the grave prejudice of the party in default. It was pointed out that having regard to the scheme of the Act inasmuch as the Tribunal was the final forum where a dispute could be taken, the party suffers an adverse order without having an opportunity of being heard. It was held that the Tribunal should indicate clearly and satisfactorily why its discretionary power to decide the application on merits has been exercised rather than the dismissal of the application for default. The High Court allowed the application and quashed the order of the Tribunal.

It is pointed out that one of the respondents Ranbir Singh was present, but in my opinion that makes no difference to the application of the principle on which the Bombay High Court relied. If the applicant was absent, the principle would still require that ordinarily his application should be dismissed in default only and not decided on the merits. For dismissing an application in default it is the absence of the petitioner which is relevant. Section 54 of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 gives the widest power to the Director in the matter of disposing of a petition before him. He has the discretion, in the absence of the petitioner, to dismiss the petition in default or to decide it on the merits. On the basis of the principle men-

tioned above, the Director, Consolidation of Holdings erred in disposing of the petition before him on the merits. In the proper exercise of his jurisdiction he should have dismissed the petition in default.

4. It is urged by learned counsel for the respondents, Ranbir Singh and Harnam Singh, that the petitioner had no right to be heard in a proceeding under Section 54 of the Himachal Pradesh Act. It is pointed out that the power conferred by Section 54 has been left to be exercised by the State Government entirely at its discretion and this is in contrast with the appeal provisions contained in the Act which expressly confer a right to be heard. It is urged that by contrast, Section 54 must be construed as excluding a right of hearing, especially when a right of hearing has been provided only to the respondent in the case set out in the proviso to Section 54. The submission is that by necessary implication a party applying in revision under Section 54 is denied a right of being heard. Now, it seems to me that when the statute does not lay down any specified procedure for the conduct of any judicial or quasi-judicial proceeding, it is open to the authority entrusted with that proceeding to adopt such appropriate and reasonable procedure as it considers desirable. Once the authority adopts that procedure all the necessary incidents of that procedure are attracted, and it is not then open to that authority to say subsequently that the omission of any feature of that procedure cannot be made the ground of complaint. In the present case, the Director of Consolidation adopted a procedure of which one feature was that an opportunity should be given to the party applying in revision to be heard in support of it. That is evidenced by the circumstance that notice was issued by the Director to the petitioner. When the Director did so, and adopted that procedure, the petitioner became entitled as of right to be heard. He enjoyed that right because it was a part of a procedure deliberately adopted by the Director, and the procedure had a statutory basis inasmuch as it was implied within Section 54 that the Director could adopt such procedure as he considered fit. It is not correct to say that the Director had no power to direct issue of such notice. Upon the aforesaid considerations, I am of opinion that the observations relied on in *B. K. Abdul Azeez v. State of Mysore*, AIR 1957 Mys 12 and *T. Venkatasubbiah Setty v. Commr., Cor-*

poration of the City of Bangalore, AIR 1968 Mys 251 do not assist the respondents.

5. It is pointed out that the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 does not contain any provision for an application for restoration of a revision petition dismissed in default. In my opinion, if there is power in the Director to dismiss a revision petition in default, it must be implied *ex debito justitiae* that the party so prejudiced is entitled to apply for restoration of the proceeding. There are several instances where the party may, for no fault of his own and for reasons beyond his control, be unable to be present at the time when his case is called on for hearing. If the case is dismissed in default and the party is unable to obtain restoration of the proceeding in such circumstances, he will be deprived of a decision on the merits for no fault of his, and a right to such decision will be defeated. In such a case, the law will step in and imply the right to apply for restoration.

6. Learned counsel for the respondents points out that a direct application was made by the petitioner to the Director of Consolidation and no application was made by him in the first instance to the Consolidation Officer. It is said that he cannot maintain a direct application before the Director. This is a matter which the Director will consider, now that the case will go back to him.

7. In my opinion, the petitioner is entitled to succeed.

8. The writ petition is allowed. The order dated November 26, 1973 passed by the Director, Consolidation of Holdings is quashed. It is open to the Director to dispose of the revision petition afresh. There is no order as to costs.

Petition allowed.

AIR 1976 HIMACHAL PRADESH 66

D. B. LAL, J.

Rakha Singh, Appellant v. Santokha and others, Respondents.

Second Appeal No. 23 of 1970, D/- 26-9-1975.

(A) Specific Relief Act (1963), S. 16 (c) — Specific performance — Contract for purchase of land — Vendor not serving notice on vendee repudiating contract or making time the essence — Vendee

LS/AT/E330/75/JRM

found to have been not ready and willing to perform his part of contract — If and when specific performance available.

In a contract of sale of land time is not the essence of the contract but either party can make it so by notice or it may be inferred from the nature of the property, circumstances and whether commercial element is involved. Readiness and willingness to perform includes ability to perform. The buyer has to prove either such willingness or his capacity to pay for the property and proper preparations by him for securing the purchase money. (Para 3)

When the vendee had been postponing the sale from one date to another, never fulfilled his offer to pay part of the sale price, was short of money and was selling his land to raise money to meet the sale consideration, it is clear he was not ready and willing to perform his part of the contract at any relevant time. Hence he is disentitled to specific performance of the contract. AIR 1967 SC 868 Referred. (Paras 4 and 5)

Cases Referred : Chronological Paras

AIR 1967 SC 868 = (1967) 1 SCR 227 4
AIR 1966 Mad 46 = 78 Mad LW 186 4

S. Malhotra, for Appellant; K. D. Sud, for Respondents.

JUDGMENT:— This second appeal is brought from the judgment of the District Judge, Simla reversing in appeal the judgment of the Sub-Judge, 1st Class, Nalagarh, as a result to which a suit for specific performance filed by Rakha Singh has been dismissed. It was stated by Rakha Singh that Chanan Ram (respondent No. 4) entered into an agreement with him on June 4, 1965 whereby Chanan Ram was willing to sell and Rakha Singh was willing to purchase 6 bighas 16 biswas land situate in village Bhogpur at the rate of Rs. 235 per bigha and the sale deed was to be executed on June 25, 1965.

After a protracted correspondence between the parties, Chanan Ram finally wrote to Rakha Singh on 20-12-1965 that the sale deed must be executed in the month of December, 1965. According to him he also sent a notice to the plaintiff on 24-12-1965 but received no reply. Thereafter on 10-1-1966 Chanan Ram executed the sale of the disputed land in favour of the respondents 1 to 3. Rakha Singh thereafter brought a suit for specific performance of contract. The suit was decreed by the trial Court. The subsequent vendees came in appeal before

the District Judge and the decree of the trial Court was set aside. It was held that Rakha Singh was not ready and willing to perform his part of the contract. The suit was accordingly dismissed. Rakha Singh has now come up in second appeal.

2. At the very outset, the respondents contended that the question regarding readiness and willingness on the part of Rakha Singh to perform his part of the contract was a question of fact and howsoever erroneous the finding of the District Judge may be, the same cannot be set aside in second appeal. The appellant, however, controverted by saying that the learned District Judge drew up a wrong inference from the facts and circumstances made out and as the plea was a primary one and the decision depended upon it, a wrong inference thus drawn upon facts established will give rise to a question of law which can be entered into in second appeal. Being governed by this principle, I decided to consider the evidence de novo and find out if really a wrong inference has been drawn by the District Judge.

3. The central point argued by the learned counsel on behalf of the appellant was that a notice repudiating the contract was not given by Chanan Ram and the reasonable opportunity was not offered to Rakha Singh to perform his part of the contract and as such a decree for specific performance must have been granted. The learned counsel further argued and rightly so, that in a contract for sale of property, ordinarily, time is not the essence of the contract unless a notice is given making it essence of the contract and unless a reasonable opportunity is offered to fulfil the contract made by the promisee. One of the essential factors in a suit for specific performance of a contract is that the plaintiff must first allege and then if the matter is traversed, prove (a) that he has performed all the conditions which under the contract he was bound to perform, and (b) that he has been ready and willing at all times from the time of the contract, down to the date of suit, to perform his part of the contract. It is true that in a contract for sale and purchase of land time is not essence of contract but either party can make it so by giving notice. A similar intention may be inferred from the nature of the property, surrounding circumstances and whether commercial element is involved. Readiness and willingness to perform includes ability to

perform. It is incumbent upon the buyer to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the property and that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. One has then to consider the facts and circumstances arising in the case in order to arrive at a finding as to whether Rakha Singh was ready and willing to perform his part of the contract.

4. It may be stated from the correspondence that exchanged between the parties that up till 29-11-1965 (Ex. D.W. 4/16) Chanan Ram all along wanted the execution of the deed to be completed by a specified date but postponed it at the instance of Rakha Singh and thereby gave an expression to Rakha Singh that he could postpone the date even subsequently and Chanan Ram would have no objection to execute the sale even on a subsequent date. But on 29-11-1965 Chanan Ram wrote that Rakha Singh should give a definite date and in case he never intended to purchase he should make him free to sell the land to somebody else. No reply was given to this letter. Thereafter Chanan Ram sent another letter on 20-12-1965 (Ex. D.W. 4/14) wherein he wrote that he was to go to Lucknow and that the sale deed should be executed in December, 1965. Again no reply was given by Rakha Singh.

Thereafter on 5-1-1966 Chanan Ram made an application (Ex. D.W. 4/13) to Tahsildar Nalagarh giving out all the facts and proving inability of Rakha Singh to purchase land and also submitting that he was free to sell the land to anybody he liked. Finally on 10-1-1966 he sold the land to the respondents 1 to 3. The learned counsel from all this concluded that Chanan Ram never gave a notice finally repudiating the contract. Further he was required to give a reasonable time to Rakha Singh to perform his part of the contract. This also he never did. Similarly as before Rakha Singh thought that Chanan Ram would still accommodate him and the date of execution would be postponed. For this reliance was placed on *N. Palanichami Nadar v. Gomathinayagam Pillai* (AIR 1966 Mad 46). In a *pari materia* similar situation, the Division Bench held that the equity must look not at the letter but to the substance of the transaction in ascertaining the intention of the parties to the agreement as to whether time was of essence of contract.

The conduct of the parties in the past in that case and similarly in the instant case indicate that time was intended to be extended more than once and the parties did not stick to the time so as to make it the essence of the contract. But this decision of the Division Bench of Madras was reversed by the Supreme Court when it went in appeal of which the report is *Gomathinayagam Pillai v. Palaniswami Nadar*, (AIR 1967 SC 868).

It was no doubt held that time was not of essence as held by the High Court but the plaintiff was not ready and willing to perform his part of the contract. On that finding the judgment was reversed and the suit was dismissed. Therefore, in the present case it may be stated that the time was not essence of the contract and that notice was not served upon Rakha Singh repudiating the contract or making time its essence and that would not ordinarily refuse Rakha Singh to claim a specific performance of the contract. Nevertheless the other condition that he was ready and willing to perform his part of the contract is not satisfied and that would not entitle him to a decree for specific performance. In that connection reference can be made to Section 16 (c) because specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. One of the essential terms of the contract was decidedly readiness and willingness on the part of Rakha Singh to pay the sale price.

5. From the correspondence which passed between the parties before 29-11-1965 it is evident (a) that Rakha Singh was postponing the sale from one date to the other, (b) that he was making an offer of paying part of sale price which he never fulfilled and (c) that he was short of money and was selling land to raise money to meet the disputed sale consideration. On 19-6-1965 he asked Chanan Ram to reach on 10-7-1965 for execution of sale. On 5-7-1965 this date was postponed to 20-7-1965. On 19-7-1965 Rakha Singh again postponed the date upto the end of August. On 9-8-1965 he postponed it upto 24-10-1965. On 17-9-1965 (Ex. D.W. 4/8) he promised to send a part of sale consideration and asked Chanan Ram not to insist for an early date of execution of sale deed.

On 17-10-1965 he asked Chanan Ram that he would fix a date for the execution of the sale deed. On 27-11-1965 (Ex. D.W. 4/11) he wrote that he was sending Rs. 100 (which he never did). He also mentioned that he was selling his own property and would thus be able to raise money to pay Chanan Ram. Then finally on 29-11-1965 Chanan Ram wrote that a definite date should be given, otherwise he would sell the land to somebody else. It is true that on the very date the sale deed was to be registered, Rakha Singh made an application to the Sub-Registrar that he was willing to purchase the land that the sale deed should not be registered in favour of the respondents 1 to 3. It appears from all this that he was not ready and willing to perform his part of the contract at any relevant time. This is how the learned District Judge has concluded and I do not find that any exception can be taken to the inference deduced by him. At any rate the inference that Rakha Singh was ready and willing does not get support from his conduct.

6. It was argued on behalf of the respondents that one of the witnesses (D.W. 4) even stated that Rakha Singh had actually told Chanan Ram that he was not willing to purchase the land. A lukewarm argument was raised on behalf of the appellant that the vendor Chanan Ram did not file any written statement nor did he contest the suit. That was so because the property was sold in the names of respondents 1 to 3 and it is they who contested the suit. This fact alone will not go to prove that the appellant was ready and willing to perform his part of the contract.

7. In this view of the matter the learned District Judge rightly inferred that the appellant was not ready and willing to perform the essential term of the contract and as such a decree for specific performance could not be granted in his favour.

8. The appeal has no force and the same is, therefore, dismissed. However, in the special circumstances of the case, no order is made as to costs.

Appeal dismissed.

AIR 1976 HIMACHAL PRADESH 69

R. S. PATHAK, C. J. AND C. R. THAKUR, J.

Lakshmi Chand Sood, Petitioner v. Shankar Lal Pal, Respondent.

Civil Revn. No. 47 of 1974, D/- 27-4-1976.

(A) Himachal Pradesh Urban Rent Control Act (23 of 1971), Ss. 5, 14 (2) (i) — Fixation of fair rent operates prospectively — Application for fixation of fair rent by tenant filed before landlord's application under S. 14 (2) (i), for eviction for non-payment of rent for statutory period — Eviction proceedings are not to be stayed for fixation of fair rent first.

The fixation of fair rent operates prospectively only. It operates from the date the fair rent is fixed and not from any earlier date. Where, therefore, a landlord applies under Section 14 (2) (i) of the Act for eviction of the tenant on the ground that the tenant has not paid or tendered the rent due by him within the statutory period mentioned therein, it is not relevant for the tenant to plead in defence that the fair rent should be fixed and the liability to pay the arrears should be determined on the basis of the fair rent. The arrears of rent have to be calculated on the basis of the contract between the parties inasmuch as the period for which the tenant is in default precedes the date from which the fair rent is payable, viz. the date of fixation of fair rent. It is, therefore, not correct to say that when an application for eviction is made by a landlord under Section 14 (2) (i) the proceedings must be held up to enable the fixation of fair rent first. That will be so even if the application for fixation of fair rent has been filed before the application for eviction. (1970) 2 SCR 390 and AIR 1973 Delhi 145 and AIR 1950 Mad 185 and AIR 1951 Mad 222 and AIR 1951 Mad 493, Distinguished; AIR 1953 Him Pra 55, Doubted. (Paras 10, 11, 12)

(B) Constitution of India, Art. 20 (1) — Ex post facto legislation — Construction — Distinction between American and English Rules — Principle applied by English Courts that law is construed where possible as operating prospectively only — To be applied in construing Ss. 7 and 8 of H. P. Urban Rent Control Act (23 of 1971). (1798) 1 L Ed 648 and (1867) 18 L Ed 356 and (1870) 6 QB 1 and AIR 1953 SC 394, Ref. (Para 8)

Cases Referred: Chronological Paras
AIR 1973 Delhi 145 = 1972 Ren CR 344

	14
(1970) 2 SCR 390 = 1969 Ren CJ 913	13
AIR 1953 SC 394 = 1953 Cri LJ 1480	8
AIR 1953 Him Pra 55	16
AIR 1951 Mad 222 = (1950) 2 Mad LJ 317	16
AIR 1951 Mad 493 = (1950) 2 Mad LJ 810	16
AIR 1950 Mad 185 = (1949) 2 Mad LJ 555	16
(1870) 6 QB 1 = 40 LJQB 28	8
(1867) 18 Law Ed 356 = 4 Wall 277	8
(1798) 1 Law Ed 648 = 3 Dallas 386	8

D. P. Sud, for Petitioner; B. Sita Ram, for Respondent.

R. S. PATHAK, C. J.:— The petitioner applies in revision under Section 21 (5) of the Himachal Pradesh Urban Rent Control Act, 1971 against an order of the Controller refusing to stay the proceedings for his eviction until the determination of the fair rent.

2. There is a residential building called 'Mann House' situated at Shankli in Simla. The respondent is the owner, and the petitioner is the tenant of suite No. 9 therein.

3. On April 13, 1972 the petitioner filed an application under Section 5 of the Himachal Pradesh Urban Rent Control Act, 1971 for the determination of the fair rent of the accommodation occupied by him. That proceeding remained pending for almost six months and has not yet been disposed of.

4. On September 28, 1972 the respondent applied under Section 14 (2) (i) of the Act asserting that the tenancy of the petitioner had been terminated by notice, that the petitioner was in arrears of rent from April 1, 1972 to September 30, 1972 calculated in terms of the contractual rent, and had failed to pay despite demand. It was prayed that the petitioner be directed to put the respondent in possession.

5. On December 6, 1972 the petitioner applied that the eviction proceedings be stayed until the application for determination of the fair rent had been disposed of. By his order dated June 22, 1974 the Controller, Simla has rejected the application for stay, taking the view that until the fair rent was fixed the petitioner was obliged to pay the contractual rent. Against that order, the petitioner has filed the present revision petition.

6. The contention of Shri D. P. Sud, for the petitioner, is that the disposal of an application for eviction under

Section 14 (2) of the Act filed on the ground that the tenant has not paid or tendered the rent due must await the disposal of an application under Section 5 of the Act for determination of the fair rent. The submission of learned counsel is that when the fair rent is determined under Section 5 it represents the rent due from the commencement of the contract of tenancy or of the statute, whichever is later, and in any event it represents the rent payable from the date of the application for eviction. It is on that basis, he says, that the amount due by a tenant has to be determined and the eviction petition disposed of. It is pointed out that therefore the application for determination of the fair rent must be disposed of first and only thereafter can the application for eviction be proceeded with. In support of the proposition that the determination of fair rent payable operates also for the period before such determination, learned counsel for the petitioner relies on Sections 7, 8 and 9 of the Act. The case of the respondent, on the contrary, is that the fair rent represents the rent payable for the period following the determination of fair rent.

7. Section 5 of the Act empowers the Controller to fix the fair rent of a building on application made by the tenant or landlord. In determining the fair rent, the Controller is required to fix the basic rent first, having regard to the rent prevailing in the locality for the same or similar accommodation and the rental value of the building in question as entered in the property tax assessment register of the local authority in respect of the twelve months prior to August 15, 1947. For the purpose of fixing the fair rent, a specified accretion is permitted to the basic rent varying with different categories of buildings. By virtue of Section 6 the fair rent fixed in respect of the building cannot be increased except where some addition, improvement or alteration has been carried out. Sections 7, 8 and 9 of the Act read as follows:—

"7 (1) Save as provided in Section 6, when the Controller has fixed the fair rent of a building or rented land under Section 5:—

(a) the landlord shall not claim or receive any premium or other like sum in addition to fair rent, or any rent in excess of such fair rent, but the landlord may stipulate for and receive in advance an amount not exceeding one month's rent;

(b) any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent shall be null and void.

(2) Nothing in this section shall apply to the recovery of any rent which became due before the 15th day of August, 1947.

8 (1) Subject to the provisions of this Act, no landlord shall claim or receive any rent in excess of the fair rent, notwithstanding any agreement to the contrary.

(2) No landlord shall, in consideration of the grant, renewal or continuance of a tenancy or a sub-tenancy of any building or rented land claim or receive the payment of any premium, puggree, fine, advance or any other like sum in addition to the rent.

(3) Nothing in this section shall apply to any payment under any subsisting agreement entered into before the 15th day of August, 1947.

9 (1) Where any sum has, whether before or after the commencement of this Act, been paid which sum is by reason of the provisions of this Act not payable, such sum shall, at any time within a period of one year after the date of the payment, or in the case of a payment made before the commencement of this Act, within one year after the commencement thereof, be recoverable by the tenant by whom it was paid or his legal representative from the landlord who received the payment or his legal representative, and may without prejudice, to any other method of recovery be deducted by such tenant from any rent payable within such one year by him to such landlord.

(2) In this section the expression 'legal representative' has the same meaning as in the Code of Civil Procedure, 1908 and includes also, in the case of joint family property, the joint family of which the deceased person was a member."

On a plain reading of Section 7 it seems clear that it is only when the Controller has fixed the fair rent of a building that the landlord is prohibited from claiming or receiving any rent in excess of the fair rent. That is also apparent from Section 8. Both Sections 7 and 8 lay down a statutory injunction restraining the landlord from claiming or receiving rent in excess of the fair rent. The difference between the two sections lies in

this, that while under Section 7 an agreement for the payment of any sum as rent in excess of the fair rent is declared null and void, under Section 8 the injunction operates against the landlord 'notwithstanding any agreement to the contrary'. The difference between the two sections indicates at once the prospective nature of the determination of the fair rent. The agreement referred to in Section 7 (1) for the payment of rent in excess of the fair rent is an agreement entered into after the fair rent has been determined. For that reason, the agreement is treated as null and void. On the other hand, the agreement referred to in Section 8 is an agreement entered into before the fair rent could be determined, and it is therefore that the statute advisedly uses the words 'notwithstanding any agreement to the contrary'. In other words, such an agreement is not permitted to operate in contravention of the statutory injunction provided against the landlord by Section 8. It is an agreement which operates so long as the fair rent is not determined, but once the determination has been made it is the fair rent which governs the tenancy notwithstanding the agreement.

8. The second indication evidencing the prospective nature of the determination of the fair rent is the circumstance that if the landlord contravenes the injunction embodied in Section 7 or Section 8 a contravention of the injunction is punishable with imprisonment and with fine under Section 25 (2) of the Act. If the determination of fair rent operates retrospectively, a landlord who recovers an amount under a contract which on subsequent determination under Section 5 turns out to be in excess of the fair rent would be guilty of an offence. One of the primary and well accepted canons of statutory interpretation is that the Legislature does not make an act punishable which on the date of its commission had not been constituted an offence. Article 20 (1) of the Constitution provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. The prohibition against ex post facto legislation in the Constitution of the United States has been explained in *Calder v. Bull*, (1798) 1 Law Ed 648 and *Cumming v. Missouri*, (1867) 18 Law Ed 356 while in England the principle has received attention in *Philips v. Eyre*, (1870) 6 QB 1. In *Rao Shiv Bahadur Singh v. State of Vindhya*

Pradesh, AIR 1953 SC 394 the Supreme Court of India considered it to be a paramount principle that ex post facto laws which retrospectively create offences and punish them are bad 'as being highly inequitable and unjust'. Under the American Law ex post facto legislation is declared invalid by the courts. In the English courts, the law is construed where possible as operating prospectively only. It seems to me that the principle applied by the English courts calls for application in the present case. Sections 7 and 8 are reasonably capable of the construction that they operate with respect to the future only.

9. The third indication showing that the fixation of fair rent operates prospectively only appears from Sec. 9 (1) of the Act. As is apparent from its provisions, a tenant is entitled to recover a sum which, whether paid before or after the commencement of the Act, is by reason of some provision of the Act not payable. Where payment has been made before the commencement of the Act, the period prescribed for recovering it is one year after the commencement of the Act. Where the payment has been made after the commencement of the Act the period for recovery is one year after the date of payment. Now the right of a tenant to recover a sum paid before the commencement of the Act arises by virtue of the fact that under some provision of the Act payment of that character is not permitted. In other words, although the payment was made before the Act came into operation and therefore, when made was not prohibited, it is by the operation of the Act subsequently that the sum becomes recoverable. The position amounts to this. When the tenant made the payment the Act did not forbid such payment and quite possibly the tenant paid because he was obliged to do so. Subsequently, when the Act came into operation it prohibited the landlord from claiming or receiving that kind of payment. The Act did not declare any payment made before it to be contrary to law. It did not declare that the money paid by the tenant before it commenced was paid contrary to its provisions. The Act was not made retrospective. What the Act has done is to enact in Section 9 that although the payment when made was rightly made, nevertheless on the Act coming into operation a right has been given to the tenant to recover the amount so paid before its commencement.

The obligation to pay has not itself been interfered with. The Act merely declares that even though the tenant was obliged to pay before the Act came into force, with the commencement of the Act a right now accrues to the tenant to recover that which he had paid. Therefore, if within one year after the commencement of the Act a tenant obtains an order from the Controller fixing the fair rent, and it is found that he had paid the rent in excess of the figure representing the fair rent, then although the fixation of fair rent is prospective only Section 9 expressly entitles the tenant to recover the excess paid during the period before the commencement of the Act. It is clear that as the Act is not retrospective in operation a provision such as Section 9 was necessary to enable the tenant to recover the excess paid before the commencement of the Act. Similarly, a sum paid after the commencement of the Act but before the fair rent is fixed can be recovered by the tenant within a year of the payment. For that purpose he must obtain an order fixing the fair rent within that period. Here again, although the amount paid as rent before the fair rent was fixed was rightly paid by virtue of the contract between the parties, Sec. 9 nevertheless entitles the tenant to recover the excess paid within a year of the payment even though the fair rent was fixed subsequently. Had the fixation of fair rent operated retrospectively, the tenant would have been entitled, without anything more, to recover the excess over the figure of the fair rent paid by him. It is because the fixation of fair rent is prospective only that it became necessary to enact Section 9, so as to enable the tenant to recover the excess paid before the fair rent was fixed.

10. In my judgment, the fixation of fair rent operates prospectively only. It operates from the date the fair rent is fixed and not from any earlier date.

11. In that view of the matter when a landlord applies under Section 14 (2) (i) of the Act for the eviction of the tenant on the ground that the tenant has not paid or tendered the rent due by him within the statutory period mentioned therein, it is hardly relevant for the tenant to plead in his reply to the application that the fair rent should be fixed and the liability to pay the arrears should be determined on the basis of the fair rent. Inasmuch as the liability to pay the fair rent only arises prospectively with

effect from the date the fair rent is fixed, the fixation of the fair rent is not relevant at all for the purpose of determining the true figure of the arrears of rent. The arrears of rent have to be calculated on the basis of the contract between the parties inasmuch as the period for which the tenant is in default precedes the date from which the fair rent is payable, viz. the date of fixation of fair rent. If the subsequent fixation of fair rent does not affect the liability to pay the arrears of rent for a period before the fair rent is fixed, any plea taken in the reply to the eviction application under Section 14 (2) (i) of the Act cannot be based on the fixation of fair rent. It is, therefore, not correct to say that when an application for eviction is made by a landlord under Section 14 (2) (i) the proceedings must be held up to enable the fixation of fair rent first. That will be so even if the application for fixation of fair rent has been filed before the application for eviction. It would have been a different matter if the fixation of fair rent operates retrospectively to the date of the making of the application. But that, in my opinion, is not a possible view having regard to the considerations already mentioned above. In this connection it is relevant to note that when Section 9 (1) entitles a tenant to deduct the excess amount paid in the past over the fair rent, the deduction has to be made from the rent payable in the future within one year of the payment of the excess amount. No deduction is contemplated where the tenant has not in fact paid the rent due in the past. He cannot be heard to say that although he has not paid such rent he is not in arrears because the figure of fair rent wipes out the amount which had fallen due in the past and which has not been paid by him. Section 9 (1) entitles the tenant to deduct from rent payable in future the excess actually paid in the past. It does not entitle him to reduce his liability of the past by reference to the fair rent.

12. Inasmuch as the pending application for fixation of fair rent is not relevant for the purpose of deciding an application for eviction filed under Sec. 14 (2) (i) of the Act, no question arises of staying the proceedings on the latter application. In the circumstances, it is unnecessary to consider the cases relied on by Shri D. P. Sud to show that the Controller has power to stay the proceedings before him on the basis of the principle embodied in Section 10 of the Code of Civil Procedure.

13. Reliance has been placed on *M. M. Chawla v. J. S. Sethi*, (1970) 2 SCR 390. That case is distinguishable. The Supreme Court was concerned there with the Delhi Rent Control Act, 1958. Section 14 of that Act contemplated an application by the landlord for the recovery of possession of the premises on the ground that the tenant had neither paid nor tendered the arrears of rent legally recoverable from him within two months of the date on which a notice of demand for the arrears had been served. Sec. 15 (1) provides that in such a proceeding for the recovery of possession the Controller shall make an order directing the tenant to pay to the landlord or deposit with the Controller within one month of the date of the order an amount calculated at the rate of rent at which it was last paid for the period for which the arrears of rent were legally recoverable. Sec. 15 (3) provides that if in a proceeding under Section 15 (1) there is a dispute as to the amount of rent payable by the tenant the Controller shall within fifteen days of the first hearing of the proceeding fix an interim rent to be paid or deposited by the tenant until the standard rent in relation to the premises is fixed, and the amount of arrears calculated on the basis of the standard rent shall thereafter be paid or deposited by the tenant. There is no such provision in the Himachal Pradesh Urban Rent Control Act, 1971.

14. We have also been referred to *Hari Ram Dhupar v. Rajinder Singh*, AIR 1973 Delhi 145. In that case a learned Single Judge of the Delhi High Court held that even though an application for eviction of the tenant was not specifically based on the ground of his default in payment of arrears of rent it was open to the tenant to pray for the fixation of standard rent in his written statement filed to the eviction application. I am unable to see how the observations in that case are of any assistance to the present petitioner.

15. One of the contentions of Shri D. P. Sud is that the landlord can charge only reasonable rent, and the reasonable rent is the amount payable by the tenant determined on the basis of the provisions of Section 5 of the Act for fixation of fair rent. He says that if that contention is accepted no case can arise of a contravention of Section 7 or Section 8 and therefore of punishment under Section 25 (2) in respect of an act done before the fair rent was fixed. The con-

tention is misconceived. As long as a contract of tenancy is in force, the landlord is entitled to rent payable under that contract. It is difficult for any landlord to determine what should be the reasonable rent with reference to the provisions of Section 5 of the Act. Section 5 does not automatically result in the determination of the fair rent at any definite predictable figure. The fair rent is not determined in a mechanical manner. It will depend upon the individual judgment of the particular Controller. Section 5 merely prescribes the criteria with reference to which the Controller will exercise his judgment. He will take into consideration those criteria, but the ultimate figure determined by him will depend upon the circumstances of each individual case. When a discretion has been conferred by the statute on the Controller in the matter of determining what should be the fair rent, plainly the discretion will vary from Controller to Controller and it cannot be said that before the fair rent has been fixed it is possible for the landlord to anticipate what should be the fair rent or, as Shri D. P. Sud would put it, the reasonable rent. A number of cases have been cited by Shri Sud for the purpose of indicating the scope of the expression 'reasonable'. Upon what I have said above, it is not necessary to refer to those decisions.

16. Shri Sud then relies on *Bajammal v. The Chief Judge*, AIR 1950 Mad 185 where the Madras High Court held that when the fair rent is fixed under Section 4 of the Madras Buildings (Lease and Control) Act, 1946 the fair rent so fixed rules from the date of the application for fixing the fair rent. The learned Judges were concerned with the question whether the fair rent so fixed should not rule from the date of the commencement of the Act. They held that it did not. They were not concerned in that case with the question whether the fixation of the fair rent operates only from the date the fixation is effected. For the same reason, the view taken in *George Oakes Ltd. v. The Chief Judge*, AIR 1951 Mad 222 and *Hari Rowji Gore Sastri v. The Malabar District Board*, AIR 1951 Mad 493 is distinguishable. It has not been shown to us that the provisions of the statute with which the Madras High Court was concerned in the three cases mentioned above were analogous to the provisions of the Himachal Pradesh statute before us. Shri D. P. Sud also relies on *Nandu Ram v.*

Jagannath Parshotam Das, AIR 1953 Him Pra 55 but it seems to me that the observations in that case run contrary to what he suggests. And in so far as the Judicial Commissioner can be said to have implied that an order for fixation of fair rent can operate retrospectively, it is difficult for me, with respect, to agree with him in a case such as the one before us.

17. The revision petition has no force and is dismissed, but in the circumstances there is no order as to costs.

C. R. THAKUR, J.:— I agree.

Petition dismissed.

AIR 1976 HIMACHAL PRADESH 74

R. S. PATHAK, C. J.

Suraj Mani and another, Petitioners
v. Kishori Lal, Respondent.

Civil Revn. No. 5 of 1975, D/- 23-4-1976.

(A) Civil P. C. (1908), S. 2 (11), O. 22, R. 3 — Legatee is a legal representative.

The definition of 'legal representative' in Section 2 (11) is very wide. It will include a person who seeks to represent the estate of a deceased person on the basis of a will said to be executed by the deceased in his favour. The estate will be sufficiently represented by such a person.

(Para 3)

(B) Civil P. C. (1908), O. 22, R. 5 — Substitution — Does not confer heirship or right to property.

Where the legal representative of a deceased plaintiff is brought on record, the decision to do so under O. 22, R. 5 must be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. AIR 1941 Lah 142, Rel. on.

(Para 3)

(C) Civil P. C. (1908), S. 11, O. 22, R. 5 — Order of substitution under O. 22, R. 5 — Does not operate as res judicata.

An order under Order 22, Rule 5 involves a summary enquiry as to who should be substituted in place of the deceased party in a pending proceeding and such a decision does not operate as res judicata. Therefore, when a substitution is made on the finding that the will is valid, that finding cannot operate as res judicata where that very question needs to be decided later on, in order to resolve the controversy in the suit on its merits. (1906) ILR 28 All 109 and AIR 1936 All

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412 and AIR 1934 Lah 465 and AIR 1958 All 573, Rel. on. (Para 3)

Cases Referred: Chronological Paras

AIR 1958 All 573 = 1958 All LJ 8 3
 AIR 1941 Lah 142 = 43 Pun LR 16 3
 AIR 1936 All 412 = ILR 58 All 734 3
 AIR 1934 Lah 465 = 154 Ind Cas 985 3
 (1906) ILR 28 All 109 = 1905 All WN 206 3

Inder Singh, for Petitioners; S. S. Ahuja, for Respondent.

ORDER:— This is a defendant's revision petition against an order of the learned Senior Subordinate Judge, Mandi allowing a substitution application.

2. One Hari Krishan filed a suit for possession. On December 10, 1971 he died. An application for substitution as his legal representative was made by the respondent Kishori Lal. Kishori Lal claimed that the deceased had executed a will in his favour. The will was a registered document. The claim to substitution was opposed by the petitioner on the ground that the will was invalid and the legal representatives of Hari Krishan were in fact his sons and daughters. The learned Senior Subordinate Judge examined the material on the record and came to the finding that the will was a reliable document and operative in law and that therefore the respondent was entitled to be brought on the record as the legal representative of Hari Krishan. That order was made on November 1, 1974. Against that order the petitioner now applies in revision.

3. The contention of learned counsel for the petitioner is that by the impugned order the learned Senior Subordinate Judge has permitted a trespasser to be brought on the record and has enabled him thereby to prosecute the suit. It is submitted by learned counsel that this is not permissible in law. I am unable to agree. The definition of "legal representative" in Section 2 (11) of the Code of Civil Procedure is very wide. It will certainly include a person who seeks to represent the estate of a deceased person on the basis of a will said to be executed by the deceased in his favour. The estate will be sufficiently represented by such a person. The learned Senior Subordinate Judge acted within his jurisdiction in substituting the respondent as the legal representative of the deceased. The substitution does not make the legal representative heir to the property of the deceased. It was pointed out by the Lahore High Court in Daulat Ram v. Mt.

Meero, AIR 1941 Lah 142, in a case where the legal representative of a deceased plaintiff was brought on the record, that a decision to do so under Order 22, Rule 5 must be limited to the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. Even if the learned Senior Subordinate Judge has held that the will relied on by the respondent is a valid will, that finding had been rendered merely for the purpose of enabling the prosecution of the suit to go on. It cannot be construed as a decision on the merits of the suit. The finding that the will is valid cannot operate as *res judicata* where that very question needs to be decided in order to resolve the controversy in the suit on its merits. I am supported in this view by Parsotam Rao v. Jankibai, (1906) ILR 28 All 109; Antu Rai v. Ram Kinkar Rai, ILR 58 All 734 = (AIR 1936 All 412) and Chiragh Din v. Dilwar Khan, AIR 1934 Lah 465. It was held by the Allahabad High Court in Ram Kalap v. Banshi Dhar, AIR 1958 All 573 that an order under Order 22, Rule 5 involves a summary enquiry as to who should be substituted in place of the deceased party in the pending proceeding and that such a decision does not operate as *res judicata*. It is still open to the petitioner in the present case, during the trial of the suit, to establish that the will is incompetent and confers no right, title and interest on the respondent and that, therefore, the respondent is not entitled to any relief in the suit.

4. The revision petition is dismissed. There is no order as to costs.

Revision dismissed.

AIR 1976 HIMACHAL PRADESH 75

R. S. PATHAK, C. J. AND D. B. LAL, J.
 Smt. Gayatri Devi, Appellant v. Tani Ram and others, Respondents.

F. A. O. No. 14 of 1971, D/- 15-1-1976.

(A) Motor Vehicles Act (1939), Section 110-AA — Section is prospective — S. 110-A compensation application filed prior to introduction of S. 110-AA — Application not liable to be dismissed merely because claimant had applied for compensation under Workmen's Compensation Act. (Para 10)

ET/GT/B542/76/JHS

(B) Workmen's Compensation Act (1923), S. 19 — Scope — Liability adjudicated upon by Claims Tribunal under Motor Vehicles Act falls outside scope of S. 19.

Section 19 refers to a liability arising by virtue of the Workmen's Compensation Act. Sub-section (1) speaks of a proceeding under the Act. Such a proceeding relates to the statutory liability created under the Act. Sub-section (2) specifically mentioned 'any liability incurred under this Act'. The liability adjudicated upon by Claims Tribunals under the Motor Vehicles Act is a liability founded in tort and thus falls outside the scope of S. 19.

(Para 11)

(C) Workmen's Compensation Act (1923), S. 3 (5) — 'Court of law' — Claims Tribunal under Motor Vehicles Act is not a 'Court of law' envisaged by S. 3 (5). 1973 Acc CJ 242 (Mys), Dissented from.

(Para 13)

(D) Motor Vehicles Act (1939), Section 110-A — Application for compensation — Must contain plea of negligence.

(Para 16)

Cases Referred: Chronological Paras

AIR 1974 Madh Pra 159 = 1973 Acc CJ 352 (FB)	13
1973 Acc CJ 242 (Mys)	13
AIR 1972 Madh Pra 125 = 1971 Acc CJ 372	13
1972 Acc CJ 21 = 73 Pun LR 554	13
AIR 1971 Guj 151 = 1971 Acc CJ 222	13
1971 Acc CJ 240 = (1971) 1 Mys LJ 86	16
1971 Acc CJ 49 = ILR (1971) Cut 624	8
1970 Acc CJ 403 = 1970 MPLJ 754	13
1969 Acc CJ 306 (Delhi)	8
1969 Acc CJ 327 = 35 Cut LT 752	8
AIR 1969 Punj 172 = 1968 Acc CJ 401	8
AIR 1967 Mys 11 = (1966) 1 Mys LJ 576	16
AIR 1964 SC 152 = (1964) 2 SCR 859	16
AIR 1957 Mad 216 = (1957) 1 Lab LJ 517	7
AIR 1954 All 132 = 1953 All WR (HC) 546	7
AIR 1933 PC 63 = 60 Ind App 13	13

O. P. Sharma, for Appellant; Y. P. Gandhi, H. S. Thakur, D. P. Sud and K. D. Sud, for Respondents.

R. S. PATHAK, C. J.:— This is a claimants' first appeal directed against the order of the Motor Accident Claims Tribunal, Kangra Division dismissing their petition for compensation under Section 110-A of the Motor Vehicles Act, 1939.

2. Daya Ram was employed as a truck driver by the respondents Tani

Ram, Smt. Raj Kumari, Jagmohan and Chain Lal. They owned Truck No. HEM-4934, which was insured with the Oriental Fire & Life Insurance Company Limited. On February 18, 1968, Daya Ram was driving the truck from Mehatpur to Bahi Kharialti in the Tahsil of Hamirpur. At Talmehra, at about 6 O'clock in the morning, the truck met with an accident. It overturned and Daya Ram was killed. His widow Smt. Gayatri Devi, his daughter Neelam and son Papu filed a claim on May 3, 1968 before the Motor Accident Claims Tribunal under Section 110-A of the Motor Vehicles Act for compensation from the employers and the Insurance Company. The respondents resisted the claim on the ground that the Tribunal had no jurisdiction to entertain it and that it did not disclose any cause of action against them. The Claims Tribunal dismissed the claim by its order dated December 2, 1970. It held that the claim did not disclose any cause of action against the respondents inasmuch as no plea of negligence had been taken therein. It also held that Daya Ram had died during the course of his employment and therefore the claim properly lay before the Commissioner under the Workmen's Compensation Act and not before the Motor Accident Claims Tribunal.

3. The claimants then filed the present appeal.

4. It appears that after the impugned order of the Claims Tribunal, the claimants also applied for compensation on January 8, 1971 before the Commissioner under the Workmen's Compensation Act, and that application is pending.

5. It is urged on behalf of the appellants that it was open to them to make a claim for compensation either under the Motor Vehicles Act or under the Workmen's Compensation Act inasmuch as the death had arisen out of the use of a motor vehicle. It is also urged that a specific allegation of negligence in the claim petition is not necessary and that the fact of negligence could be determined later on in the trial of the claim. For the respondents, the case is that after the Claims Tribunal had dismissed the claim the appellants had elected to apply for compensation before the Commissioner under the Workmen's Compensation Act and therefore the present appeal should not be entertained. It is also urged that a plea of negligence is the sine qua non of a claim made under the Motor Vehicles Act and in its absence the present claim is incompetent.

6. The first point for consideration is whether the claim of the appellants can be entertained under Section 110-A of the Motor Vehicles Act. To appreciate the context in which the point falls to be decided, it is necessary to trace briefly the evolution of the law in this area.

7. Originally, the position appears to have been that in certain cases the employer was liable under the common law to a workman for any injury arising out of and in the course of his employment, and the workman could recover damages against his employer for such injury. Subsequently, the Workmen's Compensation Act, 1923 was enacted as a result of which employers have become the insurers of their servants against accidental injuries and deaths. The Act provides a simple and expeditious remedy. The Schedule to the Act specifies a fixed quantum of compensation depending upon the wages of the workman and the nature of his injuries. The obligation of the employer to pay compensation under the Act is determined by the mere circumstance that it was caused by an accident arising out of, and in the course of, his employment. The liability is independent of any neglect or wrongful act on the part of the employer. It is a liability which springs out of the relationship of master and servant and not out of tort. *Works Manager Carriage and Wagon Shop v. Mahabir*, AIR 1954 All 132 and *S. Suppiah Chettiar v. V. Chinnathurai*, AIR 1957 Mad 216. While a claim for damages under the common law has to establish the element of negligence in order to prove the tortious liability of the employer, if the claim is laid under the Workmen's Compensation Act it relies entirely on a liability created by statute. In each case the right to compensation or damages is rooted in a different legal concept. Ordinarily, it could have been possible in certain cases for the claim to lie both under the common law as well as under the Workmen's Compensation Act. To provide against the grant of relief twice over, the Legislature included Section 3 (5) in the Workmen's Compensation Act, which prohibited a workman from claiming a right to compensation under that Act if he had instituted in a civil court a suit for damages in respect of the injury. It was also provided conversely that no suit for damages would be maintainable by a workman in a court of law in respect of any injury if he had insti-

tuted a claim to compensation in respect of the injury before a Commissioner for Workmen's Compensation under the Act or if an agreement had been reached between the workman and his employer providing for payment of compensation in accordance with the provisions of the Act. That position obtained until the enactment of the Motor Vehicles Act, 1939.

8. The Motor Vehicles Act, as originally framed and subsequently amended, provided for the constitution of Motor Accident Claims Tribunals for adjudicating on claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles. An analysis of Sections 110-A to 110-D shows that while the Act lays down the procedure and powers of the Claims Tribunals, envisages the making of awards by them and provides for appeals against the awards, nowhere does it specify what will be the nature of the legal right or legal obligation which the Claims Tribunals will be called upon to consider. It is apparent that the basis remained the same as under the common law. What the Motor Vehicles Act did was merely to create a machinery and provide for summary adjudication of the claim. *State of Punjab v. V. K. Kalia*, 1968 Acc CJ 401 = (AIR 1969 Punj 172); *Jagjit Singh v. Ram Chandra*, 1969 Acc CJ 306 (Delhi); *Narottam Dass v. General Manager, Orissa Road Transport Co. Ltd.*, 1969 Acc CJ 327 (Orissa) and *Orissa Co-operative Ins. Society Ltd. v. Bhagaban Sahu*, 1971 Acc CJ 49 (Orissa). A claim which otherwise would have been made by way of a suit for damages in an ordinary court of law can now be expeditiously disposed of by a Claims Tribunal. The essential basis of the claim remains the same. As in the case of a suit, it is necessary for the claimant to establish negligence before he can be awarded compensation by a Claims Tribunal. Substantially, the effect of the scheme contained in the Motor Vehicles Act was merely one of substitution of a forum and procedure for the determination of such claim in place of the original common law action in a court of law. Now, the Legislature considered it appropriate that the adjudication of claims for compensation in such cases should not be effected by the civil courts but by Claims Tribunals, and accordingly Section 110-F of the Motor Vehicles Act denies jurisdiction to the civil court to entertain any question relating to any

claim for compensation which can be adjudicated upon by the Claims Tribunal, wherever such Claims Tribunal has been constituted.

9. Therefore, the position now was that a claim for compensation can be made either under the Workmen's Compensation Act or under the Motor Vehicles Act. The difference between the nature and legal incidents of a claim under the Workmen's Compensation Act and a claim made in a common law suit continues to be reflected between a claim made under the Workmen's Compensation Act and a claim made under the Motor Vehicles Act. The basis of the two claims differ from each other, and therefore, until 1970 it was possible to obtain relief on both claims. It may be observed that while Section 3 (5) of the Workmen's Compensation Act compels a workman to choose between a common law suit and a proceeding under that Act, a corresponding restriction was wanting in respect of a claim under the Motor Vehicles Act and a claim under the Workmen's Compensation Act. In order to allow a claim only under one of the two Acts, the Motor Vehicles (Amendment) Act, 1969 inserted Section 110-AA in the Motor Vehicles Act. The section provides:

"110-AA. Notwithstanding anything contained in the Workmen's Compensation Act, 1923, where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may claim such compensation under either of those Acts but not under both."

The amendment came into effect on March 2, 1970. With effect from that date a person entitled to compensation can make a claim either under the Workmen's Compensation Act or under the Motor Vehicles Act. He cannot claim compensation under both Acts and thus obtain compensation twice over.

10. In the present case, the appellants had already filed a claim to compensation under the Motor Vehicles Act on May 3, 1968. Section 110-AA had not yet been enacted. On that date the appellants could claim compensation under each of the two Acts. The appellants were not confined to a choice between the two Acts. They were not bound to choose, there was no obligation to do so. They were entitled as of right to pursue both remedies; and on the basis of dif-

ferent legal rights, one purely statutory and the other arising out of tort, they were entitled to compensation separately. That right accrued on the date of the death of Daya Ram. The right was not taken away by Section 110-AA, which is prospective in operation. Consequently, the appellants continued to be entitled to claim compensation both under the Motor Vehicles Act and under the Workmen's Compensation Act. The bar imposed by Section 110-AA of the Motor Vehicles Act cannot be invoked against them. That being so, the objection raised by learned counsel for the respondents that this appeal should not be entertained because the appellants had applied for compensation before the Commissioner under the Workmen's Compensation Act, has no force and must be rejected.

11. Reliance was placed by the respondents on Section 19 of the Workmen's Compensation Act in support of the proposition that if an application for compensation is made under Section 3 of the Workmen's Compensation Act, it is the Commissioner under that Act who alone has jurisdiction to decide the question and that the civil court is barred from dealing with it. Section 19 provides:—

"19. Reference to Commissioners. (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement) the question shall, in default of agreement, be settled by a Commissioner.

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act."

To my mind, Section 19 refers to a liability arising by virtue of the Workmen's Compensation Act. Sub-section (1) speaks of a proceeding under the Act. Such a proceeding relates to the statutory liability created under that Act. And sub-section (2) specifically mentions 'any liability incurred under this Act'. The liability adjudicated upon by Claims Tribunals under the Motor Vehicles Act is a liability founded in tort and falls outside the scope of Section 19 of the Workmen's Compensation Act.

12. Reference may be made now to the cases cited by the respondents.

13. In *Radhabai Bhikaji v. Baluram Daluram*, 1970 Acc CJ 403 (M. P.) the Madhya Pradesh High Court held that duplication of proceedings occasioned by a claim instituted under the Workmen's Compensation Act and a claim filed under the Motor Vehicles Act was intended to be avoided and therefore, Section 3 (5) of the Workmen's Compensation Act was enacted. With great respect, it seems difficult to accept the reasons which have found favour with that Court. When Section 3 (5) of the Workmen's Compensation Act was enacted, the Legislature could not have had in mind the Motor Vehicles Act, which was enacted in 1939. Indeed, in 1923, there was no statute which provided for any other tribunal for entertaining claims in respect of such injuries or death. None has been pointed out to us. It seems that when Section 3 (5) of the Workmen's Compensation Act was enacted, the Legislature could have had in mind the ordinary courts only as an alternative forum for entertaining a claim for damages. It will be noted in particular that Section 3 (5) speaks of a 'suit' and as has been well settled a suit is 'a civil proceeding instituted by the presentation of a plaint'. That was laid down by the Privy Council in *Hans Raj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*, AIR 1933 PC 63. A proceeding for compensation made under the Workmen's Compensation Act or under the Motor Vehicles Act cannot be confused with a suit. That ingredient of Section 3 (5) has apparently not been noticed by the learned Judges in the cases cited before us. Moreover, when the Madhya Pradesh High Court in *Radhabai Bhikaji* (supra) spoke of a duplication of proceedings it was apparently not pointed out to the learned Judges that there is no duplication in the true sense, and that the claim under the Workmen's Compensation Act is based on a statutory liability while that under the Motor Vehicles Act rests on liability in tort. In *Shardaben v. M. I. Pandya*, 1971 Acc CJ 222 = (AIR 1971 Guj 151) the Gujarat High Court identified Claims Tribunal as a court, and that is also the view which appears to have been taken by the Madhya Pradesh High Court in *Krishan Gopal v. Dattatraya*, 1971 Acc CJ 372 = (AIR 1972 Madh Pra 125) and again in *Mangilal v. Union of India*, 1973 Acc CJ 352 = (AIR 1974 Madh Pra 159) (FB). Reliance has been placed by the respon-

dents on *Jaswant Rai v. National Transport & General Co. Ltd.*, 1972 Acc CJ 21 (Punjab), but in that case it was not specifically considered that a claim could not lie directly under the Workmen's Compensation Act if a claim had already been made under the Motor Vehicles Act. If the decision in that case can be construed as the respondents would have it, I regret I am unable to agree with the law laid down by it. Following the view taken by the Madhya Pradesh High Court in *Radhabai Bhikaji* (supra), the Mysore High Court held in *Yellubai Torappa Kadam v. M/s. Mujawar & Co.*, 1973 Acc CJ 242 (Mys) that a Claims Tribunal under the M. V. Act could be described as a 'court of law' in the sense used in Section 3 (5) of the Workmen's Compensation Act, and therefore, a claimant could file a claim either under the Workmen's Compensation Act or under the Motor Vehicles Act, but not under both. The view proceeds on the assumption that because Section 110-F excludes a civil court from adjudicating on claims falling within the jurisdiction of the Claims Tribunals, it is intended that Claims Tribunals could substitute for civil courts and can therefore be regarded as 'courts of law'. With respect, the assumption is not justified. The purpose of Section 110-F of the Motor Vehicles Act has already been discussed above, and in my opinion the exclusion of the civil court does not make a Claims Tribunal a court of law, notwithstanding that the Claims Tribunal exercises some of the powers of a civil court under the Code of Civil Procedure. I may also add that, as was observed by the Madhya Pradesh High Court in *Radhabai Bhikaji* (supra), there is no material distinction relevant to the point before us between the expression 'civil court' and the expression 'court of law' used in Section 3 (5) of the Workmen's Compensation Act.

14. Having regard to the manner in which the law has developed, to which reference has already been made, I find myself unable to accept the proposition that a claimant, to whom Section 110-AA of the Motor Vehicles Act does not apply, cannot claim compensation both under the Workmen's Compensation Act and the Motor Vehicles Act.

15. I am of opinion that neither Section 3 (5) nor Section 19 of the Workmen's Compensation Act operates as a bar to the consideration of the claim made by the appellants under the Motor

Vehicles Act. That claim was maintainable before the Claims Tribunal, and therefore the present appeal is maintainable. The institution of a claim under the Workmen's Compensation Act does not bar the present appeal.

16. The second ground on which the Claims Tribunal has rejected the claim of the appellants is that negligence was not pleaded in the application. It seems to me that inasmuch as a claimant for compensation under the Motor Vehicles Act must establish negligence against the respondents an application under Section 110-A of the Act must contain a clear plea to that effect. Full particulars should be set out. Unless that is done, the right of the respondents to be informed of the case against them is defeated. It is a different matter where all along the parties are aware of the negligence alleged and evidence is led with that awareness. In such a case a Claims Tribunal will be reluctant to dismiss the application for want of such a plea. In the present case, a perusal of the application under Section 110-A shows that it does not contain any plea of negligence. It is true, as was held by the Mysore High Court in *M. Krishnappa v. Madras Motor & General Insurance Co.*, 1971 Acc CJ 240 (Mys), that an application under S. 110-A should not be treated with the strictness customarily applied to a plaint. Nonetheless, a plea of negligence is a plea fundamental to the maintainability of the application, and its absence should ordinarily preclude the Claims Tribunal from trying the claim. In the objections filed by some of the respondents to the application, a specific preliminary objection was taken to the effect that the application did not disclose any cause of action against those respondents. In the course of proceedings it became evident to the appellants that the maintainability of the application was challenged because no plea of negligence had been taken. The appellants should have applied for amendment of the application to include such plea, but nothing was done to the very end before the Claims Tribunal. It is unfortunate that the claim had to be dismissed on that ground. During the hearing of this appeal, learned counsel for the appellants orally applied for permission to amend the application. Without anything more, it is not possible to grant permission. Before an amendment can be permitted, the court must be satisfied that the circumstances of the case, including the conduct of the party during

the trial proceeding, warrant such permission. There is no material whatever before us of that nature. If a proper application had been made before us, the question might have arisen whether the case should not be remanded to the Claims Tribunal for further consideration. It may be pointed out that in *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152 the Supreme Court laid down that a plea of negligence cannot be allowed to be raised for the first time in appeal. Although that is a case where the plea was sought to be taken by the defendant-respondent, the principle applies equally to a plaintiff-appellant. The appellants rely on *Seethamma v. Benedict D'Sa*, AIR 1967 Mys 11. The case is distinguishable. The statutory form prescribed by the rules in that case was vague, and did not contain the requisite column No. 24 set out in the statutory form applicable in this case. The statutory form prescribed by the Punjab Motor Vehicles Rules, applicable here, requires particulars in regard to 'the cause of accident'. This clearly calls for a plea of negligence.

17. In the result, the appeal fails and is dismissed. There is no order as to costs.

D. B. LAL, J.:— I agree.

Appeal dismissed.

AIR 1976 HIMACHAL PRADESH 80

D. B. LAL, J.

Smt. Satya Devi, Petitioner v. V. S. Malik, Respondent.

Civil Revn. No. 4 of 1974, D/- 5-1-1976.

(A) Houses and Rents — East Punjab Urban Rent Restriction Act (1949), S. 4 — Determination of fair rent — Order appointing Commissioner to hold enquiry — Not invalid. (1965) 1 Mad LJ 287, Dissented from.

Under S. 4, the Controller has to hold such enquiry as he thinks fit for determination of fair rent. To say that the Controller cannot appoint a local Commissioner to report on specific points referred to him by the Controller, will be too wide a proposition to get a legal support. There may be a case where the report by a local Commissioner will be necessary. But that report by itself will not be evidence unless the Commissioner as well as the witnesses recorded by him

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private Medical Colleges do not get any grant in aid either from the Central Government or the State Government. However, four of these private Medical Colleges including respondent-2 College, have been permitted by the State Government to utilise clinical facilities in Government Hospitals.

5. Admission to Government Medical Colleges is governed by Rules made by the Government from time to time. At a meeting of the representatives of the State Government and the representatives of the management of these private medical Colleges held on 27-6-1975, it was agreed as to how certain numbers of seats in these Colleges should be allotted to different categories of applicants. The management of respondent-2 College agreed, inter-alia, that 33 seats should be reserved for 'students of Karnataka' on payment of a capitation fee of Rs. 10,000 only, that selection of 'Karnataka Students' should be done by the Governing Body of that College at a meeting at which the Additional Director of Health Services in Karnataka State should be present and that selection of 'Karnataka Students' should be done purely on the basis of merit.

6. Rule 2 of the Rules which prescribes the eligibility for admission to Government medical Colleges, sets out the academic qualifications and the minimum percentage of marks in optional subjects for being eligible for admission.

7. The heading of Rule 3 is 'Domicile, etc.'. main part of sub-rule (1) of that Rule, reads:

"No person who is not a citizen of India and who has not studied in any educational institution in the State of Karnataka for not less than ten years at any time prior to the date of the application for a seat shall be eligible to apply;"

8. The proviso to that sub-rule exempts certain categories of applicants from the requirement of the main part of that sub-rule.

9. Sub-rule (2) of Rule 3 provides that in the cases of children and wards of members of Parliament, the period during which they (such children and wards) studied in any educational institutions in New Delhi while staying with their parents and guardians who were members of Parliament, shall be treated as the period of study in educational institutions in the State of Karnataka.

10. Rule 4 sets apart certain numbers of seats for certain special categories of applicants like applicants from neighbouring States and countries and children of defence personnel, ex-defence personnel, and political sufferers.

11. Rule 5 provides for reservation of certain percentages of seats in favour of Scheduled Castes, Scheduled Tribes and socially and educationally Backward classes.

12. Rule 10 prescribes the procedure for selection of candidates on the basis of marks secured by them in the Pre-University examination or Degree examination, subject to reservation for Scheduled Castes and Scheduled Tribes and other Backward classes.

13. We shall now briefly set out the facts of this case. The petitioner's parents were born in Karnataka State, but have been residing outside Karnataka State since several years. The petitioner was residing with them till the year 1972 when he joined a school in Bangalore. After passing out from that school, he studied in a College in Bangalore and passed the pre-University in the year 1975. In the final Pre-University examination he secured a first class and 83 per cent marks in the optional subjects. He applied for admission to respondent-2 College which, by its letter dated 26-7-1975 (Exhibit-A), informed him that he had been selected for admission to the first year of the M. B. B. S. course for the academic year 1975-76 and that he should join the College on or before 1-8-1975 after producing certain documents including the proof of his 'domicile status'. On 5-8-1975 respondent-2 College issued a receipt (Exhibit-B) for having received Rupees 11,450 from the petitioner's grandfather towards provisional reservation of a seat for him (the petitioner) in that College. The Petitioner did not produce any proof of his having studied in educational institutions in Karnataka State for 10 years. On 9-8-75, respondent-2 College addressed a letter to the petitioner's grandfather in which it was stated, inter alia, that the petitioner could be admitted only if the State Government waived '10 years residency rule' and that alternatively he could be considered for allotment of a seat as a 'Non-Karnataka' student in which case he had to pay a capitation fee of Rs. 35,000. However, at his request the petitioner was permitted to attend classes pending completion of his admission. Respondent-2 College informed him that he must produce all the documents before 14-8-1975 which was the last date fixed by the Indian Medical Council for admission to Medical Colleges. He neither produced any documents to show that he had studied for 10 years in schools and colleges in Karnataka State nor did he express his willingness to be considered for admission as a 'non-Karnataka' student. He presented this petition on 28-8-1975. On 29-8-1975, the learned single Judge made an interim order, by

virtue of which he has been attending classes in respondent-2 College. On 5-9-1975 the learned single judge recalled the above interim order and directed respondent-2 College to admit the petitioner to the 1st year M. B. B. S. class subject to the result of the petition. Accordingly the petitioner has joined respondent-2 College and has been attending classes.

14. The State of Karnataka, respondent-1, has not filed any statement of objections, but respondent-2 has filed its statement of objections in which it has pleaded, inter alia, as follows: The Rules are applicable to admission to Government Medical Colleges only. In view of the fact that certain clinical facilities are made available to respondent-2 College in Government Head Quarters Hospitals, Mangalore, the State Government wanted to have a say in the allotment of seats in respondent-2 College. It was agreed in the meeting of the representatives of the Government and private Medical Colleges that for the sake of convenience, the criterion for selection of 'Karnataka students' should be as defined in Rule 3 of the Rules and that a candidate would be entitled for admission as a Karnataka student if he fulfilled the requirement of Rule 3. As the petitioner failed to produce documents in proof of his domicile status as a Karnataka student on or before 14-8-1975, the last date fixed for admission, respondent-2 College was constrained to allot the seat which had been allotted to him, to the next best student in the waiting list. All the 100 seats in that College have been allotted to students who have since joined the College. By admitting him the maximum number of students permitted by the Indian Medical Council and the State Government would be exceeded. Even if he is admitted, he will have to be treated as a 'Non-Karnataka Student' who has to pay a capitation fee of Rs. 35,000.

15. Respondent-2 College has also pleaded that as it is a private institution, it is not subject to the writ jurisdiction of this Court and that no writ can be issued against it when no statutory duty has been cast upon it and that hence the petition is unsustainable as against it (respondent-2) and is liable to be dismissed.

16. At the hearing of this petition, a preliminary objection was raised on behalf of both the respondents that the petitioner could not ask for quashing Rule 3 since the Rules had no application to admission to respondent-2 College which is not a Government College, that no writ could be issued against respondent-2 which is neither the State as defined in Article 12 of the Consti-

tution nor a public authority and that no writ could be issued against respondent-1 also as the petitioner has not shown any order or direction by respondent-1 by which he can be regarded as being aggrieved.

17. It is true that Rule 3 (1) of the Rules which provides that a student should have studied in educational institutions in Karnataka-State for not less than 10 years prior to the date of his application to a Medical College, does not, in terms, apply to admission of students to respondent-2 College since that College is not a Government College and no seats were reserved in that College for being filled by the Government in the academic year 1975-76. But, as stated earlier, at the conference at which the representatives of the Government and the private Medical Colleges were present, it was agreed that respondent-2 College should admit 33 'Karnataka' students to its College. This was followed by a letter dated 30-6-1976 (Exhibit-1) from the State Government to respondent-2 College stating, inter alia, that in respect of selection of candidates the procedure agreed to in the aforesaid conference, should be followed and that under no circumstances there should be any deviation in the distribution of seats and the method of selection of candidates.

18. The expression 'Karnataka' students was not defined or explained by the State Government. But, not unnaturally, respondent-2 understood this expression as meaning students who fulfil the requirement of Rule 3. Since the direction of the Government as to how the seats should be filled in respondent-2 College, has to be obeyed by the latter, failing which it runs the risk of deprivation of clinical facilities in Government hospitals at Mangalore, it is reasonable to regard Rule 3 as embodying a direction by the Government to respondent-2 College. Hence, it would be too technical to hold that the validity of Rule 3 (1) does not arise for determination in this petition. Though respondent-2 is a private institution which does not come within the definition of 'State' in Article 12 of the Constitution and is also not a public authority, since it (respondent-2) feels obliged to obey the direction of the Government to admit certain number of 'Karnataka' students to its College, the petitioner can ask for a writ restraining respondent-1, the State of Karnataka, from enforcing any direction given by it (respondent-1). Hence, it would, in our opinion, be too technical to dismiss this petition solely on the ground that respondent-2 is a private institution. Though the petitioner has asked for a writ, direction or order as against respondent-2,

what he has, in substance, sought for is a writ to respondent-1, the State of Karnataka, not to enforce its direction to admit certain number of 'Karnataka' students to respondent-2 College. Hence, we overrule the preliminary objection of the respondents and proceed to consider the petition on its merits.

19. Mr. B. R. L. Iyengar, learned Counsel for the petitioner, made it clear at the very commencement of his arguments, that his attack on Rule 3 (1) is not on the ground of violation of Articles 14 and 15 of the Constitution. This is presumably in view of the rulings of the Supreme Court in *D. P. Joshi v. State of Madhya Bharat* (AIR 1955 SC 334) and in *Vasundhara v. State of Mysore* (AIR 1971 SC 1439). In *D. P. Joshi's* case, the impugned rule provided that for all students who were bona fide residents of Madhya Bharat, no capitation fee should be charged for admission to the Medical College at Indore and that for non-Madhya Bharat students certain capitation fee should be charged. For the purpose of that rule, the expression 'bona fide students' was defined as:

"one who is

(a) a citizen of India whose original domicile is in Madhya Bharat, provided he has not acquired a domicile elsewhere, or

(b) a citizen of India, whose original domicile is not in Madhya Bharat but who has acquired a domicile in Madhya Bharat and has resided there for not less than 5 years at the date, on which he applies for admission, or

(c) xxx xxx xxx

(d) xxx xxx xxx"

Repelling the contention that prescription of domicile as the basis for preferential treatment in regard to payment of capitation fee, was violative of Articles 14 and 15 of the Constitution, this is what Venkatarama Iyyar, J., who delivered the majority judgment, said at page 336:

"The rule as modified is clearly not open to attack as infringing Art. 15 (1). The ground for exemption from payment of capitation fee as laid down therein is 'bona fide' residence in the State of Madhya Bharat. Residence and place of birth are two distinct conceptions with different connotations both in law and in fact, and when Article 15 (1) prohibits discrimination based on the place of birth, it cannot be read as prohibiting discrimination based on residence."

His Lordship rejected the contention that though the rule purported to grant exemption based on residence within the State, the definition of 'bona fide students' in that rule was really based on

the place of birth. His Lordship said that when the rule-making authorities referred to domicile in clauses (a) and (b) of that Rule, they were really thinking of residence. The attack on that rule on the ground of violation of Article 14, was also repelled by his Lordship. Upholding the classification of students into bona fide residents of Madhya Bharat and those who were not so, his Lordship observed thus:

"It is well-known that it requires considerable finance to maintain a Medical College. A concession given to the residents of the State in the matter of fees is obviously calculated to serve that end, as presumably some of them might, after passing out of the College, settle down as doctors and serve the needs of the locality."

20. The validity of Rule 3 of the earlier Rules framed by the Government of Karnataka for selection of candidates for admission to Medical Colleges, came up for consideration in *Vasundhara v. State of Mysore*, (AIR 1971 SC 1439). The main part of that Rule read as follows:

"No person who is not a citizen of India and who is not domiciled and resident in the State of Mysore for not less than ten years at any time prior to the date of the application for a seat shall be eligible to apply."

The above Rule had been impugned, not on the ground of being violative of Article 15, but on the ground of being violative of Article 14 of the Constitution. The Supreme Court, after referring to its earlier decision in *D. P. Joshi's* case, observed that the word 'domicile' occurring in the above Rule, was used to convey the idea of the intention to reside or remain in the State of Mysore. The Supreme Court held that that Rule did not offend Article 14 of the Constitution.

21. In this petition, Mr. Iyengar urged the following contentions:

(i) The requirement under Rule 3 (1) that an applicant should have studied for 10 years in educational institutions in Karnataka State, is applicable only to applicants who are non-citizens and not to applicants who are citizens of India;

(ii) If Rule 3 (1) is construed as requiring even an applicant who is a citizen of India, that he should have studied for not less than 10 years in educational institutions in Karnataka State, then the State of Karnataka had no competence to make such Rule; and

(iii) The State Government had no competence to make, in exercise of its

executive power under Article 162 of the Constitution, Rule 3(1) which seeks to classify applicants into distinct classes, to prescribe a binding rule of eligibility and to impose certain disabilities on certain class of applicants.

22. Elaborating his first contention, Mr. Iyengar referred to the words 'no person who is not a citizen of India' occurring in the opening part of Rule 3(1) and argued that what that sub-rule provides is that a non-citizen of India who has not studied in educational institutions in Karnataka State for not less than 10 years, is ineligible to apply for admission to Government Colleges in Karnataka and that that sub-rule has no application to an applicant who is a citizen of India. In other words, Mr. Iyengar's contention was that Rule 3(1) does not require that an applicant who is a citizen of India, should have studied for not less than 10 years in educational institutions in Karnataka State in order to be eligible for applying for admission to Government Medical Colleges.

23. On the other hand, the learned Government Advocate contended that what Rule 3(1) provides is that in order to be so eligible, a person should have two qualifications, namely, being a citizen of India and having studied in educational institutions in Karnataka State for not less than 10 years and that it is not enough that he is merely a citizen of India. The learned Government Advocate maintained that Rule 3(1) could not have intended conferring eligibility on a non-citizen if he merely studied for 10 years in educational institutions in Karnataka State and that that sub-rule cannot reasonably be construed as requiring study in educational institutions in Karnataka State for not less than 10 years, only in the case of a non-citizen.

24. It is well settled that in order to ascertain the meaning of a section or a rule, it is legitimate to take the aid of other sections or rules in an enactment or a body of rules.

25. As stated earlier, clause (b) of the proviso to Rule 3(1) exempts children of Central Government servants and employees of statutory Corporations from the requirement of having studied for 10 years in educational institutions in Karnataka State if they (such servants or employees) are serving in Karnataka State on the date of making application and during the period of 24 months immediately before such date. Clause (c) of

that proviso exempts the children of State Government employees serving outside the State on deputation and the children of members of All India Services borne on the Karnataka State cadre serving in the State on the date of application or have retired within 4 years prior thereto, from the requirement of having studied for 10 years in educational institutions in Karnataka State. If the requirement of 10 years' study in educational institutions in Karnataka State, is applicable only to non-citizens and has no application to citizens of India, then there would have been no necessity to grant exemption in the cases of children of the aforesaid categories of Government servants and employees, because it is very unlikely that non-citizens would be Central Government employees or employees of such statutory Corporations or members of All India Services.

26. As stated earlier, sub-rule (2) of Rule 3 provides that the period during which children or wards of members of Parliament resided with their parents or guardians in New Delhi when the latter were or are members of Parliament, shall be treated as equivalent to the period of study in educational institutions in Karnataka State. If sub-rule (1) of Rule 3 has no application to citizens of India and applies only to non-citizens, then sub-rule (2) would have been wholly unnecessary because a non-citizen cannot be a member of Parliament.

27. Rule 4 provides for reservation of one seat for a student from Nepal. If Rule 3(1) contemplated a non-citizen becoming eligible for admission to a Government Medical College by studying for 10 years in educational institutions in Karnataka State, it is very unlikely that reservation would have been made under Rule 4 for a student from Nepal.

28. It is well-known that establishment and running of Medical Colleges, require huge initial outlay as well as heavy recurring expenditure. The number of seats in Medical Colleges is very limited. Only a small proportion of applicants can be provided seats in Medical Colleges. When most of the applicants who are citizens, have to go without seats in Government Medical Colleges, it is very unlikely that the State Government intended that seats in Government Medical Colleges should be available to non-citizens if they merely studied in educational institutions in Karnataka State for 10 years. It is well settled that if a statutory provision or rule is capable of two

constructions, that which accords with the probable intention of the Legislature or the rule-making authority, should be preferred.

29. Having regard to the above considerations, we are of the view that the requirement of having studied for 10 years in educational institutions in Karnataka State, is in addition to, but not as an alternative to, the requirement of Indian citizenship. Hence, we have no hesitation in rejecting the construction sought to be placed by Mr. Iyengar on Rule 3 (1).

30. Elucidating his second contention, Mr. Iyengar referred to Articles 5 to 11 in Part II of the Constitution. Article 5 deals with citizenship at the commencement of the Constitution. Article 6 deals with the rights of citizenship of certain categories of persons who migrated to India from Pakistan. Article 8 deals with rights of citizenship of a certain category of persons of Indian origin residing outside India. Articles 7 and 9 provide that notwithstanding anything in Articles 5 and 6 a person loses his Indian citizenship by migrating to Pakistan after 1-3-1947 or by acquiring the citizenship of any foreign State. Article 10 provides for continuance of the rights of citizenship under the foregoing Articles subject to the provisions of any law made by Parliament. Article 11 provides that nothing in the foregoing Articles shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

31. Mr. Iyengar next referred to Entries 17 and 81 of List I of the Seventh Schedule to the Constitution, which read:

17. Citizenship, naturalisation and aliens.

81. Inter-State migration; inter-State quarantine.

Mr. Iyengar contended that having regard to Article 11 read with Entries 17 and 81 of List I of the Seventh Schedule to the Constitution, it is only Parliament which has competence to legislate on matters which affect the rights, privileges and immunities of citizens, that State Legislatures have no competence to make any law on such matters and that hence it follows that the State Government could not, in exercise of its executive power under Article 162 of the Constitution, make rules in respect of a matter not within the power of the State Legislature.

32. Elaborating his contention, Mr. Iyengar submitted that unlike in United States where there is dual citizenship, namely, citizenship of the United States and citizenship of any of the Individual States, our Constitution envisages only a single citizenship of entire India and not citizenship of any individual State in India. Mr. Iyengar maintained that from the concept of the single citizenship of the whole of India, it follows that there can be only one domicile for the whole of India, that there can be no domicile in any of the individual States in India and that it is not competent for a State Legislature to provide for domicile within that State or to provide that residence within that State shall be the basis for any rights, privileges or disabilities of a citizen of India. Mr. Iyengar added that the State Legislature has no competence to make any law similar to Rule 3 (1) of the Rules which puts a disability on a citizen of India on the basis of the accidental or adventitious circumstance of his residence in that State for any particular length of time. According to Mr. Iyengar, citizenship, domicile and residence are so inter-related that domicile and residence are also matters in respect of which Parliament alone has exclusive power to make laws.

33. Mr. Iyengar argued that if each State in India erects barriers on the ground of domicile or residence and imposes any disability on a citizen on the ground thereof, such barriers would affect the quality and content of the citizenship of India, attenuate the rights and privileges of a citizen and would also infringe Articles 301 to 304 of the Constitution which ensure freedom of trade, commerce and intercourse throughout the territory of India and also interfere with the rights of citizens to move freely throughout the territory of India and to reside and to settle in any part thereof which rights have been guaranteed by sub-clauses (d) and (e) of clause (1) of Article 19 of the Constitution.

34. Mr. Iyengar referred to some observations in decisions of the Supreme Court and the High Courts emphasizing unity and oneness of India. In *N. B. Khare v. State of Delhi*, (AIR 1950 SC 211), Mukherjea, J., (as he then was), observed at page 216:

"What the Constitution lays stress upon is that the entire Indian territory is one unit so far as the citizens are concerned."

In *C. Philip v. Travancore-Cochin*, (AIR 1952 Trav Co 274), Govindapillai, J., observed at page 276 that the right contemplated in Article 19 (1) (d) of the Constitution, has for its object the removal of all internal barriers in the country and to make India as a whole the abode of citizens of India.

35. Mr. Iyengar sought to draw sustenance from several decisions of the United States Supreme Court for his contention that no State legislature can place any restriction on a citizen which affects equality of treatment in any part of the territory of India.

36. In *Ellis Ward v. State of Maryland* (United States Supreme Court Reports, (1871) 20 Law Ed 449), a statute of a State prohibited the sale, within a certain district of the State, of goods other than agricultural products and articles manufactured in that State, by persons not residents therein, without first obtaining a license and paying therefor. Section 2 (d) of Article 4 of the American Constitution provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. Clifford, J., who delivered the opinion of the Court, held that the statute in question was repugnant to the Federal Constitution and invalid for the reason that it imposed a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, who were not permanent residents in the State of Maryland.

37. In his separate but concurring judgment, Bradley, J., observed thus:

"..... the Act of the Legislature of Maryland, complained of in this case, discriminates in favour of residents and against non-residents of the State and, consequently, is in violation of the 4th Article of the Constitution of the United States and, therefore, pro tanto void."

38. In what are popularly known as *Slaughter-House* cases (United States Supreme Court Reports, (1872) 21 Law Ed 394), the scope of Section 2 (d) of Article 4 of the American Constitution was explained thus by Miller, J., who delivered the majority opinion of the Court:

"Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less,

shall be the measure of the rights of citizens of other States within your jurisdiction".

39. In *Blake v. McClung* (U. S. Supreme Court Reports, (1898) 43 Law Ed 432), the Supreme Court invalidated a State statute which gave to residents of that State a priority over non-residents in the distribution of the assets of a foreign corporation which, by filing its charter of articles of association in the State, was deemed a corporation of that State, in so far as it discriminated against citizens of other states.

40. Harlan, J., who delivered the opinion of the Court, observed thus at page 439:

"We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth Article of the Constitution of the United States, although, generally speaking, the state has the power to prescribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the Supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

41. In *Edward v. California* (U. S. Supreme Court Reports, (1941) 86 Law Ed 119), a State statute penalised the bringing into the State of any indigent person. That statute was held to be unconstitutional even in cases of persons who were destitute of property and without resources to obtain the necessities of life and who had no relatives or friends able and willing to support them. Douglas, J., said thus at page 129:

"Thus it is plain that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by State citizenship..... The conclusion that the right of free movement is a right of national citizenship stands on firm historical ground..... a State statute which obstructs or in substance prevents that movement must fall..... it would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus

withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of national citizenship, a serious impairment of the principles of equality. Since the State statute here challenged involves such consequences, it runs afoul of the privileges and immunities clause of the Fourteenth Amendment."

42. Black, J., in his separate but concurring judgment, observed thus at page 130:

"This Court, should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing."

43. In *Oyama v. State of California* (U. S. Supreme Court Reports, (1947) 92 Law Ed 249), the validity of the California Alien Land Law came up for consideration. Under it, aliens who were ineligible for citizenship, were forbidden from acquiring ownership of agricultural lands under penalty of escheat. That law contained a provision that payment by such alien for consideration of a transfer to a third person, was, prima facie, evidence of an intent to evade the statute. The facts of that case were briefly these: The son of a Japanese father was an American citizen by birth. The father had paid the consideration for transfer of a land to his son who was minor. The majority of Judges of the Supreme Court held that the impugned statute, as applied to that case, made an unconstitutional discrimination against the son because of his parents' country of origin by saddling him with an onerous burden of proof not generally borne by California children for whom parents might purchase property.

44. On the basis of the aforesaid decisions of the American Supreme Court, Mr. Iyengar contended that the State legislature has no power to enact a law imposing on a citizen of India who is not a resident of that State, any disability from which a citizen of India who is a resident of that State, did not suffer and that such a law can, if at all, be enacted only by Parliament in exercise of the power under Article 11 read with Entries 17 and 81 of List I of the Seventh

Schedule to the Constitution. He further contended that when the State Legislature itself has no competence to make such law, it was obvious that the State Government could not make such provision by rules in exercise of its executive power.

45. On the other hand, the learned Government Advocate contended that the question whether a rule which prescribes the qualification based on domicile or residence in a State, affects the rights of citizenship is no longer *res integra* in view of the pronouncement in the majority judgment of the Supreme Court in *D. P. Joshi v. Madhya Bharat State*, (AIR 1955 SC 334). He invited our attention to the following observations of Venkatarama Iyer, J., at page 337:

"But citizenship and domicile represent two different conceptions. Citizenship has reference to political status of a person and domicile to his civil rights." At page 338, his Lordship said—

"Under the Constitution Article 5 which defines citizenship, itself proceeds on the basis that it is different from domicile Domicile has reference to the system of law by which a person is governed and when we speak of the domicile of a country, we assume that the same system of law prevails all over the country each area having a distinct set of laws would itself be regarded as a country for the purpose of domicile." His Lordship added that within one political unit there can be as many domiciles as there are systems of law in different parts of that political unit.

46. In the light of the distinction between citizenship and domicile as pointed out by the Supreme Court, it follows that a law that makes distinction in regard to civil rights of citizens based on the ground of domicile or residence in a part of India, does not necessarily affect the political status or rights of citizens. What Article 11 of the Constitution states is that the provisions of Articles 5 to 10 are not intended to lay down exhaustive or unalterable law relating to acquisition, continuance and termination of citizenship and that Parliament has power to enact laws regulating citizenship, including acquisition continuance and termination of citizenship. But laws which do not relate to political status of citizens or acquisition, continuance or termination of citizenship, are outside the scope of Art. 11 and Entry 17 of List I of the Seventh Schedule to the Constitution. As pointed

out by the Supreme Court in *Chitralekha v. State of Mysore*, (AIR 1964 SC 1823) by virtue of Entry 11 of List II of the Seventh Schedule to the Constitution (which reads "Education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III"), the State Government would be within its right to prescribe qualifications for admission to colleges so long as its action does not contravene any other law. As the requirement that an applicant for admission to Medical Colleges should have studied for 10 years in educational institutions in Karnataka State, does not relate to the political status of a citizen or acquisition, continuance or termination of citizenship, we do not see how Rule 3(1) can be said to lie within the ambit of Article 11 or Entry 17 of List I of the Seventh Schedule to the Constitution.

47. However, Mr. Iyengar argued that Rule 3(1) abridges the right of citizen to enjoy all the facilities available to citizens who are domiciled or residing in Karnataka State and that any denial of such facilities to him on the ground of his not being domiciled or not residing in this State, would take away or abridge his right of citizenship of India.

48. To examine the above contention, it is necessary to ascertain what are the rights attached to citizenship of India. Such rights have been expressly specified in Part III of the Constitution. Art. 15 which prohibits discrimination on the grounds of race, religion, caste, sex or place of birth, confers a corresponding right on citizens not to be so discriminated against. Art. 16 confers on citizens right to equality of opportunity in matters of public employment; Article 19 confers on citizens rights to freedom of speech and expression, to assemble peaceably without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire and dispose of property and to practice any profession, or to carry on any occupation, trade or business. But these rights are subject to reasonable restrictions in public interest. Article 29(1) confers on citizens the right to conserve their language, script and culture. Article 29(2) confers on citizens a right not to be discriminated against on the grounds of race, religion, caste or language in regard to admission to educational institutions maintained by the State or receiving aid out of the State funds.

49. There is no right expressly conferred on a citizen to be admitted to any educational institution maintained or aided by the State or a right that he should not be discriminated in regard to admission to such educational institutions on the ground of domicile or residence, as distinguished from race, religion, caste, sex, language, or place of birth. We are unable to accept the contention of Mr. Iyengar that apart from the rights expressly specified in the provisions of the Constitution, there are certain implied rights attached to citizenship and that the right not to be discriminated against on the ground of domicile or residence in a State, in regard to admission to educational institutions, is such implied right of a citizen. When the several grounds on which a citizen shall not be discriminated against in regard to admission to educational institutions, have been expressly specified in Articles 15 and 29(2) of the Constitution, it is unreasonable to imply any other ground not expressly mentioned in those two Articles.

50. The several decisions of the American Supreme Court relied on by Mr. Iyengar, are based on Section 2(d) of Article 4 of the United States Constitution which expressly provides that the citizens of each State shall be entitled to all the rights, privileges and immunities of citizens in several States. As there is no corresponding provision in our Constitution, those decisions have no application to the present case.

51. Elaborating his contention that Rule 3(1) is inconsistent with the concept of citizenship of the whole of India, Mr. Iyengar argued that a citizen has the right to move freely throughout the territory of India and the right to reside and settle in any part of the territory of India which rights are guaranteed by Cls. (d) and (e) of Article 19(1) of the Constitution and that those rights would include the right to enjoy the same privileges and advantages which are available to persons having domicile or residence in any State. Mr. Iyengar maintained that the right to move freely throughout the territory of India and the right to reside and settle in any part of India, would be illusory if a citizen who moves into any State in India or resides and settles in any State in India, is subject to any disabilities or disadvantages and is treated as a second class citizen on account of his not being domiciled in, or not having resided in, that State for any particular length of time. Mr. Iyengar said that if

discrimination between citizens of India on the ground of domicile or residence for a particular period in State, is permitted, each State may go to the length of denying protection of life and property or supply of water and other civic amenities to citizens of India if they are not domiciled or residents for a particular length of time in that State.

52. Though the above arguments of Mr. Iyengar may look attractive at first sight, on closer examination we cannot accept them. The right to move freely throughout the territory of India, bars any restrictions of such movement and the right to reside and to settle in any part of India, bars any restriction, either temporary or permanent, on inter-State migration, except where such restriction is reasonable and is public interest. Those rights do not, by themselves, ensure that every citizen of India will have all the advantages and privileges in every State available to citizens domiciled or residing therein and that no kind of preference is permissible to citizens who are domiciled in, or residents of, that State. But such differential treatment will be bad in law if it is not based on reasonable classification contemplated by Art. 14 of the Constitution. Thus, if a citizen of India is denied protection of life and property or water and other civic amenities in State solely on the ground that he is not domiciled in that State or has not resided therein for any particular length of time, then such denial may offend Article 14 and therefore be impermissible. But every preference given by a State to citizens who are domiciled therein or have resided therein, is not necessarily bad. For example, in granting agricultural lands or house sites, if preference is shown by a State to citizens who are domiciled therein or who have resided therein for a certain minimum period, such preference may not be violative of Article 14. As stated earlier, in *D. P. Joshi v. State of Madhya Bharat*, (AIR 1955 SC 334), the Supreme Court held that the preference shown by a State to students domiciled in that State in regard to capitation fee for admission to the Government Medical College, was not violative of Article 14 of the Constitution and in *Vasundhara's case* (AIR 1971 SC 1439) the requirement of domicile and residence for 10 years in the State of Mysore as a condition of eligibility for admission to Medical Colleges, was held by the Supreme Court as not offending Article 14.

53. There is no merit in the contention of Mr. Iyengar that Rule 3 (1) offends Article 301. Freedom of trade, commerce, intercourse throughout the territory of India enjoined by Art. 301, has no application to the right of a person to be admitted to an educational institution in any part of the territory of India.

54. Thus, we are not persuaded to accept the contention of Mr. Iyengar that the State legislature itself has no power to make a legislation similar to Rule 3 (1) and that hence the State had no power to make that Rule in exercise of its executive power.

55. Elucidating his third contention, namely, that provisions like the impugned Rules could be made only by a legislative enactment and not by administrative rules, Mr. Iyengar submitted that provisions which lay down a binding rule of conduct, classify persons for purposes of eligibility, prescribe the procedure to be followed for a particular purpose, create authorities and confer powers on them to effectuate such purpose, impose consequences for breach of such provisions and operate to the prejudice of a person or a class of persons, are legislative in character and that such provisions can be made only by a legislature and not by the executive. Mr. Iyengar added that if the executive is permitted to make such provisions, it would amount to excessive delegation or abdication of essential functions of the legislature and that hence such provision would be bad in law. Mr. Iyengar maintained that the impugned Rules prescribe conditions of eligibility, restrict the rights of applicants to get admission to Medical Colleges, impose disability on applicants not possessing the qualifications prescribed by them (the Rules), constitute the Selection Committee, empower that Committee to make selection of applicants and prescribe the procedure to be followed by that Committee and provide for cancellation of admission of applicants who furnish false particulars and that hence the impugned Rules are essentially legislative in character and could not have been made by the State Government in exercise of its executive power.

56. In support of his above contention, Mr. Iyengar, relied on a few decisions of the Indian and American Supreme Courts.

57. In *Dwarakanath v. Bihar State*, (AIR 1959 SC 249), the Supreme Court

held that Article 182 of the Bihar Education Code, which, inter alia, provided for withdrawal or withholding of recognition in case the managing committee of a school did not carry out the directions of the Board of Secondary Education, could not deprive the managing committee of its right in the properties of the school under its management as that Code was in the nature of administrative rules and not based on statutory authority which could give it force of law. This decision is distinguishable inasmuch as the property rights of the Education Society could be deprived of only in accordance with Article 31 of the Constitution which requires, inter alia, that such deprivation should be under a law enacted by the appropriate legislature. But, in the present case the petitioner had no legal right to be admitted to any Government Medical College or respondent-2 College apart from his right not to be discriminated on the grounds prohibited by Articles 15 and 29.

58. In *State of Madhya Pradesh v. Bharat Singh*, (AIR 1967 SC 1170), the Supreme Court observed that every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority. There, the impugned order of the Government had directed the respondent therein to reside within a particular town, not to enter a particular district and to notify his movements to the police. That order clearly abridged the freedoms guaranteed by clauses (d) and (e) of Article 19 (1) of the Constitution. This decision has no application to the present case, because the petitioner who had no legal right to be admitted to the respondent-2 college could not say that Rule 3(1) operated to his prejudice.

59. In *Panama Refining Co. v. Ryan* (U. S. Supreme Court Reports, (1934) 79 Law Ed 446), the validity of delegation of power to the President under the National Industrial Recovery Act, 1933, came up for consideration. The delegation of power to the President under that Act, was held to be unguided and uncontrolled and not within the permissible limits of delegation. But that decision has no bearing on the present case inasmuch as the impugned Rules were made by the Government not in exercise of any power delegated by the legislature to the Government, but in exercise of the executive power under Article 162.

60. Article 162 provides, inter alia, that subject to the provisions of the Constitution, the executive power of the State shall extend to all matters with respect to which the legislature of the State has power to make laws. There is no reason why the Government should not, in exercise of such executive power, make rules for regulating its actions in any matter where there is no legislative enactment regulating such matter. Such rules should undoubtedly be subject to the provisions of the Constitution which expressly provide that exercise of certain executive powers should be authorised by legislative enactment of the appropriate legislature. The following are some of the instances where such legislation is necessary for exercise of executive power:

(i) imposing reasonable restrictions in the public interest under Clause (6) of Article 19 on the exercise of rights guaranteed under sub-clauses (a) to (g) of clause (1) of that Article;

(ii) procedure for deprivation of personal liberty which is guaranteed under Article 21;

(iii) preventive detention permitted under Article 22;

(iv) compulsory acquisition of property (vide Art. 32);

(v) levy and collection of tax (vide Art. 265);

(vi) restriction on freedom of trade, commerce and intercourse throughout the territory of India (vide Art. 302); and

(vii) imposing sentence of imprisonment or levy of fine.

61. Except where the Constitution has expressly provided that exercise of executive power in any matter should be under a law enacted by legislature, the executive power of the State would, in the absence of legislation, extend to making rules regulating the action of the executive. But, such rules cannot offend the provisions of the Constitution and should not be repugnant to any legislative enactment of the appropriate legislature. Such rules will, no doubt be superseded by any legislation of the appropriate legislature in respect of the matters covered by the rules. Thus we are unable to accept the contention of Mr. Iyengar that there is any other limitation on the power of the executive to make rules to regulate its activities. Subject to the aforesaid limitations, such rules may relate to matters of policy, may make classification for purposes of those

rules and may determine the conditions of eligibility for receiving any advantage, privilege, grant or aid from the State.

62. In *Chitralekha v. State of Mysore*, (AIR 1964 SC 1823), Subba Rao, J. (as he then was), who delivered the majority judgment, said, at page 1830 that the State Government would be within its rights to prescribe qualifications for admission to colleges so long as its action does not contravene any law. Hence, the competence of the State Government to make the impugned Rules is beyond any doubt.

63. The questions of the legislature not preforming its essential legislative functions and excessive delegation of powers by the legislature, will arise only when the legislature has enacted a law on any matter. If in the absence of a legislative enactment on any matter, the executive has, in exercise of its executive power, made certain rules regarding such matter, there can be no question of abdication of the essential legislative function or excessive delegation even if such rules relate to important matters of policy. Hence, we have no hesitation in rejecting the contention of Mr. Iyengar that Rule 3 (1) is invalid on the ground of impermissible delegation of the legislative powers.

64. All the contentions of Mr. Iyengar fail and we dismiss this petition.

65. In the circumstances of the case, we direct the parties to bear their own costs,

Petition dismissed.

AIR 1976 KARNATAKA 187

M. SADANANDASWAMY AND
D. NORONHA, JJ.

The Premier Insurance Co. Ltd., Appellant v. Smt. Padma Srinivasan, Respondent.

Misc. First Appeal No. 19 of 1973, D/- 9-1-1976.*

(A) Motor Vehicles Act (1939), Section 95 (2) (a) (as it stood before and after the amendment in 1969) — Extent of liabilities of an insurer — Insurance effected prior to amendment — Accident taking place subsequent to amendment — Liability of insurer is limited to the one prescribed

* (Against judgment and Award passed by M. A. C. T., Bangalore in M. C. (M. V. C.) No. 120 of 1970, D/- 20-11-1972).

under Section 95 (2) (a) as it stood prior to its amendment — Amendment is not retrospective in operation. (Interpretation of Statutes).

Under the Motor Vehicles (Amendment) Act (56 of 1969), the word "fifty" was substituted for the word "twenty" in sub-clause (a) of clause (2) of Sec. 95. The amendment was brought into effect from 2-3-1970. There are no express words giving retrospective effect to the amendment of Section 95 (2). In the amendment Act, there being no other indications to show that it was the intention of the Legislature to give a retrospective effect to this amendment, the amendment must be held to apply only to policies of insurance or liabilities of the insurer created after the date the amendment came into effect viz. 2-3-1970. Case law discussed. (Para 5)

Where the insurance was effected before the amendment of the Act and the certificate of insurance stated that the liability of the insurer was limited to that under Chapter VIII of the Motor Vehicles Act but the accident took place subsequent to the coming into effect of the amendment of Section 95 (2) (a),

Held that the liability of the insurer was limited to the one prescribed under Section 95 (2) (a) as it stood prior to its amendment viz., to Rs. 20,000/- instead of Rs. 50,000/-. (Para 7)

If retrospective effect is given to the amendment Act, it will have the effect of enhancing the liability of the insurer to Rs. 50,000/-. In other words, it affects adversely the existing obligation of the insurer under the terms of the contract entered into by the insurer with the insured. (Para 5)

Cases Referred: Chronological Paras
(1972) 1 Mys LJ 327 = 1972 Ren CR 481

1968 Acc CJ 1 = 1968 Jab LJ 189	6
AIR 1964 SC 1511 = (1964) 6 SCR 876	3
AIR 1952 SC 324 = 1952 Cri LJ 1503	4
1901 AC 297 = 70 LJ PC 53	6
(1898) 2 QBD 547 = 67 LJ QB 935	4
(1878) 3 AC 582	4

N. Bheemacharya, for Appellant; S. V. Srinath, for Respondent.

SADANANDASWAMY, J.:— The appellant is an Insurance Company. The appeal is filed against the award made by the Motor Accidents Claims Tribunal at Bangalore, dated 20th November, 1972 in M. C. (M. V. C.) No. 120 of 1970. The respondent preferred an application under Section 110-A of the Motor Vehicles Act

for compensation on account of the death of her husband who died in a motor accident which took place in Bangalore on 5-4-1970. The lorry bearing Registration No. MYT 3298 insured with the present appellant-Company was involved in the accident. In the Objection Statement filed by the appellant-Company before the Tribunal it was alleged that on a search in the Office of the appellant Company there was no reference to this lorry being insured with the Company, that there must have been some fraud in the matter of having insured this lorry and that otherwise the appellant-Company would have issued a policy if a duplicate of the certificate of insurance had been sent to the Office. The appellant-Company therefore put the petitioner to strict proof of the insurance having been effected by the owner of the lorry with the appellant-Company. It, therefore, denied its liability. On a consideration of the evidence, the Tribunal held that the claimants viz., respondent 1 and her children were entitled to a compensation of Rs. 60,000/-. It has also held that the liability of the Insurer — the present appellant is limited to Rs. 50,000/-.

2. It is the contention of Mr. Bheemacharya, learned counsel appearing for the appellant-Company, that the liability of the Insurer must be confined to the maximum under Section 95, Clause (2) of the Motor Vehicles Act, 1939 as it stood prior to its amendment by the Motor Vehicles (Amendment) Act, 1969 (Act No. 56 of 1969). According to the appellant-Company, no policy of insurance had been issued by it. Exhibit P-9 is the certificate of insurance issued by the Agent of the appellant-Company on 31-5-1969. The period covered by that certificate is from 30th June, 1969 to 29th June, 1970. The accident took place on 5-4-1970. Under Act No. 56 of 1969, the word "fifty" was substituted for the word "twenty" in sub-clause (a) of Clause (2) of Section 95. The amendment was brought into effect from 2-3-1970. Thus, though the insurance was effected before the amendment of the Act, the accident took place subsequent to the coming into effect of the amendment of Section 95, clause (2), sub-clause (a). It is the contention of Mr. Bheemacharya that the said amendment has no retrospective effect and that the liability must be confined to the one under the Act as it stood before the amendment. The Certificate of Insurance, Exhibit P-9, mentions the liability as the one under Chapter VIII of

the Motor Vehicles Act, 1939. Hence, according to the terms of Exhibit P-9, the liability was only to the maximum extent of Rs. 20,000/-. It is his contention that the Amendment Act does not specifically state that it has retrospective operation and that therefore it must be construed as having prospective operation only and not to affect the existing contractual rights and obligations.

3. It is contended Mr. Srinath, appearing for the respondent, that the insurer did not urge this plea before the Tribunal. But it is open to the Insurer to urge this question in appeal (See 1968 Acc CJ 1 (Madh Pra), Manjula Devi Bhuta v. Manjusri Raha).

4. In Craies on Statute Law, 7th Edition, at page 390 the following observation of Lord O'Hagan in *Gardner v. Lucas*, (1878) 3 AC 582 has been cited with approval—

"Unless there is some declared intention of the legislature — clear and unequivocal — or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective, and not retrospective."

And again the observation of Lord Ashbourne in *Smith v. Callander*, (1901 AC 297) while dealing with interpretation of a statute so as to have retrospective effect—

"Before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct interpretation." has been referred to and it has been further stated as follows:

"..... and perhaps no rule or construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In *Halsbury's Laws of England*, Third Edition, Volume 36 at page 423, it has been stated as follows:

"The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are *prima facie* prospective; and retrospective effect

is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

In Maxwell on Interpretation of Statutes, Twelfth Edition, at page 215 it is stated as follows:

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

In AIR 1964 SC 1511, (Rafiquenessa v. Lal Bahadur) the question was whether the Assam Non-Agricultural Urban Areas Tenancy Act, 1955 applied to pending proceedings and it was observed as follows:

"..... It is not disputed by him that the legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them. Mr. Chatterjee has relied upon the well known observations made by Wright J. in *In re Athlumney Ex Parte Wilson*, ((1898) 2 QBD 547) when the learned Judge said that it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. He added that there was one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights."

5. The liability of the insurer is that under the insurance policy issued by him. But in the present case, the liabil-

ity is determined by the terms of Exhibit P-9 the Certificate of Insurance. It states that the liability is limited to that under Chapter VIII of the Motor Vehicles Act, 1939. It means that the liability was limited to Rs. 20,000/-, according to Section 95 (2) as it then stood. If retrospective effect is given to the amendment Act, it will have the effect of enhancing the liability of the insurer to Rs. 50,000/-. In other words, it affects adversely the existing obligation of the insurer under the terms of the contract entered into by the insurer with the insured. There are no express words giving retrospective effect to the amendment of Section 95 (2) of the Motor Vehicles Act. In the amendment Act, there are no other indications to show that it was the intention of the Legislature to give a retrospective effect to this amendment. Hence the amendment must be held to apply only to policies of insurance or liabilities of the insurer created after the date the amendment came into effect viz. 2-3-1970.

6. Mr. Srinath relied upon the decision of this Court in (1972) 1 Mys LJ 327. (*Sha Chunilal Sohanraj v. T. Gurushantappa*). In that case sub-section (2) of Section 21 of the Mysore Rent Control Act, 1961 was amended by Mysore Act No. 14 of 1969 during the pendency of the proceedings arising out of an application of landlord under Section 21 (1) (a) of the Act for eviction of the tenant. It was held, following the decision in AIR 1952 SC 324, (*Shamrao v. Parulekar*), that the intention of the legislature must be deemed to be that the substituted provision must be construed as having been part of the Act from the very inception since there was no repugnancy or inconsistency between the old and the new sub-sections. This decision is based on the principle that if there is change in the law during the pending proceeding, it is the amended law which applies to such a proceeding, and therefore it does not apply to the facts of the present case.

7. The liability of the appellant, therefore, is limited to the one prescribed under Section 95 (2) of the Act as it stood prior to its amendment viz., to Rs. 20,000/-. We, therefore, allow the appeal and the Award of the Tribunal is confirmed subject to the modification that the liability of the appellant Insurance Company is limited to Rs. 20,000/- instead of Rupees 50,000/-. In view of the fact that the appellant did not urge this question before the Tribunal, the parties shall bear their own costs in this appeal.

8. It is urged by Mr. Srinath that Rs. 25,000/- has already been paid by the appellant after the appeal was filed in this Court, and that it is open to the appellant to recover the excess of Rs. 5,000/- from the owner of the vehicle. But it is submitted by Mr. Bheemacharya that the appellant was bound to deposit Rs. 5,000/- every month, until half the amount awarded by Tribunal has been deposited, in pursuance of the order of this Court while granting stay and that the appellant has accordingly deposited the above amount. It is clear that the liability of the appellant is limited to Rs. 20,000/-. Appellant is, therefore, entitled to recover back the excess of Rs. 5,000/- deposited by him and drawn by the respondent since the liability of the appellant has been held to be only Rs. 20,000/-.

Order accordingly.

AIR 1976 KARNATAKA 190

K. JAGANNATHA SHETTY, J.

H. K. Krishnamurthy, Petitioner v. The Regional Transport Authority, Mysore and others, Respondents.

Writ Petn. No. 4402 of 1975, D/- 2-1-1976.

(A) Motor Vehicles Act (1939), Sections 57 (5) and 64 — Motor Vehicles Rules, 1939, Rule 100 — Objection to validity of notification before R. T. A. while considering grant of permits — R. T. A. accepting objection and directing return of applications — Applications not taken back and remaining on file — Subsequently R. T. A. can review its order and consider those applications.

The Act does not specifically confer on the R. T. A. the power to review its own order made under the provisions of the Act. The R. T. A. being the statutory authority, has to perform its functions in accordance with the provisions of the Act. It is difficult to state that the R. T. A. while returning the applications, has in fact disposed them of, as provided by Section 57 (5). The disposal of the applications as provided by Section 57 (5) of the Act, means that the R. T. A. must consider the applications and the objections, if any, on the merits, and make an order either granting or refusing to grant the permit. (Paras 3, 4)

An order on merits is appealable under Section 64 but the order returning appli-

cations is not on merits and not appealable. In the circumstances the R. T. A. would be under the legal obligation to consider and dispose of the applications in accordance with the provisions of Section 57 (5). (Para 3)

Cases Referred: Chronological Paras
AIR 1975 Kant 238 = (1975) 2 Kant LJ 258 2
(1966) 2 Mys LJ 49 = (1966) 7 Law Rep 275 5
(1963) 2 Mys LJ 65 4

A. S. Viswanath, for Petitioner; C. Shanthamallappa (for Nos. 2 and 3), M. R. Venkatanarasimhachar (for Nos. 5 and 15), S. V. Krishnaswamy (for Nos. 8, 13), T. R. Rangaraj (for No. 9) and M. Rangaswamy (for No. 17), for Respondents.

ORDER:— On 24th June 1974, the Regional Transport Authority (R. T. A.) issued a notification under Section 57 (2) of the Motor Vehicles Act, (shortly called "the Act") inviting applications for the grant of stage carriage permits on the route "Mysore to Koudhalli and back". The Gazette notification shows that it was signed by the in-charge Secretary of the R. T. A. In response to the said notification, respondents 2 to 18 submitted their applications. The petitioner was one among the objectors opposing the grant of the proposed permits. On 11th June, 1975, the applications came up for consideration before the R. T. A. The petitioner raised a preliminary objection that the notification issued under Section 57 (2) was invalid since it was issued by the in-charge Secretary who was incompetent to perform the statutory functions under the Act. That objection was based on the well known principle that a person in-charge of a statutory office can only perform the day to day routine works and not the statutory functions. The R. T. A. accepted that objection and directed the return of the applications to the concerned applicants under Rule 100 of the Motor Vehicles Rules. The applicants, however, did not take back the applications, which, therefore, remained on the file of the R. T. A.

2. After 11th June, 1975, on which day the R. T. A. made the above order, a similar question relating to the validity of the notification issued by the incharge Secretary of the R. T. A. came up for consideration before this Court in Nanjappa M. v. Karnataka State Transport Appellate Tribunal, (1975) 2 Kant LJ 258 = (AIR 1975 Kant 238), in which it was observed that such notification would not

be invalid since the R. T. A. only performs a ministerial act by issuing any such notification. The above decision was brought to the notice of the members of the R. T. A. by some of the applicants to show that the view taken by the R. T. A. in its order dated 11th June 1975 was incorrect. The R. T. A. then thought that the matter required reconsideration and so it issued notices to all the applicants and also to the objectors stating that the applications of respondents 2 to 18 would be considered on the merits on 1st September, 1975. The petitioner along with some others objected to the R. T. A. from reconsidering its earlier decision stating that it has no jurisdiction to review its own order. It is said that on 1st September 1975, the R. T. A. heard the parties, considered the merits of the applications, and orally informed the parties that it would grant permits to some of the applicants. Before the written order was made, the petitioner approached this Court with an application under Article 226 of the Constitution, praying for a writ of prohibition to restrain the R. T. A. from pronouncing its order, primarily on the contention that the R. T. A. has no power to review its own order.

3. The decision on the question, therefore, turns on the scope of the order dated 11th June, 1975 which is set out hereunder:

"Since it was contended on behalf of some of the objectors that the Notification published under sub-section (2) of Section 57 of the Motor Vehicles Act inviting applications for selection of permit holder for the route Mysore to Gowdalli and Gowdalli to Mysore is not maintainable under the law as the same has been notified by the Secretary, who was in charge during the absence of the Regular Secretary and that under the law the power to invite the applications is a statutory power vested with the Regional Transport Authority and that power exercisable under Rule 95 of the Rule, 1963 is the Secretary, Regional Transport Authority to whom such power is delegated and not the other who might be placed in charge during his absence.

In the above circumstances, the Regional Transport Authority decided that a fresh notification under the signature of the Regular Secretary is necessary and accordingly resolved that a fresh notification inviting applications under sub-section (2) of Section 57 of the M. V. Act

may be issued by the Secretary, Regional Transport Authority.

The applications received in response to the notification published by the Secretary who was in charge may be returned to the applicants concerned along with the challans and other enclosures under Rule 100 of the M. V. Rules."

It was urged for the petitioner that the above order directing the return of the applications in the context, was an order disposing or rejecting the said applications and the aggrieved parties should have preferred appeals against the said order, and the R. T. A. has no jurisdiction to review its own order. Before I consider the above contention, it is necessary to bear in mind that the Act does not specifically confer on the R. T. A. the power to review its own order made under the provisions of the Act. The R. T. A. being the statutory authority, has to perform its functions in accordance with the provisions of the Act, it has to dispose of the application for a stage carriage permit at the public hearing as provided by Section 57(5) of the Act which states that when any representation is made against the application, the R. T. A. shall dispose of the application at a public hearing at which the applicant and the person making the representation shall have an opportunity of being heard either in person or by a duly authorised representative. The order made thereunder either by granting or by refusing to grant a permit, is made appealable under Section 64(1)(a) of the Act. If the order dated 11th June, 1975 was an order disposing of the applications in the above manner, then the R. T. A. must be held to have no right to reconsider the said applications, and the parties must have preferred the appeals against the said order. If it was not, the R. T. A. would be under a legal obligation to consider and dispose of the said applications in accordance with the provisions of Section 57(5).

4. I will now turn to the order dated 11th June, 1975. It shows that the R. T. A. was primarily concerned with the validity of the notification issued by the in-charge Secretary and it did not advert to the merits of the applications or the objections raised by the petitioner against the grant of permits. The R. T. A. then held that the incharge Secretary was not competent to issue the notification under Section 57(2) of the Act and consequently it directed the return of the

applications received in response to the said notification. It is not disputed that the order determining the validity of such notification is not appealable under the Act. So also, the order directing the return of the applications under Rule 100 of the Motor Vehicles Rules is not appealable. The said rule itself gives an indication that the return of the application is not the same thing as rejection or disposing of the application. The rule provides that the application should not be rejected on technical grounds but it shall be returned to the applicant for rectification of any defects or for presentation to the authority which has jurisdiction to dispose of.

It is difficult to state that the R. T. A. while returning the applications, has in fact disposed of them, as provided by Section 57 (5). The disposal of the applications as provided by Section 57 (5) of the Act, means that the R. T. A. must consider the applications and the objections, if any, on the merits, and make an order either granting or refusing to grant the permit. That was also the view taken by this Court in *D. T. Lakshminarasimha Iyengar v. The Regional Transport Authority, Bangalore*, (1963-2 Mys LJ 65) where it was observed:

"Although sub-section (5) only directs the Regional Transport Authority to 'dispose of' the application, the clear meaning of the expression is that it must either grant the permit or refuse it. That, that is the meaning to be given to that expression is clear from sub-section (7) which directs the Regional Transport Authority to state the reasons in case of refusal of the application."

5. It was, however, submitted that the fact that the R. T. A. did not grant the permit on 11th June 1975 to any one of the applicants itself shows that it rejected their applications or refused to grant the permits, and therefore that that order was appealable under Section 64 (1) (a) of the Act. In support of that contention, reliance was placed on the decision of this Court in *G. N. Ramachandra Setty v. Mysore Revenue Appellate Tribunal*, (1966) 2 Mys LJ 49. That was a case where the R. T. A. after considering the application and without making a specific order of granting or refusing it, recommended the same to the State Transport Authority for further action. This Court in the context held that the recommendation must be held to be a refusal to grant the permit and therefore appealable under Section 64 (1) (a) of the Act. It may be

relevant to state that the R. T. A. in that case considered the application on the merits and without granting the permit, it recommended the said application to the State Transport Authority. The facts of the present case are quite different. The R. T. A. did not consider the merits of the applications in this case on 11th June 1975.

6. Having regard to the facts of the case and the context in which the order dated 11th June 1975 was made, it must be held that the said order was not appealable as it was not an order disposing of the applications for permit, and therefore the R. T. A. would be well within its jurisdiction nay, under a legal obligation to dispose of the same applications in accordance with law.

7. In the result, the rule is discharged without an order as to costs.

Rule discharged,

AIR 1976 KARNATAKA 192

K. BHIMIAH AND

E. S. VENKATARAMIAH, JJ.

Mallayya Murigeyya Naduvnamath,
Appellant v. Puttappa Shivappa Mosali,
Respondent.

Misc. Second Appeal No. 126 of 1974,
D/- 30-3-1976.*

(A) Karnataka Land Reforms Act (1961), Section 133 (after amendment by Act 27 of 1976) — Applicability — Suit for injunction restraining the owner of land from interfering with possession — Plaintiff alleging to be a tenant — Issue regarding tenancy arises and has to be referred to the Tribunal. (Civil P. C. (1908), Section 9).

Section 133 of the Act as it stands now takes away the jurisdiction of any civil or criminal court or officer or authority to decide the question whether a land is an agricultural land or not and whether a person claiming to be in possession is or is not a tenant of the said land from prior to 1-3-1974. In a case where the plaintiff claiming to be a tenant of a land in question while admitting that the defendant is the owner prays for an injunction restraining the defendant from interfering with his possession, the question whether the plaintiff is a tenant

*(Against judgment and decree passed by Civil J., Hubli in Appeal No. 39 of 1973, D/- 28-8-1974).

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or not would arise for consideration, since the suit would have inevitably to be dismissed if a finding is not given in the affirmative on the said question. AIR-1972 Mys 214, W. P. No. 2042 of 1969, D/- 28-10-1971 (Mys) and (1974) 2 Kant LJ 34, Dist. (Para 7)

Cases Referred: Chronological Paras

(1975) 1 Kant LJ 167 = ILR (1975) Kant 286 6

(1974) 2 Kant LJ 34 = ILR (1974) Kant 830 5

AIR 1972 Mys 214 = (1972) 1 Mys LJ 216 5

(1971) W. P. No. 2042 of 1969, D/- 28-10-1971 (Mys) 5

AIR 1962 Mad 149 = (1962) 1 Mad LJ 383 5

M. Rama Bhat, for Appellant; B. V. Deshpande, for Respondent.

VENKATARAMIAH, J.:— On a reference made by Venkataswami, J., the above appeal has come up for decision before this Division Bench.

2. The appellant is the defendant in the suit, O. S. No. 68 of 1971 on the file of the Munsiff, Savanur. The respondent instituted the said suit for injunction restraining the appellant from interfering with his possession of the suit land on the ground that the land in question was an agricultural land and that he was in possession of the same as tenant under the appellant. The appellant denied that the respondent was his tenant and contended that he himself was in actual possession and enjoyment of the suit land. On the basis of the pleadings, the Munsiff framed several issues. One of them was "Whether the plaintiff was in lawful possession of the suit land on the date of the suit?" At the conclusion of the trial the Munsiff passed a decree dismissing the suit. Aggrieved by the decree of the trial Court, the respondent filed an appeal before the Civil Judge, Kubli. The Civil Judge set aside the judgment and decree passed by the trial Court and remanded the suit to the trial Court to dispose it of in accordance with Section 133 (2) (a) of the Karnataka Land Reforms Act, 1961 (hereinafter referred to as the Act) as it stood on the date of the decision of the lower appellate Court i.e. 28-8-1974. Aggrieved by the decision of the lower appellate Court, the appellant has filed this appeal.

3. On 28-8-1974 Section 133 of the Act read as follows:—

"133. Suits involving issues required to be decided under this Act:—

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(1) xx xx xx

(2) (a) If any suit instituted in any Civil Court involves any issues which are required to be settled, decided or dealt with by the Tribunal or any suit is instituted in any such Court for possession of or injunction in respect of an agricultural land on the allegation that the defendant has trespassed or is trying to trespass on such land and the defendant denies the said allegation and claims that he is in possession on the strength of a tenancy existing from prior to 1st March 1974, then the Civil Court shall stay the suit and refer such issues or the claim, as the case may be, to the Tribunal for decision

(b) On receipt of such reference, the Tribunal shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court which has made the reference."

By the Karnataka Land Reforms (Second Amendment) Act, 1976 (Karnataka Act 27 of 1976) which received the assent of the President on 12-3-1976 and was published in the Karnataka Gazette dated 13-3-1976, Section 133 of the Act was substituted by the following new section:—

"133. Suits, Proceedings, etc., involving questions required to be decided, by the Tribunal:—

(1) Notwithstanding anything in any law for the time being in force—

(i) no Civil or Criminal Court or Officer or authority shall, in any suit, case or proceedings concerning a land other than proceedings under Chapter IV of this Act, decide the question whether such land is or is not agricultural land and whether the person claiming to be in possession is or is not a tenant of the said land from prior to 1st March, 1974;

(ii) such Court or officer or authority shall stay such suit or proceedings in so far as such question is concerned and refer the same to the Tribunal for decision;

(iii) all interim orders issued or made by such Court, officer or authority, whether in the nature of temporary injunction or appointment of a Receiver or otherwise, concerning the land shall stand dissolved or vacated; as the case may be;

(iv) the Tribunal shall decide the question referred to it under clause (1) and communicate its decision to such Court, officer, or authority. The decision of the Tribunal shall be final.

(2) Nothing in sub-section (1) shall preclude the Civil or Criminal Court or

the officer or authority from proceeding with the suit, case or proceedings in respect of any matter other than that referred to in that sub-section."

It should be mentioned here that by introducing a new provision Section 48-C into the Act, the above Amending Act made provision for the passing of interim orders by the Tribunal. Section 48-C reads:—

"48-C. Interim Orders:—

(1) The Tribunal may, when it considers it just and proper and subject to such terms and conditions as it may impose, issue interlocutory orders in the nature of temporary injunction or appointment of Receiver concerning the land in respect of which an application is made under Section 48-A.

(2) The Tribunal may at any time revoke or modify the order issued by it under sub-section (1).

(3) Subject to the provisions of sub-section (2), the order of the Tribunal shall be final."

4. Since the Amending Act (Karnataka Act 27 of 1976) has come into force, this case has to be decided in the light of Section 133 as it stands now.

5. It is argued by Sri M. Rama Bhat, learned counsel for the appellant, relying upon the decision of this Court in *Tarabai v. Krishna Pandurang Powar*, 1972 (1) Mys LJ 216 = (AIR 1972 Mys 214) and the decision in *Gowda Basappa v. N. S. Srinivasa Rao*, (W. P. No. 2042 of 1969, D/- 28-10-1971) (Mys) that in a suit for injunction the only issue that arises for decision is whether the plaintiff is in lawful possession of the land in question and that the question whether the plaintiff is a tenant of the suit land would not arise for decision. Hence the question whether the plaintiff is a tenant or not need not be decided by the Civil Court. Since under Section 133 of the Act only those issues which have to be decided by the Tribunal have to be referred to the Tribunal and since the question whether the plaintiff is in possession of the land or not is not a question on which the Tribunal can express its opinion under the Act, there is no need to comply with the provisions of Section 133 of the Act. In *Tarabai's* case the Court was concerned with Section 85-A of the Bombay Tenancy and Agricultural Lands Act and Section 133 (2) of the Act as it stood in the year 1971. In *Gowda Basappa's* case which was also decided in 1971, the Court was concerned with the provisions of Sec-

tion 133 of the Act as it stood then. In *Kamala Kandthy v. Ananthayya Hebbar*, (1974 (2) Kant LJ 34) Section 133 as amended by the Karnataka Act 1 of 1974, came up for consideration. After referring to the decision in *Tarabai's* case, the learned Chief Justice observed in the course of his decision as follows:—

"The amendment to the Land Reforms Act came into force with effect from 1-3-1974. The said amendment has made drastic changes in the principal Act. The provision for resumption of lands by landlords within ceiling limits has been deleted and all proceedings for resumption stand abated. All lands held by or in the occupation of tenants including tenants against whom a decree or order for eviction or a certificate for resumption is, made or issued immediately prior to the date of commencement of the amendment Act, other than lands held by them under leases permitted under Section 5 stand transferred to and vest in the State Government with effect from 1st March, 1974. The result is that the rights of landlords stand transferred to and vest in the State Government with effect from 1-3-1974 (vide S. 44). The tenants holding lands immediately prior to 1-3-1974 are entitled to be registered as occupants in respect of lands which they were cultivating before the date of vesting (vide Section 45).

xx xx xx

The right to an injunction depends upon statute and is governed by the Specific Relief Act, 1963. The grant of an injunction is in the discretion of the Court — a discretion to be exercised, of course, as a discretion of the Courts always is. In a case where the title of the plaintiff itself is uncertain and is contingent on the determination by the Tribunal which has exclusive jurisdiction over the matter, I do not think it would be proper exercise of jurisdiction to make an order of temporary injunction in suits of this nature

xx xx xx

Let me suppose that a Civil Court in a suit brought by a land owner holds that he is in possession of the lands and the defendant claiming to be the tenant is not in possession, and decrees the suit for perpetual injunction. Let me also suppose of a case where a person claiming to be a tenant holding land immediately prior to 1-3-1974 brings a suit for perpetual injunction against the land owner and that suit is decreed. The decision of the Civil Court in both the suits will not

be binding on the Tribunal constituted under the Land Reforms Act. The Tribunal may hold that the landowner who has obtained a decree for perpetual injunction had been divested of his right as on 1-3-1974 and the same has vested in the State Government and that the defendant against whom the decree is passed is entitled to be registered as occupant. In the other case the person who claiming to be the tenant in possession has succeeded in obtaining a decree for perpetual injunction against the land owner, may fail before the Tribunal and the Tribunal may hold that such a person is not a tenant. Any decree passed in these circumstances will be rendered ineffective, and, it is desirable that such a situation should be avoided. In any suit where there is a bona fide dispute between the parties on the question whether the suit farm lands were held by one of the parties as a tenant immediately prior to 1-3-1974, it would be just and convenient to appoint a receiver for the disputed property pending final disposal of the suit. A Receiver may be appointed in a case otherwise proper for relief, if the facts showing the necessity for the relief are before the Court although the application was made for an injunction and did not specify the appointment of a Receiver After appointing a Receiver the Court should stay the suit and direct the party or parties claiming to be tenants to obtain the decision of the Tribunal. The suit should be disposed of in the light of the adjudication obtained from the Tribunal."

6. After the above decision was rendered, in Basappa Gulappa v. Basappa Nataveerappa Hanji, (1975 (1) Kant LJ 167), it was held that where in a suit for permanent injunction the plaintiff asserted that he was in possession of the suit land as a tenant, no issue regarding tenancy arose for consideration. The Court in reaching that conclusion relied on the decision of this Court in Tarabai's case. The Court however did not consider in detail the clear effect of the amendments made by Karnataka Act 1 of 1974 as was done in Kamala Kandthy's case. After the above decision was rendered the Karnataka Land Reforms (Second Amendment) Act, 1976, was passed by the State Legislature. We are of the opinion that not much assistance can be derived by the learned counsel for the appellant from the decisions of this Court in Tarabai's case; Gowda Basappa's case and Basappa Gulappa's case since we are of

the opinion that this case has to be disposed of on the basis of the provisions of Section 133 as they are now in force.

7. Section 133 of the Act as it stands now takes away the jurisdiction of any civil or criminal court or officer or authority to decide the question whether a land is an agricultural land or not and whether a person claiming to be in possession is or is not a tenant of the said land from prior to 1-3-1974. In a case where the plaintiff claiming to be a tenant of a land in question while admitting that the defendant is the owner prays for an injunction restraining the defendant from interfering with his possession, we are of the opinion that the question whether the plaintiff is a tenant or not would arise for consideration, since the suit would have inevitably to be dismissed if a finding is not given in the affirmative on the said question as admittedly the defendant is the owner of the property. The reason is not far to seek. It is well settled that no person in possession of land can sue for injunction against a true owner unless he is able to maintain that either under an agreement or under a statute he is entitled to the said relief even as against him. If he is not able to rely on any such agreement or statute his possession would be wrongful. No Court will by its order help a party, who is found to be in wrongful possession as against the lawful owner (see *Alamelu Achi v. Ponniah*, AIR 1962 Mad 149). It follows that in order to decide the case on hand it is absolutely necessary to decide the question whether the plaintiff is a tenant or not for a just disposal of the case. Section 133 provides that when the question before the Civil Court is whether the person, claiming to be in possession, is or is not a tenant of the suit land from prior to 1-3-1974, then the Court shall stay such suit in so far as such question is concerned and refer the same for decision. Section 133 applies to all such cases irrespective of the fact that the person who claims to be the tenant is a plaintiff or a defendant.

8. In view of the foregoing, we are of the opinion that in the case before us the question whether the plaintiff is or is not a tenant of the agricultural land in question from prior to 1-3-1974 arises for consideration and that question has to be referred to the Tribunal for its decision. The order of remand passed by the lower appellate Court has therefore to be affirmed. The appeal, therefore, fails

and it is dismissed. The trial Court shall refer the question to the decision of the Tribunal in accordance with the provisions of Section 133 of the Act as it stands now.

Appeal dismissed.

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B. VENKATASWAMI, J.

P. K. Thipperudrappa, Petitioner v. The State of Karnataka, Respondent.

Writ Petn. No. 2350 of 1975, D/- 30-3-1976.

(A) Karnataka Slum Areas (Improvements and Clearance) Act (33 of 1974), Section 3 (1) — Notification under — Petitioner not given opportunity of being heard — Notification is invalid. (Constitution of India, Art. 226 — Natural justice). AIR 1975 SC 596, Rel. on. (Paras 2, 4) Cases Referred: Chronological Paras AIR 1975 SC 596 = (1975) 2 SCR 407 2

Minajagi for R. R. Indrakumar, for Petitioner; Miss P. G. Gowri High Court Govt. Pleader, for Respondent.

ORDER :— In this petition under Article 226 of the Constitution, the petitioner has challenged the notification issued under Section 3 (1) of the Karnataka Slum Areas (Improvements and Clearance) Act, 1973 (Slum Act) whereby certain land belonging to him had been notified as a slum area.

2. On behalf of the petitioner, Sri Minajagi, learned counsel, submitted that before promulgation of the said notification, which affected his civil rights to property, it was the duty of the authority concerned to have afforded him an opportunity to show cause against such declaration. In support of this submission, he relied on certain enunciations of the Supreme Court in the case of Govt. of Mysore v. J. V. Bhat, (AIR 1975 SC 596), which was a case arising under the Mysore Slum Areas (Improvements and Clearance) Act, 1958, wherein also a similar notification had been issued under Section 3 thereof, the provisions of which are in pari materia with the provisions of the Act concerned herewith. It seems to me that this contention is well founded and must be accepted as correct.

3. The petitioner has alleged that before the issuance of the impugned notification under Section 3 of the Slum Act, he had not been served with any

notice calling upon him to show cause why the land in question should not be declared as a slum area for the purpose of that Act. This fact is not denied on behalf of the respondents.

4. In the case relied on behalf of the petitioner, the Supreme Court was concerned with the constitutional validity of certain provisions of the Mysore Slum Areas (Improvements and Clearance) Act, 1958. The respondents therein had also challenged the legality of certain notifications issued under Sections 3, 9, 12 (1) (a) and (b) of that Act on the ground that the said notifications were violative of the principles of natural justice in that they had not been afforded an opportunity of making representations against them. The Court while unholding the validity of Sections 3, 9, 12 (1) (a) and (b) of that Act, which had been challenged as unconstitutional had struck down the three notifications, upholding the contention relative to absence of opportunity to the affected persons. In doing so, it is enunciated thus:

"..... Policies and schemes, framed under statutory provisions, which affected rights of individuals could impose the obligations upon the authorities taking what were essentially administrative decisions at points at which they begin to impinge on specific individual rights. It is only where there is nothing in the statute to actually prohibit the giving of an opportunity to be heard, but, on the other hand, the nature of the statutory duty imposed itself necessarily implied an obligation to hear before deciding that the "audi alteram partem" rule could be imported. The nature of the hearing would, of course, vary according to the nature of the function and what its just and fair exercise require in the context of rights affected".

Again at page 601

"There can be no two opinions about the need to hear the affected persons before declaring an area to be a slum area under Section 3, or an area as a clearance area under Section 9 or before taking action under Section 10. All these difficulties will be removed if the affected persons are given an opportunity to be heard in respect of the action proposed."

(Emphasis supplied)

Viewed in the light of the above principles, it is clear that the notification impugned herein cannot be sustained.

5. In the result, this petition succeeds and is accordingly allowed. Consequently, the Notification No. NMA 93 MNI 75 dated 15th April 1975 and gazetted on 24th April 1975 (Exhibit A) is hereby quashed in so far as it concerns the petitioner's land. It is needless to point out that it is open to the authority concerned to take further action in accordance with the Slum Act, after providing for a reasonable opportunity to petitioner to make a representation against any such declaration and after considering such a representation on its merits. In the circumstances, the parties will bear their own costs.

Petition allowed.

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D. M. CHANDRASHEKHAR AND
B. VENKATASWAMI, JJ.

Basanagouda Takanagouda Patil and others, Petitioners v. State of Mysore and others, Respondents.

Writ Petns. Nos. 1878, 1949, 1950 and 1951 of 1971, D/- 26-3-1976.

(A) Constitution of India, Art. 226 — Delay in making application, disentitles applicants to relief under the Article.

(Para 6)

(B) Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966 (1 of 1967), Section 6 — Acquisition of land creating fragmentation, if hit by Section 6.

Involuntary transfers such as the acquisition of lands under the Land Acquisition Act, which have the effect of creating fragmentation of land, are not within the scope and ambit of Section 6 of the above Fragmentation Act, and such acquisitions by the State are not hit by S. 6.

(Para 13)

(C) Land Acquisition Act (1894), Sections 39 to 41 — Panchayat of a Village is not a 'Company' — Procedure under Sections 39 to 41 do not apply to acquisition of land for a village extension at the cost of the villagers.

(Para 15)

(D) Constitution of India, Art. 14 — Laws — How far binding on State.

In absence of a provision in a statute specifically or by necessary implication excluding the State from the operation of a statute, the State should ordinarily be held bound by it, in order to avoid confusion and discrimination in given cases.

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But it cannot be said that even if the intention to the contrary of the Legislature were ascertainable, express provision providing for such exemption or exclusion must be made in such a statute. AIR 1967 SC 997, Rel. on. (Para 11)

Cases Referred: Chronological Paras
AIR 1967 SC 997 = 1967 Cri LJ 950 12
(1964) 53 ITR 747 = ILR (1964) 2 Mad 331 9

V. Krishna Murthy, for Petitioners in all writ petns; M. P. Chandrakantharaja Urs High Court Govt. Advocate (for Nos. 1 to 4) and C. S. Kothavale (for No. 5) for Respondents in all writ petns:

B. VENKATASWAMI, J.:— This batch of four petitions have been brought up before us on a reference by a learned single Judge. They can be disposed of by a common order as the questions of fact and law raised are common.

2. Briefly stated, the material facts are as follows: For the purpose of extension of a village by name Nirenarti, certain lands were proposed for acquisition by a notification dated 31-1-1969 under Section 4 of the Land Acquisition Act. After following the procedure prescribed by the Act, a further notification under Section 6 was also issued. Both these notifications were duly gazetted. Thereafter, an award had also been passed even before the petitioners approached this Court under Article 226 of the Constitution.

3. As a result of the notification under Section 6 of the Act, fragments of lands ranging in extent between 1 and 8 guntas had been created, as the said extents were left out of acquisition. It is further apparent from the annexures to the petition that this acquisition was undertaken at the instance of certain villagers who had moved the Panchayat concerned which, in its turn, had moved the authority competent to acquire those lands under the Act. It was also alleged that the villagers had contributed a portion of the funds for that purpose. On 22-12-1969 after the issuance of the notification under Section 6 of the Act, the Panchayat concerned executed an agreement in favour of the Government, undertaking to bear the cost of such acquisition.

4. The petitioners have challenged the acquisition of their lands on various grounds in the present petitions, which have been filed only on 23-7-1971. It is unnecessary to refer to all the grounds raised therein, having regard to the

points pressed before us, which shall be detailed hereafter.

5. On behalf of the respondent-State, a ground of objection based on inordinate delay in the petitioners' approach to this Court, has been raised. It is convenient to consider this question, before advertng to the other contentions urged on behalf of the petitioners.

6. From the allegations in the petitions, it can be seen that no serious attempt at all has been made to explain the inordinate delay involved in approaching this Court. The notification under Section 6 came to be gazetted as early as on 9-10-1969. It has also been followed up by an award. All the same, the petitioners have approached this Court only on 23-7-1971, that is, after a lapse of nearly 21 months from the date of the publication of the notice under Section 6. The only explanation offered in the course of the arguments was that they had earlier approached this Court in the month of April 1971 itself. This, in our judgment, does not afford any acceptable basis to explain the delay involved as even by that day the petitions were hopelessly delayed. It was then urged that inasmuch as the petitioners' fundamental rights were involved, this delay ought not to be held up against them as barring relief. We are not impressed by this submission, especially in the absence of any reasonable explanation offered on their behalf, furnishing reasons for their not approaching the Court earlier. This clearly bespeaks of laches on the part of the petitioners. Having regard to all the circumstances of the case, we are satisfied that the delay involved is inordinate enough to disentitle the petitioners to relief under Article 226 of the Constitution. For those reasons, we decline to exercise the jurisdiction under Article 226 and grant relief to the petitioners. However, since the questions raised were debated at some length, we shall proceed to examine briefly the contentions urged.

7. The first contention urged is that having regard to the provisions of Sections 6 and 39 of the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966 (Act 1 of 1967) (hereafter referred to as the Fragmentation Act), the acquisitions in question were void, inasmuch as even the State, which is the acquiring authority, was bound to comply with those provisions. In the absence of any provision specifically exempting or excluding it (the State) from the purview of their operation. For

a proper appreciation of this contention, it is necessary to set out some of the relevant provisions of the Fragmentation Act.

Section 2 (g) defines 'fragment' thus:

"2 (g) 'fragment' means a holding of land of less extent than the appropriate standard area determined under Sec. 3:

Provided that no holding shall be deemed to be fragment by reason of any diminution in its area by diluvion."

Section 6 reads:

"Fragmentation prohibited — No land in any area shall be transferred or partitioned or sub-divided so as to create a fragment."

Section 7 reads:

"Notwithstanding anything contained in any law for the time being in force,—

(a) no fragment, in respect of which a notice has been given under sub-section (2) of Section 4, shall be sold at any sale held under the orders of any Court except after notice to the owners of contiguous survey numbers or recognised sub-divisions of survey numbers; and

(b) no land shall be sold at such sale so as to leave a fragment."

The portion relevant in Section 39 reads:

"(1) The transfer or partition of any land contrary to the provisions of this Act shall be void.

(2) The owner of any land so transferred or partitioned shall be liable to pay such fine not exceeding two hundred and fifty rupees as the Deputy Commissioner may, subject to the general orders of the State Government, direct. Such fine shall be recoverable as arrears of land revenue.

(3) ** **

8. Sri V. Krishnamurthy, learned Counsel for the petitioners, argued that the language of Section 6 did not leave any doubt as to the fact that it was applicable to all kinds of transfers of land, voluntary as well as involuntary, and would take within its ambit compulsory acquisitions under the Act and that that being so, in the absence of any specific provision exempting the State from the operation of the provisions of the Fragmentation Act, it was not open to the State to create a 'fragment' within the meaning assigned to that expression in that Act. In support of this submission, our attention was invited to two reported decisions which will be referred to presently. On behalf of the respondents, it was submitted that the provisions of Sec-

tion 6 of the Fragmentation Act had reference only to transfers inter vivos and would not apply to involuntary transfers brought about when the State acquires land under the Act. That this was the clear intendment of the Legislature while enacting Section 6 of the Fragmentation Act, would also be apparent from the provisions made in regard to Court sales which are also involuntary transfers, which otherwise would have been unnecessary if the intention was that Section 6 should cover involuntary transfers also.

9. The first of the reported decisions relied on for the petitioners in *Wilfred Pereira Ltd. v. Commr. of Income-tax, Madras*, (1964) 53 ITR 747 (Mad). In that case, the Madras High Court was concerned with the interpretation of Section 12-B of the Indian Income-tax Act, 1922, for the purpose of assessment of capital gains arising from the acquisition of agricultural land belonging to the tax-payer. It was observed therein that the word 'transfer' in Section 12-B would include transfers by act of parties and transfers by operation of law. It was further enunciated thus:

"..... In our opinion, any divestiture of title would amount to a transfer. The transferor may not be a willing party. But nevertheless his title to the property is divested from him and the result is, the title is transferred"

10. It seems to us inappropriate to give to the expression "transferred" occurring in the Fragmentation Act the meaning attributed to that expression in the context of the Income-tax Act. Moreover, if a combined reading of the provisions of Sections 6 and 7 of the Fragmentation Act were to disclose an intention on the part of the Legislature to exclude involuntary sales from the purview of Section 6, except as regards those specified under Section 7, as we think it does, we do not think it is permissible to accord to that expression a meaning of such wide amplitude, as we have been invited to do on behalf of the petitioners. Hence, this decision relied on cannot be of any assistance to the petitioners.

11. It is no doubt true that the legal position in regard to the binding character of the laws on the State is that in the absence of provision in a statute specifically or by necessary implication excluding the State from the operation of a statute, the State should ordinarily be held bound by it, in order to avoid

confusion and discrimination in given cases. This is not to say that even if the intention to the contrary of the Legislature were ascertainable, express provision providing for such exemption or exclusion must be made in such a statute.

12. In this connection, it is relevant to refer to the observation of the Supreme Court in the case of *Supdt. and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta*, (AIR 1967 SC 997). It is observed therein:

"..... We have no Crown; the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality. It introduces conflicts and discrimination. There is, no justification to accept the English canon of construction, for it brings about diverse results and conflicting decisions. On the other hand, the normal construction namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication excepts the State from its operation, steers clear of all the anomalies. It prima facie applies to all States and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. The natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the State"

13. We think, however, it is unnecessary to pursue this aspect of the contention urged or to decide the question whether or not the State was bound by the provisions of Section 6 of the Fragmentation Act, as we are clearly of the view that involuntary transfers do not fall within the scope and ambit of that section and, consequently, the impugned acquisitions would not be hit by it.

14. If the expression "transferred" concurring in Section 6 were to include involuntary transfers, as contended, it would also take within its purview sales in invitum, such as Court sales, wherein the volition of the owner becomes immaterial. It was, therefore, unnecessary

for the Legislature to have enacted Section 7 wherein special provision has been made in regard to such Court sales. The very fact that the Legislature has thought it fit to make such special provision, is a clear indication that it has never intended the provisions of Section 6 to cover cases of involuntary sales. In other words, if the Legislature had wanted Section 6 to apply to cases of transfers by acquisition, it would have provided for it by making appropriate provision, similar to the one in Section 7 specifically governing Court sales. For all these reasons, we are clearly of the view that this contention has no merit and, therefore, must fail.

15. The next contention is that the provisions of Sections 39 to 41 of the Act which primarily govern acquisitions for the purposes of a Company ought to have been followed. This argument is more or less based on the fact that the Village Panchayat concerned was required to execute an agreement such as the one referred to earlier, undertaking to bear the cost of acquisition. This contention is devoid of substance as the purpose of the acquisition, namely, the village extension, is a public purpose and the Panchayat is not a company within the meaning of the Act. This contention too, therefore, must fail.

16. The last contention relates to the fact that no notice as per Section 4 had been served on the owner, a minor, concerned with the acquisition of the land involved in Writ Petition No. 1878 of 1971 and that he had not been intimated of the fact of a report having been sent to the Government under Section 5-A of the Land Acquisition Act. On behalf of the State, it has been stated that the said notice had been served on the mother of the minor and that no objections having been filed by her to the proposed acquisition, she was not entitled to any such intimation under Section 5-A of the Act. In these circumstances, we fail to see any infirmity in the proceedings impugned. Hence all the contentions fail.

17. In the result, these petitions are dismissed, but without costs.

Petitions dismissed.

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E. S. VENKATARAMIAH, J.

Raj Mohammad, Appellant v. Saeeda Amina Begum, Respondent.

Second Appeal No. 618 of 1974, D/- 22-3-1976.*

(A) Mahomedan Law — Marriage — Restitution of conjugal rights — Suit by husband — Duty of Court — Decision does not entirely depend upon the right of the husband — Court should also consider whether it would be inequitable for it to compel the wife to live with her husband.

There is no absolute right in a husband to claim restitution of conjugal rights against his wife. Gross failure by the husband of the performance of the obligation which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. It has to be borne in mind that the decision in a suit, for restitution of conjugal rights does not entirely depend upon the right of the husband. The Court should also consider whether it would make it inequitable for it to compel the wife to live with her husband. There is no such rule which compels the Courts always to pass a decree in a suit for restitution of conjugal rights in favour of the husband. As long as there is no such rule, it would be just and reasonable for the Court to deny the said relief to the plaintiff if the surrounding circumstances show that it would be inequitable to do so. AIR 1960 All 684, Rel. on. (Paras 6, 7)

In a suit for restitution of conjugal rights by a Muslim husband against the first wife filed after she had called upon him to pay her and her children maintenance and he had taken a second wife during the pendency of the suit, it would be just and reasonable for the Court to deny the said relief to him on consideration of facts and circumstances revealing that the husband has been guilty of such conduct which leads to the conclusion that he has disintitiled himself to a decree for restitution of conjugal rights. (Para 7)

Cases Referred: Chronological Paras
 AIR 1960 All 684 = 1960 All LJ 523 6
 AIR 1933 All 634 = ILR 55 All 743 6
 (1866-67) 11 Moo Ind App 551 = 2 Sar 259 (PC) 6

*(Against judgment and decree passed by Civil J., Raichur in Appeal No. 2 of 1972, D/- 16-1-1974).

GT/GT/B978/76/AS/MVJ

M. M. Jagirdar, for Appellant.

JUDGMENT :— This second appeal arises out of the suit instituted in the year 1969 on the file of the Munsiff, Raichur, by the plaintiff for a decree for restitution of conjugal rights against the defendant.

2. The parties to the suit are muslims. The plaintiff, who is the husband, is a resident of Raichur. He took the defendant in marriage at Hyderabad on the 17th of May, 1963. Thereafter the defendant came over to Raichur and lived with the plaintiff. By December 1966 two children were born to them. In December 1966 the defendant left for Hyderabad. The case of the plaintiff was that she had gone away to Hyderabad since he was not willing to leave his parents and shift himself to Hyderabad. The defendant's case was that some time after the marriage, the plaintiff began to make demands on her father to provide him with a motor cycle, a gold ring etc., and as the said demands were not complied with, he began to ill-treat her. On coming to know of it, her father came to Raichur and took her away to Hyderabad. She did not thereafter return to Raichur. In May 1969, the defendant issued a notice to the plaintiff calling upon him to pay her and her children maintenance. The said notice was replied by the plaintiff. On realising that the defendant was about to sue, the plaintiff issued a notice on 2-9-1969 calling upon the defendant to rejoin him at Raichur. As the defendant was not willing to do so, the plaintiff instituted the suit for restitution of conjugal rights, out of which this second appeal arises.

3. The trial Court was of the opinion that the plaintiff had ill-treated the defendant during her stay at Raichur and that therefore the defendant was entitled to stay away from her husband. It accordingly dismissed the suit. Aggrieved by the decree of the trial Court, the plaintiff filed an appeal before the learned Civil Judge, Raichur. Although he was of the opinion that the defendant had not established that the plaintiff had treated her with such cruelty as to cause reasonable apprehension in her mind that it would be harmful to her to live with the plaintiff, he found that the defendant was justified in staying away from her husband. He therefore dismissed the appeal. Hence this second appeal. The defendant is absent and unrepresented.

4. It is not disputed that the defendant was staying away from her hus-

band from December 1966. Although it was alleged that the plaintiff had written letters to the defendant calling upon her to return to him prior to 1969, no material was placed before the Court in support of that part of the case. The learned Civil Judge has found that for the first time the plaintiff called upon the defendant to return to him only after a notice was issued on behalf of the defendant calling upon him to pay maintenance. It is also found by the learned Civil Judge that for nearly three years until the suit was instituted the plaintiff did not pay any amount for the maintenance of his wife and children. He did not even make any attempts to see them at Hyderabad. Within a few months after the suit was instituted, the plaintiff took a second wife. These facts are not in dispute.

5. It was argued by Mr. Manohar Rao Jagirdar, learned counsel appearing on behalf of the plaintiff, that the lower appellate Court was in error in holding that the defendant had justifiable cause to stay away from her husband, merely because the plaintiff had taken a second wife during the pendency of the suit. It was argued by him that since Muslim Personal Law allowed the plaintiff to take a second wife, it was not open to the defendant to contend that she would not stay under husband's roof along with a rival wife.

6. Dealing with the kinds of defences which a wife under the Muslim Law can take in a suit for restitution of conjugal rights, the Judicial Committee of the Privy Council observed in *Moonshree Buzloor Ruheem v. Shumsoonnissa Begum*, (1866-67) 11 Moo Ind App 551 (PC), as follows:

"It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered and considered with some reference to Mohammedan Law." In *Anis Begum v. Muhammad Istafa Wali*

Khan, ILR 55 All 743 = (AIR 1933 All 634) Sulaiman, C. J., observed as follows:

"Their Lordships of the Privy Council in the case of Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, (1866-67) 11 Moo Ind App 551 (PC) observed that a suit for restitution of conjugal rights, though in the nature of a suit for specific performance is in reality a suit to enforce a right under the Muhammadan law and the Courts should have regard to the principles of Muhammadan law. The observation of their Lordships was directed to emphasising the point that Courts should not exercise their discretion in complete supersession of the Muhammadan Law, but that in exercise of their discretion they should refer to that law. But the principle was fully recognised that in passing a decree for the restitution of conjugal rights, the Court has power to take into account all the circumstances of the case and impose terms which it considers to be fair and reasonable."

The rule may, therefore, be re-stated as follows:

"There is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the Courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case."

Proceeding further he observed at p. 772 as follows:

"I think that the wife is fully justified in refusing to go and live with her husband so long as there is no undertaking not to keep any mistress in the house."

After referring to the decision of the Privy Council mentioned above, Dhavan, J. in *Itwari v. Asghari*, (AIR 1960 All 684) observed as follows:—

"It follows, therefore, that in a suit for restitution of conjugal rights by a Muslim husband against the first wife after he has taken a second, if the Court after a review of the evidence feels that the circumstances reveal that in taking a second wife the husband has been guilty of such conduct as to make it inequitable for the Court to compel the first wife to live with him it will refuse relief."

Proceeding further, he observed:

"The onus today would be on the husband who takes a second wife to explain his action and prove that his taking

a second wife involved no insult or cruelty to the first. For example, he may rebut the presumption of cruelty by proving that his second marriage took place at the suggestion of the first wife or reveal some other relevant circumstances which will disprove cruelty. But in the absence of a cogent explanation the Court will presume, under modern conditions, that the action of the husband in taking a second wife involved cruelty to the first and that it would be inequitable for the Court to compel her against her wishes to live with such a husband."

I respectfully agree with the above observations made by Dhavan, J.

7. As mentioned earlier, between 1966 and 1969, the plaintiff did not provide any maintenance to his wife and the children. His case that he had made attempts to persuade her to rejoin him, has not been believed. What is significant is that within a few months after he instituted the suit for restitution of conjugal rights, he took a second wife. The suit itself was filed after the defendant had called upon the plaintiff to pay her and her children maintenance. In these circumstances, it would not be unreasonable to hold that at any rate after the plaintiff took a second wife, the defendant had reasonable and justifiable cause to stay away from her husband. It has to be borne in mind that the decision in a suit for restitution of conjugal rights does not entirely depend upon the right of the husband. The Court should also consider whether it would make it inequitable for it to compel the wife to live with her husband. Our notions of law in that regard have to be altered in such a way as to bring them in conformity with the modern social conditions. It is not shown that there is any rule which compels the Courts always to pass a decree in a suit for restitution of conjugal rights in favour of the husband. As long as there is no such rule, it would be just and reasonable for the Court to deny the said relief to the plaintiff if the surrounding circumstances show that it would be inequitable to do so. The lower appellate Court has found that the suit instituted by the plaintiff was not a bona fide one. This fact coupled with the circumstance that the plaintiff had taken a second wife during the pendency of the suit leads to the conclusion that he has disintegrated himself to a decree for restitution of conjugal rights. Even granting the plaintiff has divorced the second wife subsequently, the result cannot be different.

8. The appeal is therefore, dismissed.

Appeal dismissed.

AIR 1976 KARNATAKA 203

B. VENKATASWAMI AND
D. NORONHA, JJ.

A. K. Kaimal, Petitioner v. Sudarsen Trading Co. Ltd., Mysore and another, Respondents.

Misc. First Appeal No. 593 of 1976.*

(A) Provincial Insolvency Act (1920), Sections 7, 10 (1) — Petition by debtor to be adjudged as insolvent — Prima facie case made out — Court cannot examine the bona fides of the petitioner — Petitioner is entitled to be adjudged as insolvent — Matter does not depend on discretion of Court — At the time of initiation of proceedings, Court has only to be satisfied that essential conditions for adjudication are present. AIR 1966 Mad 331, Foll.

(Paras 4, 5)

Cases Referred: Chronological Paras
AIR 1966 Mad 331 = (1966) 1 Mad LJ 210 5

AIR 1916 PC 64 = ILR 44 Cal 535 5

M. Shivappa, for Petitioner.

VENKATASWAMI, J.:— This appeal under Section 75 (2) of the Provincial Insolvency Act (Insolvency Act) is directed against an order made by the District Judge at Mysore in Insolvency Case No. 4 of 1972, whereby the appellant's petition preferred under Section 7 of the Insolvency Act had been dismissed.

2. The appellant preferred a petition under Section 7 of the Insolvency Act to be adjudged as an insolvent as he was unable to pay two items of debts due to the respondents. One of the items represents a debt of Rs. 3,010/- and evidenced by a decree passed in O. S. No. 543 of 1971 on the file of the First Munsiff at Mysore. The other item consists of a sum of Rs. 13,319-96 with interest alleged to be due to the second respondent on account of supplies of superphosphate made by the second respondent to the appellant.

3. The learned District Judge on an examination of the appellant came to the conclusion that the first debt had

*(Against judgment and order passed by Dist. J., Mysore in Insolvency Case No. 4 of 1972, D/- 17-9-1973).

GT/GT/B971/76/BV.

been established and the second could not be accepted as subsisting even if the transaction alleged was true. He, however, dismissed the petition on the ground that the appellant who on his retiring from service under Chamundya Curing Works in the year 1969 had received a sum of Rs. 6,000 to 7,000, presumably as a retirement benefit, was unable to account as to the manner in which he dealt with or spent the said amount. In short, the Court, as it appears to us, came to the conclusion that the petitioner's claim that he was unable to pay the said debts could not be believed. Hence this appeal.

4. In support of the appeal, Sri M. Shivappa, the learned counsel, contended that having regard to the provisions of Sections 7 and 10 (1) of the Insolvency Act, it was premature for the Court to have examined the bona fides of the appellant in the context of his inability to pay the debts. He further contended that at that stage all that the Court was required to examine was whether or not a prima facie case had been made out having regard to the provisions of the Act, particularly Section 10 (1) of that Act. It seems to us that this contention is well founded and this appeal clearly deserves to succeed.

5. It is sufficient for this purpose to refer to the enunciation of the true legal position in regard to a matter of this nature where a debtor himself approaches the Court to be adjudged as an insolvent, in the case of Krishnappa Chettiar v. Kasiviswanathan Chettiar, (AIR 1966 Mad 331), with which we are in respectful agreement. The relevant passage reads:

".....As pointed out by the Privy Council in Chhatrapat Singh Dugar v. Kharg Singh Lachmiram, ILR 44 Cal 535 = (AIR 1916 PC 64), when all the conditions specified under the Provincial Insolvency Act are satisfied, a debtor is entitled to an order of adjudication. The matter does not depend on the discretion of the Court, but it is a statutory right of which he cannot be deprived by the Court on the ground of abuse of process. There is a stage at which the Court could visit on the petitioner its due consequences of misconduct, that is when the application for discharge comes before the Court. At the time of the initiation of the proceeding, the Court has only to be satisfied that the essential conditions for adjudication as provided under the Act are pre-

204 Kant. [Prs. 1-5] Shankergouda v. Garangouda (Chandrashekhar J.) A. I. R.
sent

(emphasis supplied)

6. In the result, this appeal succeeds and is accordingly allowed. Consequently the order made by the District Judge at Mysore in Insolvency Case No. 4 of 1972 is hereby set aside and the petition concerned therewith stands allowed. The matter, however, is remitted to the Court below to proceed further in accordance with law. In the circumstances, no costs.

Appeal allowed.

AIR 1976 KARNATAKA 204

D. M. CHANDRASHEKHAR, J.

Shankergouda, Appellant v. Garangouda and others, Respondents.

Second Appeal No. 564 of 1971, D/- 27-2-1976.*

(A) Civil P. C. (1908), Section 152 — Correction of judgment and decree — Power of High Court — Clerical or inadvertent error occurring due to mistake of parties in the pleadings — Giving of wrong survey number of property claimed to be self acquired — Correction can be made if there is no ambiguity as to the identity of property claimed. AIR 1957 All 133; AIR 1950 Mad 751 and AIR 1954 Pat 108, Rel. on. (Para 11)

Cases Referred: Chronological Paras
AIR 1957 All 133 = 1956 All LJ 691 10
AIR 1954 Pat 108 = 1953 BLJR 529 9
AIR 1950 Mad 751 = (1950) 1 Mad LJ 120 8

M. M. Jagirdar, for Appellant; Balakrishna for N. Santosh Hegde (for Nos. 1 to 3), for Respondents.

JUDGMENT:— Has the Court power under Section 152, Civil P. C. to amend its judgment and decree so as to correct a clerical or inadvertent error although such error had occurred on account of a mistake of the parties themselves in the pleadings? This question arises out of the application, I. A. II, made by the appellant. He has prayed for amendment of the judgment and decree in the above appeal, by substituting the figure 203 for the figure 304 denoting the survey number of the land in Kuralagere village which I held in this second appeal, to be the exclusive property of the appellant

*(Against judgment and decree passed by Civil J., Gulbarga, in Appeal File No. 315 of 1969, D/- 2-3-1971).

GT/GT/B982/76/GGM

and directed its exclusion in the partition of the joint family properties between the appellant and the respondents.

2. In the affidavit accompanying I. A. II, the appellant has alleged thus: In the plaint he had stated that the land bearing Survey No. 304 of Kuralagere was purchased by him out of his separate funds and that it was not liable for partition. The correct survey number of that land is 203. It is only by a clerical mistake that he had stated the survey number of that land as 304. In para. 8 of the written statement of plaintiff 2 who was later transposed as defendant 4 he had expressly pleaded that the mention of S. No. 304 in the plaint was incorrect, but that as a matter of fact it was S. No. 203 known as "Ichigirin Hola". In para. 1 of the additional grounds in the written statement of other defendants, that land was stated as bearing S. No. 203 and not 304. The plaintiff had also stated in his rejoinder that lands bearing S. Nos. 203, 128 and 355 of Kuralagere village had been purchased by him and hence were not liable to partition. Unless this error in the Survey number of the land is corrected in the judgment and decree in the second appeal, the decree cannot be executed.

3. The respondents have opposed I. A. II and have filed objections in which they have denied that mention of S. No. 304 in the plaint was due to a clerical mistake and that the correct number of the land referred to in the plaint as the separate property of the plaintiff, was 203. The respondents have pleaded that the appellant-plaintiff had omitted to include in the plaint schedule S. Nos. 355, 203 and 128 which were also joint family properties liable for partition, that by the terms of the decree as modified by this Court, all the four respondents have each got 1/5th share in S. No. 203 along with other joint family properties and that by the proposed amendment the respondents would be deprived of their legitimate shares in that land, granted by the decree. They further pleaded that there was a serious dispute between the parties about the identity of the land and that as such it could not be said that the mistake in the plaint was either clerical or accidental.

4. The respondents contended that the appellant-plaintiff's remedy, if any, was by way of a separate suit or an application in the trial Court and not by this application in this Court.

5. At the outset, I wish to point out that S. No. 203 is not one of the items

in Schedule A to the decree of the trial Court or to the modified decree of this Court. Hence, there is no substance in the contention of the respondents that under the decree of this Court they have been given any share in S. No. 203. They have not shown how amendment sought for by the appellant-plaintiff hurts them.

6. When defendants 1 to 3 had themselves stated in the additional grounds in their written statement that the Survey number of the land claimed by the appellant-plaintiff as his exclusive property was 203 and not 304 and defendant 4 (originally plaintiff 2) had also stated to the same effect in para. 8 of his written statement, there can be no doubt that the mention of S. No. 304 was an inadvertent or clerical error and that the correct number of the land claimed by the appellant-plaintiff as his self acquired property was 203 and not 304.

7. Even so, Mr. J. S. Gunjal, learned Counsel for respondents 1 to 4, contended that the amendment sought for by the appellant-plaintiff could not be allowed by this Court after the disposal of the appeal.

8. In Krishna Poduval v. Lakshmi Nathiar, (AIR 1950 Mad 751), the error regarding survey number of the suit land was not only in the schedule to the decree and the plaint but also in the schedule to the deed of assignment in favour of the plaintiff. Yet Madras High Court permitted amendment of the decree under Section 152, Civil P. C. so as to correct the error in regard to the survey number of the land in the schedule to the decree.

9. In Anupa Kuer v. Yogendra, (AIR 1954 Pat 108) the plaintiff who had purchased southern half of certain plots of land had omitted to state in the plaint from which direction recovery of possession over the suit plot was sought for. The decree drawn in accordance with the plaint had also omitted to give such direction. Patna High Court held that since there was no ambiguity as to the subject-matter of the suit, but that there was only a mistake as to the description of the property, the decree should be amended under Section 152, Civil P. C.

10. In Shahzad Khan v. Sheo Kumar, (AIR 1957 All 133), a mistake had crept in the decree on account of wrong description of the suit property in the plaint. Allahabad High Court held that the Court can under Section 152, Civil P. C., amend a clerical error in a decree although such error might have occurred on account of its being copied from the

plaint and that it was not necessary to amend the plaint itself.

11. The above decisions relied on by the appellant-plaintiff clearly support his prayer. As there is no ambiguity as to the identity of the land claimed by him as his self acquired property and the mistake as to its survey number in the plaint was due to an inadvertent or clerical error, I allow the application, I. A. II, and correct the mistake in my judgment in the second appeal and the decree based thereon, by substituting Survey No. 203 for Survey No. 304.

Application allowed.

AIR 1976 KARNATAKA 205

G. K. GOVINDA BHAT, C. J. AND
M. N. VENKATACHALLIAH, J.

Rayappa Basappa Killed, Petitioner
v. The Land Tribunal and others, Respondents.

Writ Appeal No. 21 of 1976, D/- 20-1-1976.*

(A) Karantaka Land Reforms Act (10 of 1962), Sections 44 and 45 (as amended by Act 1 of 1974) — Person claiming right as tenant neither in possession of land nor cultivating it personally before 1-3-1974 — Not entitled to be registered as occupant.

In a case where the alleged tenant has not been in possession of the agricultural land and he has not been cultivating it personally immediately prior to the date of vesting, viz., 1-3-1974, such land does not vest in the State Government under Section 44, and if it does not vest in the State Government, the tenant is not entitled to be registered as occupant under Section 45. (Para 5)

T. J. Chouta, for Appellant.

GOVINDA BHAT, C. J.:— This is an appeal against the order made by Venkataramiah, J. dated 10-12-1975 in Writ Petition No. 6701 of 1975 by which the learned Single Judge dismissed the appellant's writ petition challenging the order of the Land Tribunal, Kundgal, rejecting his application for registering him as occupant under Section 45 of the Karnataka Land Reforms Act, 1961 (hereinafter called the Act).

2. The appellant was admittedly not in possession of the land from 1957

*(Against Judgment of Venkataramiah, J. in W. P. No. 6701 of 1975, D/- 10-12-1975).—

in respect of which he sought registration as occupant under Section 45 of the Act. The question is whether a person who claims that he had the right of a tenant but not in possession of the agricultural land on 1-3-1974, which is the date on which all lands held by or in the possession of tenant immediately prior to the said date stand transferred to and vest in the State Government is entitled to be registered as occupant.

3. Section 44(1) of the Act as amended by Act 1 of 1974 reads:

"All lands held by or in the possession of tenants (including tenants against whom a decree or order for eviction or a certificate for resumption is made or issued) immediately prior to the date of commencement of the Amendment Act, other than land held by them under leases permitted under Section 5, shall, with effect on and from the said date, stand transferred to and vest in the State Government."

4. Section 45 of the Act provides for registration of the tenant who has been cultivating the land personally before the date of vesting. Sub-section (1) of the said Section reads:—

"Subject to the provisions of the succeeding sections of this Chapter, every person who was a permanent tenant, protected tenant or other tenant or where a tenant has lawfully sublet, such sub-tenant shall, with effect on and from the date of vesting, be entitled to be registered as an occupant in respect of the lands of which he was a permanent tenant, protected tenant or other tenant or sub-tenant before the date of vesting and which he has been cultivating personally." (Underlining is ours).

5. In a case like this where the alleged tenant has not been in possession of the agricultural land and he has not been cultivating it personally immediately prior to the date of vesting, viz., 1-3-1974, such land does not vest in the State Government under Section 44, and if it does not vest in the State Government, the tenant is not entitled to be registered as occupant. Therefore, the Tribunal was right in rejecting the appellant's application as the land has not vested in the State Government under Section 44(1).

6. We see, therefore, no grounds to admit this appeal. Accordingly it is rejected.

Appeal dismissed.

AIR 1976 KARNATAKA 206

M. SADANANDASWAMY AND
D. NORONHA, JJ.

Commander Works Engineers, Bangalore, Appellant v. Sarvashri Sreenivasan Foundaries and Engineering Works, Srinivasanagar, Respondent.

Misc. First Appeal No. 511 of 1971, D/- 6-1-1976.*

(A) Arbitration Act (1940), Section 30 — Grounds for setting aside award — Non-production of relevant documents by either party, however important those documents may be for decision of dispute by arbitrator, not a sufficient ground. AIR 1965 SC 214 and AIR 1967 SC 378, Rel. on. (Para 8)

Cases Referred: Chronological Paras
AIR 1967 SC 378 = (1967) 1 SCR 633 7
AIR 1965 SC 214 = (1964) 5 SCR 480 7
AIR 1923 PC 66 = 50 Ind App 324 7

S. A. Hakeem Central Govt. Jr. Standing Counsel, for Appellant; V. K. Govindarajulu, for Respondent.

JUDGMENT:— This is an appeal against the judgment of the II Additional Civil Judge, Belgaum, dated 14th December, 1970 in Arbitration Case No. 4 of 1969 setting aside the award filed in the case under Section 30(a) of the Arbitration Act.

2. The appellant before us is the Commander, Works Engineers, Dickinson Road, Bangalore, who was opponent No. 1 in the lower Court. On or about 10-3-1967 the 1st opponent accepted tender of the 2nd opponent, Sarvashri Sreenivasa Foundries and Engineering Works, and entered into a contract with it for the supply of steel furniture consisting of steel chairs, steel tubular tables, steel beds and steel trays for a total amount of Rs. 81,245.00. The major item of the tender consisted of 320 steel tables of the value of Rs. 73,600/-. According to the original contract they had to be manufactured in the factory of the 2nd opponent. But, according to the 2nd opponent, this item was altered by the 1st opponent and the 1st opponent insisted that the 2nd opponent had to supply tables manufactured by Messrs. Khira of Bombay according to the specifications laid down by the 1st opponent. It is the case of the 2nd opponent that Messrs. Khira expressed their inability to supply the said

*(Against order passed by 2nd Addl. Civil J., Belgaum, in Arbitration Case No. 4 of 1969, D/- 14-12-1970).

GT/GT/B997/76/VSS

tables according to the specifications laid down by opponent No. 1. Since the 2nd opponent was unable to supply the tables according to the conditions laid down by the 1st opponent, the first opponent by his order dated 26-8-1967 cancelled the contract with effect from 1-9-1967 and intimated the 2nd opponent that the items of furniture left incomplete would be got supplied by another agency at the risk and costs of the 2nd opponent. Thereafter the first opponent is said to have called for fresh tenders for manufacture and supply of the said items of furniture and purchased them from Messrs. Godrej and Company for a sum of Rupees 98,927-51 Ps. A sum of Rs. 8,993-48 was claimed on account of sales tax exemption in addition and, deducting the agreed sum of Rs. 81,245/-, the first opponent paid Rs. 27,675.99 Ps. plus 10% compensation for delay amounting to Rupees 8,154-50 Ps. The first opponent also sought to forfeit the sum of Rupees 8,497-45 Ps. which was the sum total of the securities and final bills in favour of the second opponent. But, at a later stage, he agreed to give allowance for this sum and made a net claim of Rupees 27,303-04 Ps. from the 2nd opponent. Since the 2nd opponent did not pay the amount, the Chief Engineer, Southern Zone, Fort St. George, Madras-9 who was seized of the matter, referred the dispute to the Arbitrator Lt. Col. S. J. Samuel, Commander Works Engineer's Office, Project, Mudfort, Secunderabad 3, in terms of the contract agreement on 31-8-1968.

3. Thereafter the arbitrator issued notices to both the opponents on 4-9-1968 calling for their written statements. The notices also called upon the parties to produce the relevant documents referred to in the statements of their respective cases. It also indicated that if either of the parties wanted the opposite party to produce any documents or other evidence at the hearing, it should be indicated in writing so that the arbitrator may direct the party concerned to make the same available for inspection at the time of hearing or earlier if necessary. Both the parties obtained some adjournments and later filed their respective written statements. Finally, the case was taken up on 22-8-1969 by the arbitrator. Government was represented by the Commander Works Engineer, Bangalore 1. Second opponent was represented by counsel. No oral evidence was recorded by the arbitrator and no issues had been framed in the case. But on hearing both the sides

the arbitrator gave the award under which the first opponent was awarded Rs. 18,682-51 Ps. towards extra cost of completion of supplies and Rs. 8,731-53 being 9% of the sum of Rs. 97,017-00 and, after giving deduction to a sum of Rupees 8,497-45 Ps. due to the 2nd opponent, the balance was made payable by the award. The parties had to bear their own costs. The first opponent is said to have requested the arbitrator by his letter dated 4-10-1969 to file the award in the District Court. Accordingly the present award was filed in the lower Court. The 1st opponent accepted the award and prayed for a decree to be passed in its terms. The 2nd opponent filed an application with an affidavit praying for setting aside the award under Sections 30 and 33 of the Arbitration Act.

4. According to the contentions of the 2nd respondent in his affidavit, the arbitrator held only one sitting at Belgaum on 11-8-1969, on which date he heard both the parties and perused the documents adduced in the evidence. But the first opponent was not in possession of the relevant documents and, therefore, the 2nd opponent required the 1st opponent to send for the relevant documents. The second opponent was expecting the second hearing, but on 26-9-1969 the award had been published without giving the 2nd opponent a further chance about the additional documents sought from the first opponent. He therefore contended that the arbitrator has misconducted himself and the proceedings by taking into consideration material documents without affording opportunity to the 2nd opponent of knowing their contents and that the said award has been improperly procured by the 1st opponent. He alleged that the arbitrator was biased and that the award was otherwise invalid and liable to be set aside.

5. The arbitrator has not given any reasons in the award passed by him, but has stated that he has considered all the evidence adduced by both the parties and arrived at his decision. There is no material to support the contention of the 2nd opponent that any documents were produced by the 1st opponent before the arbitrator subsequent to the date of hearing or that the arbitrator took into consideration any material or documents which were not available before him on the date of hearing. The records produced by the arbitrator show that the arbitrator noted down the arguments of

both the parties on the merits in respect of all the contentions raised by either party. The lower Court also does not come to the conclusion that the award is vitiated on account of the fact that the arbitrator took into consideration any document produced by the first opponent subsequent to date of hearing. But the lower Court has observed in the course of its judgment that the minutes maintained by the arbitrator show that though the documents were called for the first opponent did not produce the order form or the bills of Godrej to show whether the goods supplied were identical or not. It was further observed that though one of the parties insisted upon the production of the documents, which if produced before the arbitrator would have definitely affected the quantum of damages, the arbitrator has ignored the same and violated the principles of natural justice and the award is liable to be set aside. The lower Court held that the arbitrator has misconducted himself in not securing the relevant documents and, therefore, set aside the award.

The portion of the minutes maintained by the arbitrator relied on by the lower Court reads as follows:

"In support of this Advocate representing Sreenivasa Foundaries brought to the Arbitrator's notice Sections 73 and 74 of the Indian Contract Act. The defendant also wanted to know whether quotations were also called for from M/s. Khira Ltd., and also the originals of the purchased bills of Godrej which was supplied by the other contract at the risk and cost of Sreenivasa Foundaries. The plaintiff presented the comparative statement of tenders to show that no quotations/tenders were issued to M/s. Khira Ltd."

The above extract does not show that the arbitrator directed the 1st opponent to produce any additional documents. There is also no indication in the minutes recorded by the arbitrator to show that he did so direct the first opponent.

6. The question therefore is whether the failure on the part of the 1st opponent to produce the bills in respect of the supplies made by Messrs. Godrej and Company in spite of the fact that the 2nd opponent insisted upon the production of the same by the 1st opponent before the arbitrator is sufficient to vitiate the award under Section 30 of the Arbitration Act. According to the 2nd opponent if those documents had been produced they would have shown that the

articles supplied by the other firm were not of the same specifications embodied in the original contract between the second opponent and the 1st opponent; further the liability could not be fixed on the 2nd opponent to the extent to which it has been done by the arbitrator and that the 2nd opponent would not be liable in damages in view of the difference in the two specifications. The 2nd opponent contends that the failure of the first opponent to produce the relevant documents should have led the arbitrator to draw an adverse inference against the first opponent and to disallow the claim of the first opponent. In other words, what the 2nd opponent contends is that he would have been able to succeed on merits if the documents which were required by him had been produced by the first opponent before the arbitrator.

7. The scope of Section 30 of the Arbitration Act, 1940, has been considered in AIR 1965 SC 214, Jivarajbhai v. Chintamanrao Balaji, wherein it has been observed as follows:—

".....An award may be set aside by the Court on the ground of error on the face of the award, but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. As observed in *Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.*, (50 Ind App 324) = (AIR 1923 PC 66) at page 331 (of Ind App). = (at page 69 of AIR):

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what the contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

The Court in dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the Court to set aside the award is restricted to cases set out in Section 30.

reliance on Ex. P-8 G. O. That G. O. is clearly not applicable in view of the fact that there was no determination or decision of the seniority between the petitioner and the 4th respondent by the Management in this case. Manager's words alone without positive proof of such determination cannot conclude the matter. Nor will the mention of the 4th respondent's name above the petitioner in the attendance register and the acquittance roll be any evidence of fixation of such seniority. These records would not constitute determination of seniority as required under Ex. P-3.

11. The contentions of Mr. Bhaskaran Nambiar, learned counsel for the 4th respondent were:

(1) Seniority has been determined by the Management prior to the coming into force of the Act itself in favour of the 4th respondent which fact has indeed been admitted by the petitioner himself. At the time of appointment of the parties Manager could fix seniority in any way he liked which fixation cannot be reopened after the rules in question came into force. Apart from the Manager's words, the entries in the attendance register, the pay acquittance roll and other records indicate that there had been such determination. The petitioner himself in many of his communications to the authorities had admitted that the Manager made such a determination. Nor did he complain about such a fixation for a fairly long time. He is estopped from contending that he is senior to 4th respondent;

(2) Rule 37 (2) came into force only on 19-3-1963. It could have no retrospective operation;

(3) Rule 39 which says that the staff list shall be prepared with reference to the position existing on the date of commencement of the school as an aided school under the Act unless there is a staff list already approved of by the department which conforms to these rules, is really a proviso to Rule 37;

(4) Ex. P-8 squarely applies in this case. It really clarifies the position that Rule 37 (2) cannot have any retrospective operation; and

(5) The petitioner has not exhausted his remedies under the Act and Rules.

12. Similar contentions have been raised on behalf of the departmental authorities also opposing the original petition.

13. In his counter affidavit the present Manager has taken up a stand quite

contradictory to what the previous Manager stated. He says that he found no records or materials to support the stand taken that the inter se seniority as between the petitioner and the 4th respondent was decided and accepted before the Act came into force or even after the Act before 1965 when the staff list was prepared for the first time.

14. In spite of these detailed contentions it is clear that the controversy between the parties lies within a narrow compass. In regard to the question of alternative remedy open to the petitioner under the Act, I might state that I am not prepared to dismiss the O. P. on that ground. In the first place it is not an invariable rule that the petitioner should exhaust his remedies under the Statute concerned before this Court can entertain a petition under Article 226. The other remedy, the petitioner can be said to have, is a revision before the Government under Rule 92 of Chapter XIV-A. In a case of this nature where the scope and ambit of the statutory Rules come up for consideration it is only proper that the matter is dealt with on merits by this Court.

15. There could be no dispute with regard to the contention that Rule 37 (2) is not retrospective in nature. Nor could it be so in the absence of any provision in the Act itself, which enables the making of Rules with retrospective effect. As pointed out in *Rev. Fr. Xavier v. State*, (1971 Ker LT 941), law does not permit the making of rules with retrospective effect, particularly when the statute has not specifically conferred any such power.

16. However, when there has been no determination of the question of seniority before the coming into force of the Rules concerned and the law also does not provide for any such fixation, then after the Rules had come into force, the seniority list has to be prepared only in accordance with these Rules. In O. P. 56/66 a controversy arose between the petitioner in that O. P. and the 4th respondent therein in regard to seniority. Both the persons were appointed on the same date and at that time they were governed by what is known as the P. S. S. Scheme. Petitioner was earlier confirmed though 4th respondent was older in age. Mr. Justice Gopalan Nambiyar who decided the case after quoting Rule 37 (2) observed:

"In accordance with the above rule; the 4th respondent who is the older of the two is entitled to seniority over the petitioner. Neither under the P. S. S. Scheme

nor under the Kerala Education Rules is date of confirmation relevant to decide seniority."

The learned Judge then upheld the seniority that was given to 4th respondent by the department. This decision was considered by Mr. Justice Mathew in O. P. 3059/68, who said:

"After this Rule came into force, the seniority list has to be prepared only in accordance with law. This is the view taken in O. P. 56/66."

17. Before going into the present case I might also refer to a decision of Mr. Justice Isaac in Rev. Fr. John v. Director of Public Instruction, (ILR (1970) 1 Ker 480). There his Lordship said that Rule 39 should be read as a proviso or a qualification to Rule 37. Rule 39 provides that the seniority list shall be prepared not only as on the date on which the school commences as an aided school under the Act, but also with reference to the position existing on that date. In other words, the seniority as it exists on the said date has to be retained; and Rule 37 would apply only subject to that condition.

18. On the basis of the above decisions the question in this case would reduce to whether there was a determination by the Management on the question of seniority as between the petitioner and the 4th respondent before the date of commencement of the school as an aided school under the Act or afterwards before Rule 37 (2) came into force. If there had been such a determination and the 4th respondent was held to be senior, then the petitioner can have no case. On the other hand, if there had been no such determination, then the staff list will have to be prepared in accordance with Rule 37 (2) and then the petitioner will succeed in his contentions in this O. P.

19. Has there been a determination by the Management of the seniority of the 4th respondent over the petitioner? What the 4th respondent says is that she was treated as senior to the petitioner and others who were appointed on the same date. In the attendance register she was shown as 7th assistant while the petitioner was shown as 9th assistant. Similarly, it is also stated that this rank is adhered to in the acquittance roll and Inspection Report. The then Manager has also said that 4th respondent was appointed senior

to the petitioner. It is also argued that the petitioner had at no time made any protest against this.

20. I do not think these facts will constitute as such any positive evidence that the Management had determined the question of relative seniority as between the petitioner and the 4th respondent. To determine a question means to settle a question or controversy about, to resolve or decide a disputed matter. There should be a conscious advertence to the question and a decision thereon. It is difficult to come to a conclusion that any such decision had been taken by the Management here. Under the Madras Educational Rules there was no such necessity for determination of seniority as between two persons. The question of inter se seniority between the teachers was absolutely immaterial at that time as question of promotion or of appointment of Headmaster etc., was in the absolute discretion of the Manager. Therefore, there could not have been an assignment of seniority before the Rules came into force. I am inclined to accept the contention of the petitioner that Ex. P-8 G. O. makes only provisions for accepting what has been done in fact by the Managements between the date of the Act and the date of the introduction of sub-rule (2) of Rule 37 when the said sub-rule was not available for the managements for guidance. It only saves acts of the managements fixing seniority in between the date of the Act and date of introduction of sub-rule (2) of Rule 37. In this case a seniority list came into existence for the first time when such a list was forwarded for approval in 1966, long after Rule 37 (2) came into force. The rank given in the attendance register or other records cannot be said to be based on a determination of seniority.

21. I am, therefore, of the view that seniority as between the petitioner and the 4th respondent will have to be fixed on the basis of Rule 37 (2) of Chapter XIV-A of the Rules. I quash Exs. P-4 and P-7 and direct the staff list to be prepared showing the ranks of the petitioner and the 4th respondent therein in accordance with Rule 37 (2). The O. P. is disposed of as above. In the circumstances of the case I make no order as to costs.

Order accordingly.

AIR 1976 KERALA 115

P. GOVINDAN NAIR, C. J.,
T. KOCHU THOMMEN, J.

V. J. Mathukutty, Appellant v.
Ouseph Thomas, and others, Respondents.

Writ Appeal No. 102 of 1975, D/- 1-9-1975.

(A) Kerala Land Reforms Act (1 of 1964), S. 75 (2) — Shifting of kudikidappukaran — Bona fide requirement of land for building purposes — Determination of — Factors to be considered — Availability of other land with landlord — Relevancy of — Burden of proof.

Notwithstanding the conferment of the fixity of tenure on a kudikidappukaran under Section 75 (1) a person in possession of the land can by virtue of Section 75 (2) ask for shifting if the requirements of that section had been satisfied. (Para 6)

In adjudicating upon the plea put forward by the landlord that he bona fide requires the said land for building purpose the Land Tribunal can certainly take into account the nature of the property where the kudikidappu is situated, the existence of other alternative sites belonging to the landlord and consider whether, in the ordinary course of circumstances, a reasonable person situated in the position of the land owner in the case before it would ordinarily entertain a genuine intention to construct a residential house on the site of the kudikidappu. The existence of other land is a relevant consideration that may be taken into account in deciding whether the claim put forward by a person in possession of the land that he required the land for building purposes is bona fide or not. 1974 Ker LT 741, Foll.

(Para 8)

In determining the bona fides the extent of the land on which the kudikidappu is situate is not an irrelevant consideration; on the other hand it is a very relevant consideration. There may be cases where the land is so extensive that it would be unreasonable to expect any person bona fide to require the entire land for building purposes. The location of the land would also be a relevant factor. It may be situate inside the corporation or the municipality or within the panchayat in an Agricultural area.

The initial burden under Section 75 (2) is on the applicant to establish bona

fide requirement. Once it is shown that no other land is available and there was bona fide requirement of the land on which the kudikidappu is situate the claim for shifting should be allowed unless the demand indicated an extravagant disposition on the part of the person or an unreasonable and unfair attitude. (Para 8)

Cases Referred : Chronological Paras

AIR 1974 Ker 104 = 1973 Ker LT 923	8
1974 Ker LT 706	8
1974 Ker LT 741	8
1974 Ker LT 759 = ILR (1974) 2 Ker 516	8
1974 Ker LT 764	8

V. N. Swaminathan, for Appellant;
M. Krishnan Nair and N. A. Augustine, for Respondents.

GOVINDAN NAIR, C. J.: The question is whether the appellant, a "person in possession of the land", can be said bona fide to require the land for building purposes as envisaged by sub-sec. (2) of S. 75 of the Kerala Land Reforms Act, 1963, for short the Act. The appellant applied under Section 75 (2) of the Act for shifting the kudikidappu. One of the issues framed for consideration in the proceedings, issue No. iii was in these terms:

"Is the requirement stated in the application bona fide?

The finding on that issue is:

"that the petitioner does not bona fide require the land in the occupation of the kudikidappukars for building purpose for himself and the petition for shifting the respondents from A schedule property must therefore fail as per Section 75 (2) of the Act 1 of 1964"

The appellant moved the original petition No. 2702 of 1973 seeking to quash the order of the Land Tribunal Ext. P. 1 on the ground that the approach made by the Land Tribunal was wrong and the view taken on the interpretation of Section 75 (2) of the Act was erroneous. The learned Judge who heard the petition dismissed it observing that "all these facts and circumstances have been taken into consideration by the 6th respondent, Land Tribunal, in arriving at its conclusion that the shifting cannot be allowed".

2. The Land Tribunal in dealing with issue No. iii made the following observations.

"Hence the petitioner's requirement to have a separate residence of his own cannot be said to be not bona fide. The petitioner has sworn that he has other

lands but they are not suitable for constructing a residential building for him for one reason or other. The respondents have not seriously disputed this point. According to the petitioner the land most suitable for his dwelling purpose is the A schedule property". Having said so the Tribunal then observed:

"Hence the question to be decided is whether the petitioner requires the entire area of A schedule property including the kudikidappu site for constructing a residential building for him".

3. The A Schedule property from which the kudikidappukars were sought to be shifted has a total extent of 95 cents. There is an important road running along the northern boundary of this property east west. The property seems to be lying east west. The kudikidappu is more or less on the eastern corner of the property, being 20 feet to 30 feet from the eastern boundary and 50 feet to 55 feet from the southern boundary. The basement of the kudikidappu is 22 feet by 10 feet. There was an earlier application to shift the existing kudikidappu to another part of the land apparently under sub-section (4) of Section 75 of the Act. That application had been allowed. The Tribunal after discussing all these aspects came to the conclusion that the 85 cents left after leaving 10 cents to the kudikidappukars would be sufficient for constructing a house and therefore entered the finding which we have already extracted.

4. Section 75 (2) of the Act is in these terms:

"75 (2) Notwithstanding anything contained in sub-section (1), the person in possession of the land on which there is a homestead or hut (hereinafter in this sub-section referred to as the landlord) in the occupation of a kudikidappukaran may, if he bona fide requires the land —

(a) for building purposes for himself or any member of his family including major sons and daughters; or

(b) for purposes in connection with a town planning scheme approved by the competent authority; or

(c) for any industrial purpose, require the kudikidappukaran, to shift to a new site belonging to him subject to the following conditions, namely:

(i) the landholder shall pay to the kudikidappukaran the price of the home-

stead, if any erected by the kudikidappukaran;

(ii) the new site shall be fit for erecting a homestead and shall be within a distance of one mile from the existing kudikidappu;

(iii) the extent of new site shall be the extent of the existing kudikidappu subject to a minimum of three cents if within the limits of a city or a major municipality, five cents if within the limits of any other municipality and ten cents if in any panchayat area or township;

(iv) the landlord shall transfer ownership and possession of the new site to the kudikidappukaran and shall pay to him the reasonable cost of shifting the kudikidappu to the new site.

Where the above conditions are complied with, the kudikidappukaran shall be bound to shift to the new site".

5. We shall also read Section 75 (4) of the Act.

"75 (4) where the person in possession of the land in which there is a kudikidappu considers that the kudikidappu is so located as to cause inconvenience to him, he may require the kudikidappukaran to shift to another part of the land which is fit for the location of the kudikidappu:

Provided that the kudikidappukaran shall have the right to opt for the portion to which the kudikidappu may be shifted:

Provided further that the kudikidappukaran shall not be entitled to opt for any portion which is not adjoining the boundaries of the land, except with the consent of the person in possession of the land:

Provided also that if the kudikidappukaran refuses to opt, he shall be bound to shift to the portion to which he is required to shift by the person in possession of the land:

Provided also that the person in possession of the land shall transfer to the kudikidappukaran his rights over the land to which the kudikidappu is to be shifted, which shall be equal to the extent of the existing kudikidappu subject to a minimum of three cents if in any city or major municipality or five cents if in any other municipality or ten cents if in any Panchayat area or township, and pay the price of the homestead, if any, erected by the kudikidappukaran and the cost of shifting the kudikidappu".

6. Though the Act has introduced various restrictions in the matter of holding land and has conferred fixity of tenure on tenants and kudikidappukars it has not taken away the right to hold substantial property. Section 75 (1) confers fixity of tenure on a kudikidappukaran. He is also entitled to the ownership of three or five or ten cents depending on whether the kudikidappu is within a panchayat, municipality or corporation area. Notwithstanding the conferment of the fixity of tenure under Section 75 (1) of the Act, a person in possession of the land can by virtue of Section 75 (2) ask for shifting if the requirements of that section had been satisfied.

7. The question that would arise under Section 75 (2) (a) would be whether a land is bona fide required for building purposes. The Tribunal has held that most part of the land is bona fide required for building purpose. The Tribunal however felt that the whole of the land was not required and that 10 cents for the kudikidappu could be left out. The question is whether the Tribunal could justifiably substitute its ideas of requirements for deciding the bona fides or otherwise of the requirement of the person in possession of the land.

8. The question has risen on several occasions before this Court whether the existence of other land is a relevant consideration for determining whether the land was bona fide required for building purposes. Justice Eradi dealt with this matter in *Janaki v. Land Tribunal, Tellicherry* (1973 Ker LT 923) = (AIR 1974 Ker 104) and clarified what he meant in that judgment by a later decision in *Abdul Rehiman v. Ramu*, (1974 Ker LT 741). Justice Bhaskaran has dealt with the same question in the decision in *Janaki v. Land Tribunal, Vaikom* (1974 Ker LT 706) and Isaac J. has dealt with the matter in *Sreedharan v. 2nd Addl. Land Tribunal, Pattanakad*, (1974 Ker LT 764) and Justice Poti has also dealt with the same question in *Varkey Thomas v. Land Tribunal, Pampakuda* (1974 Ker LT 759). We may more or less safely state that the general view now established by this Court is that the existence of other land is a relevant consideration that may be taken into account in deciding whether the claim put forward by a person in possession of the land that he required the land for building purposes is bona fide or not. Justice Eradi stated thus in *Abdul Rahiman v. Ramu* (1974 Ker LT 741):

"In adjudicating upon the plea put forward by the landlord that he bona fide requires the said land for the said purpose the Land Tribunal can certainly take into account the nature of the property where the kudikidappu is situated, the existence of other alternative sites belonging to the landlord and consider whether, in the ordinary course of circumstances, a reasonable person situated in the position of the land-owner in the case before it would ordinarily entertain a genuine intention to construct a residential house on the site of the kudikidappu".

We think that this is the approach that should be made in regard to the consideration of the question of bona fides when the requirement is stated to be that the land in which the kudikidappu is situate is wanted for building purposes or for any other purposes mentioned in Section 75 (2) of the Act. In determining the bona fides the extent of the land on which the kudikidappu is situate is not an irrelevant consideration; on the other hand it is a very relevant consideration. There may be cases where the land is so extensive that it would be unreasonable to expect any person bona fide to require the entire land for building purposes. In such cases the obvious answer to be given by the Land Tribunal would be that it had not been established that the person in possession of the land required the land for building purposes. But when the area diminishes from a very large extent to a reasonable holding the question becomes much more difficult to answer. It may be that one person may take the view that he wanted an acre of land where his residential house should be. Another may be content with 50 cents or less. The Tribunal may think that 25 cents would be enough. It is not the subjective view-points that should govern the matter. What is reasonable in the context must be the principle that should be applied. The location of the land would be a relevant factor. It may be situate inside the corporation or the municipality or within the panchayat in an Agricultural area. It is normal for people to have larger extents of lands for building purposes in a rural set up. It may not be unreasonable to state that one acre land is required in a rural area for building purposes. The same certainly cannot be said if the land is inside the corporation or municipality. Along with this aspect must be considered the question whether it should not normally

be left to the person in possession of the land to decide how much of land is required for the purpose of constructing a building or for the other purposes mentioned by the section. In other words when once it is established that land is required for building purposes, the extent of the land required as stated by the appellant should be given due consideration and unless his claim is found to be unreasonable as to spell lack of bona fides it should be allowed. Certainly the initial burden under Section 75 (2) of the Act is on the applicant to establish bona fide requirement. Once it is shown that no other land is available and there was bona fide requirement of the land on which the kudikidappu is situate the claim for shifting should be allowed unless the demand indicated an extravagant disposition on the part of the person or an unreasonable and unfair attitude. What has been stated above should be the proper approach in deciding when other factors required by the section are established. In determining whether the demand for a particular extent of land is reasonable the provision in Section 75 (3) is helpful. That sub-section indicates that if the person in possession of land has only an acre or less of land on the whole he can seek acquisition of other land. This shows that the Act contemplates that having an acre to oneself is permissible. Ordinarily therefore, if the extent of the land in which the kudikidappu is situate is not more than an acre the claim for shifting it from the land has to be held to be reasonable.

9. In this case the finding that has been entered by the Land Tribunal which we have extracted holds that "the land in the occupation of the kudikidappukars" is not bona fide required by the applicant for shifting. This is not the finding that is contemplated by the section. "The land" in the section refers to the whole of the land on which the kudikidappu is situate. In this case "the land" would be the extent of the 95 cents and not the 10 cents out of it to which the kudikidappukaran is entitled to. So the question should be whether the applicant was being unreasonable in demanding that the whole of the 95 cents is required for building purposes, so as to make his requirement as one not supported by bona fides. This must be decided on the basis of what we have stated earlier in the judgment. We do not think the correct approach has been

made by the Land Tribunal. We therefore allow this appeal, set aside the judgment and set aside the order Ext. P. 1 of the Land Tribunal and direct the Land Tribunal to reconsider the question and pass appropriate orders. There will be no direction regarding costs.

Appeal allowed.

AIR 1976 KERALA 118

P. SUBRAMONIAN POTI, J.

Ourupuvil Mathew Ouseph, Petitioner v. The District Collector, Ernakulam and others, Respondents.

Original Petn. No. 2121 of 1973, D/- 17-7-1975.

(A) Kerala Land Acquisition Act (21 of 1962), S. 33 (2) Proviso (1) — Protest — How made — No particular form necessary — Reference simultaneously moved with receipt of compensation indicates protest.

If simultaneous with the receipt of the amount of compensation an application of reference is moved, it goes without saying that it would amount to protest, for the very fact that the petitioner questions the quantum of compensation indicates that he is not satisfied with the compensation determined in the award. So long as no particular form of protest is specified that would be sufficient to show that there was protest. (Para 2)

Ittiera Kalliath, for Petitioner; Govt. Pleader, for Respondents.

ORDER:— The complaint of the petitioner in the Original Petition is that in spite of an application for reference made by him under S. 20 of the Land Acquisition Act, 1961, the District Collector, Ernakulam has taken the stand that petitioner is not competent to claim reference. That is not because there has been any order on that application. But the stand of the District Collector is evident from Ext. P. 4, a reply to the suit notice issued to the petitioner. Therein it is mentioned that the compensation was received by the party without protest on 30-4-1966 and no reference application was filed before the Special Tahsildar as alleged. In the original petition mention is made of the filing of the reference application dt. 30-4-1966 and it is said it was sent by registered post. The acknowledgment of this is also produced along with the Original Petition, marked

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Ext. P-2. In the light of the circumstance that the Special Tahsildar Land Acquisition, who has filed the counter-affidavit has not chosen to deny the receipt of the reference application, I take it that the reference application has been filed.

2. The only question therefore is whether the amount was received without protest and if so for that reason the reference application was incompetent. Sec. 20 of the Kerala Land Acquisition Act deals with 'reference to court' and that section reads:

"20. Reference to Court—(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made—

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under Sub-section (2) of Sec. 12 or within six months from the date of the Collector's award whichever period shall first expire."

It may be necessary to refer in this context to Section 33 of the Act, which deals with payment of compensation or deposit of the same in Court. That section reads:

"33. Payment of compensation or deposit of the same in Court.—(1) On making an award under Section 11 or S. 16, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them unless prevented by any one or more of the contingencies mentioned in sub-section (2).

(2) If they do not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount

of the compensation in the court to which a reference under Section 20 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided further that no person who has received the amount otherwise than under protest shall be entitled to make any application under S. 20:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.

(3) Notwithstanding anything in this section, the Collector may, with the sanction of the government, instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such other way as may be equitable having regard to the interest of the parties concerned.

(4) Nothing in sub-section (3) shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof."

Proviso (1) to sub-section (2) enables any person who questions the sufficiency of the amount awarded as compensation by the Collector to receive such payment under protest. It is the 2nd proviso that is relevant for our purpose. That prohibits any person who has received the amount otherwise than under protest from making an application under S. 20. Therefore when an application under Section 20 is sought to be held incompetent it is for the Collector to satisfy himself that the amount had been received otherwise than under protest. It is very significant that the Section does not mention how the protest must be made. There is no requirement that the protest should be in writing. The protest may be made orally. It need not necessarily be in the nature of a memo of protest. It may take any form. In short if the materials before the District Collector showed that the applicant for reference was in a state of mind of reconciliation with the award at the time of receiving the amount there is no case for a reference. That must necessarily depend upon an assessment of all the circumstances of the case. If simultaneous with the receipt of the amount of compensation an application

of reference is moved, it goes without saying that it would amount to protest, for the very fact that the petitioner questions the quantum of compensation indicated that he is not satisfied with the compensation determined in the award. So long as no particular form of protest is specified that would be sufficient to show that there was protest.

3. The "Collector" in this case had evidently not considered the circumstances relating to the receipt of the amount under protest. Evidently he has not even adverted to the existence of a reference application in which specific mention was made that the compensation awarded was inadequate. That reference application was sent on the same day the compensation was received. That would show that at the time when the petitioner received the amount he was not satisfied with the amount awarded as compensation. The circumstances therefore indicate that the amount was received under protest. In view of the fact that the reference petition is seen to have been filed the reference ought to have been made. I direct that the original of Ext. P. 1 reference application will be referred by the authority competent to refer this matter to the court expeditiously.

Petition allowed.

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P. GOVINDAN NAIR, C. J. AND
T. KOCHU THOMMEN, J.

The Circle Inspector (Excise) Neyyattinkara and others, Appellants v. K. Mukundan, Respondent.

W. A. No. 213 of 1975, D/- 4-7-1975.

(A) (Kerala) Abkari Act (1 of 1977 ME), S. 67 — Confiscation of seized property belonging to third person after compounding of offences — Not authorised.

The Abkari Act which specifically empowers the authority concerned to accept compensation for the offences under Sections 55, 56, 57, 58 or 63 does not empower the authority to order confiscation of a thing seized which did not belong to the person who committed any of the offences referred to in the section. The basis of confiscation under S. 67 is a confession of guilt. This being so the confiscation which follows such confes-

sion must be of a thing which belonged to the person who confessed. It will be strange to read the section as providing for confiscation of things belonging to a third person. (Para 6)

(B) (Kerala) Abkari Act (1 of 1977 M. E.), S. 34 — "Article" — Meaning — Word 'Article' is wide enough to take in a vehicle as well.

The section cannot be interpreted in a manner which would defeat the object and purpose of the Act. A vehicle which has been used for the commission of an offence is certainly liable to be confiscated. So Section 34 which deals with the power of seizure must normally be taken to provide for the seizure of that vehicle also. (Para 3)

Govt. Pleader, for Appellants; S. A. Nagendran and N. N. D. Pillai, for Respondent.

GOVINDAN NAIR, C. J.:— This appeal raises an important question regarding, mainly, the interpretation of Section 67 of the Abkari Act, 1977. Shortly stated the question is whether the Abkari Act which specifically empowers the authority concerned to accept a sum of money not exceeding two thousand rupees in lieu of cancellation or suspension of a licence or permit under clauses (a) and (b) of Section 26, or accept compensation for the offences under Sections 55, 56, 57, 58 or 63 also empowers the authority to order confiscation of a thing seized as liable to confiscation which thing did not belong to the licensee, permit holder or the person who committed any of the offences referred to in the section. The learned Judge in the judgment under appeal has taken the view that there is no such power.

2. We are dealing with a very old statute and we have to bear in mind that the wording of the sections of the statute are not free from ambiguity. We have therefore to interpret these sections bearing in mind the broader aspect of the general principles of our jurisprudence. The sections with which we are concerned are Section 34 which provides for the seizure of certain articles, S. 65 which describes the articles that are liable to confiscation under the Abkari Act, Section 66 which postulates proceedings being taken for the purpose of prosecution before a Magistrate which incidentally incorporates certain powers in the Commissioner in relation to confiscation under certain specified circum-

stances and Section 67, the section with which we are primarily concerned in this appeal. We shall extract all these sections one after the other in toto.

"34. Offenders may be arrested, and contraband liquor and articles seized without warrant.—Any officer of the Abkari, Salt, Police, Land Revenue or Customs Departments, and any other person duly empowered may arrest without warrant in any public thoroughfare or open place other than a dwelling house any person found committing an offence punishable under Section 15C or Section 55 or Section 57 or Section 58 of this Act and in any such thoroughfare or place may seize and detain any liquor, drug or other article which he has reason to believe to be liable to confiscation under this Act or any other such law, and may search any person, vessel, vehicle, animal, package, receptacle or covering, upon whom or in or upon which he may have reasonable cause to suspect any such liquor, drug or other such article to be, or to be concealed:

Provided that, if the officer or person making the arrest under this section be not empowered under Section 5-A to admit to bail, the person arrested shall be forthwith forwarded to an officer so empowered, if there be such an officer within a distance of five miles from the place where such arrest took place.

And it shall be the duty of such officer empowered as aforesaid to admit such person to bail, if sufficient bail be tendered for his appearance before an Abkari officer having jurisdiction to enquire into the case.

65. What things liable to confiscation. — In any case in which an offence has been committed under this Act, the liquor, drug, materials, still, utensil, implement or apparatus in respect or by means of which an offence has been committed shall be liable to confiscation.

Any liquor or intoxicating drug lawfully imported, exported, transported, manufactured, had in possession or sold or toddy lawfully drawn or tapped along with, or in addition to any liquor, intoxicating drug or toddy, liable to confiscation under this section, and

the receptacles, packages and coverings in which any such liquor, intoxicating drug, materials, still, utensil, implement or apparatus as aforesaid is or are found, and the other contents, if any, of the receptacles or packages in which

the same is or are found, and the animals, carts, vessels or other conveyances used in carrying the same,

shall likewise be liable to confiscation."

"66. Confiscation how ordered.—When the offender is convicted or when the person charged with an offence under this Act is acquitted, but the Magistrate decides that anything is liable to confiscation such confiscation may be ordered by the Magistrate.

Whenever confiscation is authorised by this Act, the Magistrate ordering it may give the owner of the thing liable to be confiscated an option to pay, in lieu of confiscation, such fine as the officer thinks fit.

When an offence under this Act has been committed, but the offender is not known or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for, the case shall be inquired into and determined by the Commissioner, or by any other officer authorised by the Government in that behalf, who may order such confiscation.

Provided that no such order shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto, and evidence, if any, which they produce in support of their claims.

Provided further that if the thing in question is liable to speedy and natural decay, or if the Commissioner or any other officer authorised by the Government in that behalf is of opinion that the sale would be for the benefit of its owner, he may at any time direct it to be sold, and the provisions of this section shall, as early as may be practicable, apply to the net proceeds of such sale.

67. Power to compound offences. — Any Abkari Officer specially empowered in that behalf may accept from any person whose license or permit is liable to be cancelled or suspended under clauses (a) and (b) of Section 26 or who is reasonably suspected of having committed an offence under Sections 55, 56, 57, 58 or 63, a sum of money not exceeding two thousand rupees in lieu of such cancellation or suspension or by way of compensation for the offence which may have been committed, as the case may be and, in all cases whatsoever in

which any property has been seized as liable to confiscation under this Act such property may, at the option of such officer, be confiscated or released on payment of the value thereof as estimated by such officer.

On the payment of such sum of money or such value, or both, as the case may be, to such officer, the accused person, if in custody, shall be discharged, the properties seized shall be confiscated or released as the case may be and no further proceedings shall be taken against such person or against such property if it is released."

3. Arguments at one time turned on the question whether a vehicle that has been utilised for the purpose of commission of an offence is liable to be seized under Section 34 of the Abkari Act. It was pointed out that the latter part of the section specifically refers to vehicles when it speaks of the power to search but that the earlier part of the section significantly has omitted any reference to vehicles but has instead used the expression article. It was therefore urged that 'article' will not take within its ambit a 'vehicle.' We are not impressed by this argument. The word article is wide enough to take in a vehicle as well. The section cannot be interpreted in a manner which would defeat the object and purpose of the Act. A vehicle which has been used for the commission of an offence is certainly liable to be confiscated. So Section 34 which deals with the power of seizure must normally be taken to provide for the seizure of that vehicle also. There is therefore no justification for giving a limited meaning to the word 'article' and exclude from its ambit vehicle. We reject the submission.

4. In the case before us it was alleged that the liquor contained in four tins was transported without the required licence or permit in an Ambassador Car bearing registration No. KRT. 81. The driver and two other passengers in the car admitted that they had committed the offence falling under S. 58 of the Act. That section is in these terms:

"58. For possession of illicit liquor.—Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing the duty, tax or rental payable under this Act not to have been paid therefor

shall on conviction before a Magistrate, be punished with fine which may extend to three thousand rupees, or with imprisonment for a term which may extend to six months, or with both."

They expressed willingness to have the offence compounded and accordingly a compensation of Rs. 250/- was collected from each of the occupants of the car. Thereafter Ext. R. 1 order, produced along with the counter affidavit was passed by the Excise Commissioner confiscating the said vehicle bearing registration No. KRT 81. Chandrasekhara Menon J. quashed this order and directed the release of the vehicle. The learned Judge however added:

"Nothing said here will prevent the authorities from proceeding against the petitioner for offences which might have been committed under the Abkari Act and in dealing with the vehicle in such manner as prescribed by law, dealing with the offences."

5. On behalf of the appellants, the Circle Inspector (Excise), Neyyattinkara, the Board of Revenue (Excise) and the State of Kerala, the learned Government Pleader submitted that the view taken by the learned Judge requires reconsideration. According to him a plain reading of the section leaves no doubt that the officer empowered in that behalf for the purposes of Section 67 has also been empowered to pass an order of confiscation of a thing seized as liable to confiscation under the Act. Section 65 of the Act which we have read in the second paragraph of the judgment specifically refers to animals, carts, vessels or other conveyances used in carrying the liquor or drug which is liable to confiscation. There was no dispute in the case that the vehicle KRT. 81 was used for carrying liquor and there is also no doubt in view of the admission of the guilt by the occupants of the car that the offence under Section 58 of the Act had been committed. So ran the argument and it was therefore submitted that the order Ext. R. 1 is not liable to be set aside.

6. We think that the scope and ambit of Section 67 will have to be understood by reading Sections 65, 66 and 67 together and by trying to understand the scheme and the object to be achieved by these provisions. In statutes of this type, as is evident from the provisions of the Sea Customs Act, 1878, the Customs Act, 1962 and other enactments

containing similar provisions for the confiscation of a thing used for committing offences punishable under these enactments there are stringent provisions. Section 115 (2) of the Customs Act, 1962 has toned down the rigour of the power to confiscate by enabling the owner or other person interested in the vehicle which had been seized as liable to confiscation to establish that the vehicle "was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance or animal and that each of them had taken all such precautions against such use as are for the time being specified in the rules." Section 67 does not contain any such safeguard. Normally the power of confiscation has to be ordered by the Magistrate is clear from the first paragraph of Section 66, whether the offender is convicted or acquitted. This was followed by another paragraph in the section which enjoins that the Magistrate "may give the owner of the thing liable to be confiscated an option to pay, in lieu of confiscation, such fine as the officer thinks fit." The power conferred on the Commissioner under the third paragraph of Section 66 has to be exercised in exceptional circumstances, such as that "either the offender is not known or cannot be found, or when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactorily accounted for." Apart from these powers the only power for confiscation envisaged by the Act is that visualised by Section 67 of the Abkari Act. When a Magistrate acts the normal judicial procedure will be followed and the Code of Criminal Procedure applied. This ensures a safeguard which is essential particularly in matters where penalties are sought to be imposed. There can be little doubt that Section 65 imposes a drastic penalty in that any vehicle used for the purpose of carrying liquor even without the knowledge of the owner can be confiscated. When a Magistrate acts under this section the judicial approach and the exercise of a judicial discretion are enough safeguards when it is combined with a judicial process which necessarily spells a judicial procedure. When the Commissioner acts, the section itself provides that he shall hear the persons, if any, claiming any right thereto, and further that he should wait for one month from the date of seizing the things intended to be confiscated and

the evidence produced by a claimant must also be considered by him. Section 67 significantly does not provide for any such safeguards for hearing the person claiming to be the owner of a vehicle seized or claiming to have an interest in the vehicle seized. This cannot be understood as deliberately providing two different procedures for confiscation, the one the well known judicial procedure and the other the summary and even arbitrary procedure. One has therefore necessarily to find out another reason for providing two different procedures. The reason appears to us to be evident. The basis of confiscation under S. 67 of the Abkari Act as we read it is a confession of guilt. This being so the confiscation which follows such confession must be of a thing which belonged to the person who confessed. It will be strange to read the section as providing for confiscation of things belonging to a third person. We have therefore necessarily to give a limited meaning to the general words used in Section 67 which read by itself and without bearing in mind the principles that should be followed before penalising a person and without referring to the ample provisions made in the statute under S. 66 for confiscation would appear to give an unreasonable power. We think we must understand the section as has been done by the learned Judge in the judgment under appeal in a much more limited sense. In this connection we must emphasise that if an officer who is empowered to act under Section 67 feels that by compounding the offences he may not be able to confiscate the thing used for the purpose of committing an offence, it would be open to him to refuse to accept the offer for compounding and proceed under Section 66 before a Magistrate. If he does not proceed under Section 66, we think he will be able only to confiscate things belonging to the offenders who have confessed guilt. This we think would be the reasonable view to take. As we said the statute is a very old one, nearly 75 years old and in the Customs Act, 1962 as we indicated, safeguards have been incorporated in such cases of confiscation.

7. Arguments then turned on the question whether there is any means by which action could be taken for confiscation after the offences had been compounded under Section 67. Is it open to the authorities to approach the Magis-

trate under Section 66 merely for the purpose of confiscation without the Magistrate being asked to decide whether any person should be convicted for the offence committed under the Act? Sri. M. N. Sukumaran Nair counsel for the respondents argued that the wording of Section 66 will not warrant any such procedure being resorted to. According to him, the second paragraph of Section 66 is an appendix to the first paragraph and only when a Magistrate opting under the first paragraph would be enabled to pass an order of confiscation under the second paragraph of the section. We are not called upon to resolve this controversy and we express no opinion one way or the other. All that we wish to say is that if the authorities decide to approach the Magistrate under Section 66 they should do so within a month from today that is on or before the 5th of August, 1975. If no such approach is made the vehicle that has been seized and ordered by Ext. R. 1 to be confiscated will be released to the respondents forthwith. If any steps are taken before the Magistrate it will be open to the respondents to approach the Magistrate for appropriate orders relating to the release of the vehicle and it will be open to the Magistrate to pass such orders as he deems fit.

8. In the light of the above, we dismiss this appeal subject to what has been stated in paragraph 7 and also direct the parties to bear their respective costs.

Order accordingly.

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**P. GOVINDAN NAIR C. J. AND
T. KOCHU THOMMEN, J.**

Trivandrum Co-operative District Wholesale Society Ltd., Appellant v. Deputy Registrar of Co-operative Societies Trivandrum, Respondent.

Writ Appeal No. 372 of 1973, D/- 3-7-1975.

(A) Constitution of India, Art. 226 — Power of High Court to disturb decision of inferior authority or tribunal on question of jurisdiction — Plea of lack of jurisdiction, whether can be raised for the first time in the High Court. (Kerala Co-operative Societies Act (21 of 1969). Ss. 69, 2 (i).)

IS/JS/D367/75/AMG/VBB

The High Court would decline to exercise jurisdiction when the lack of jurisdiction of a Tribunal or authority, (e. g. under Kerala Co-operative Societies Act (1969) as in the instant case) was not taken before that Tribunal or authority but was urged for the first time in proceedings under Art. 226 of the Constitution. The exercise of writ jurisdiction being discretionary in nature the High Court ordinarily must exercise its discretion against those who take the chance of a decision and were not diligent enough to urge the lack of jurisdiction of a Tribunal or authority before the Tribunal or authority itself. (Para 7)

But this does not mean that there is a rule of law that the High Court cannot interfere when there is lack of jurisdiction. All that the above means is that the discretion will not be exercised in favour of an applicant who did not raise it before the Tribunal or authority and had taken the chance of a decision. It may be added that in a given case a petitioner may be able to explain why he was not able to raise the want of jurisdiction before the Tribunal or authority and if the High Court is satisfied that the explanation is valid and acceptable the High Court will interfere.

(Para 10)

Where a Co-operative Society which sought a writ to set aside an award purported to be under Section 69 of Kerala Co-operative Societies Act in which the dismissal of certain employees was set aside on the plea that the dispute did not touch the business of the society but in essence was an industrial dispute and the authority and the Tribunal had no jurisdiction under the Act to decide it.

Held: that by reading Section 39 of the Kerala Co-operative Societies Act alone it was not at all clear that matters relating to disputes which could be tried by an industrial tribunal could not be dealt with by the Registrar. The words used in the section are touching the business of the Society or relating to the business of the society. It could not be said that the matters in those disputes with which the Court was concerned did not touch the business of the society. In that sense the lack of jurisdiction of the Registrar was not patent, to justify interference by the High Court under Art. 226 of the Constitution (Para 10)

Cases Referred: Chronological Paras
1973 Ker LT 523 = (1973) 2 Lab LJ 541 5, 10

1965 Ker LT 1 = ILR (1964) 2 Ker 635 6
 1964 Ker LJ 175 = (1964) 1 Lab LJ 559 5, 10
 1963 Ker LT 705 = 1963 Ker LJ 694 5, 10
 AIR 1961 Ker 117 = 1960 Ker LT 778 6
 AIR 1961 Ker 182 = 1960 Ker LT 1340 6
 AIR 1958 Ker 341 = 1958 Ker LT 410 6
 1958 Ker LT 958 = 1958 Ker LJ 783 6
 1958 Ker LT 1034 = 1958 Ker LJ 997 6
 AIR 1957 SC 397 = 1957 SCR 233 6
 AIR 1957 Ker 109 = 1957 Ker LT 411 6
 AIR 1956 Bom 530 = 58 Bom LR 184 8
 1955 Ker LT 568 6
 AIR 1954 Bom 202 = 55 Bom LR 922 8
 AIR 1927 Mad 130 = 51 Mad LJ 742 (FB) 6
 (1894) 1 Q. B. 552 = 63 LJ QB 474 9
 (1836) 6 N&M 170 = 1 H&W 753 9

K. S. Rajamony, S. Parameswaran, A Shahul Hameed and Siby Mathew, for Appellant; Government Pleader (for Nos. 1 and 2), V. Vyasani Poti, N. Sugathan & C. S. Vijayalakshmi, (for Nos. 3 to 5) and V. N. Achutakurup (for Nos. 6 and 7) for Respondents.

JUDGMENT: This appeal is by the Trivandrum Co-operative District Wholesale Society Ltd. registered under the Kerala Co-operative Societies Act, 1969, for short the Act. The appellant sought setting aside the two awards Exts. P-1 and P-2 passed by the first respondent purporting to act under S. 69 of the Act as well as the appellate decision by the Kerala Co-operative Tribunal, Trivandrum the second respondent (Ext. P-3). The award Ext. P-1 was passed on the complaint of respondents 3, 4, 5, 6 and 7 that their service had been wrongly terminated by the appellant. The award Ext. P-2 related to the same matter. The appellant had claimed certain amounts from each of the respondents 3, 4, 5, 6 and 7 on the ground that they had falsified accounts and had committed misappropriation and criminal breach of trust. This claim of the appellant had been rejected. The appeal taken by the appellant before the second respondent the Co-operative Tribunal was dismissed by Ext. P-3.

2. The learned Judge who heard the original petition dismissed it by a short judgment reading as follows:—

"No grounds are made out warranting any interference by this Court under Article 226 or 227 of the Constitution with the concurrent findings of fact entered by the Arbitrator who decided the reference under Sec. 69 of the Kerala Co-operative Societies Act and by the Kerala Co-operative Tribunal that the

petitioner Society had failed to prove by any acceptable evidence that respondents No. 3 to 7 were responsible for the theft of some terylene cloth which took place from the Society's shop on 27-9-1969, Dismissed."

3. The appellant had taken the contention in the original petition that the first respondent had no jurisdiction to decide the question that arose before the first respondent on the "plaints" that were filed before the first respondent. The contention was that the disputes that could be settled under Section 69 of the Act must relate to a matter touching the business, constitution, establishment or management of a society capable of being the subject of litigation. This contention was elaborated by saying that the matter in dispute between the appellant and the respondents 3 onwards was not one which could be the subject of litigation in ordinary civil courts, that the disputes in essence and in substance were industrial disputes. Such a contention had not been taken before the first respondent. In fact the appellant also had invited the decision of the first respondent by the plaint that it filed. It is averred in the original petition that such a contention was raised before the Tribunal, the second respondent; but this also does not appear from the records and the point was not elaborated at the time of arguments. The Tribunal did not consider the question. In the original petition the point has been taken; but the learned Judge has not dealt with it. The only point urged before us was the lack of jurisdiction of the first respondent to deal with the disputes that arose.

4. We shall read Section 69 as well as the definition of the term 'dispute' in Section 2 (i) of the Act.

"69. Disputes to be referred to Registrar:— (1) Notwithstanding anything contained in any law for the time being in force, if a dispute arises:

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) Between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society; or

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased

agent, or deceased employee of the society; or

(d) between the society and any other society; or

(e) Between a society and the members of a society affiliated to it; or

(f) between the society and a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions or any person claiming through such a person; or

(g) between the society and a surety of a member, past member, deceased member or employee or a person other than a member who has been granted a loan by the society whether such a surety is or is not a member of the society; or

(h) between the society and a creditor of the society, such dispute shall be referred to the Registrar for decision; and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute.

(2) For the purposes of sub-section (1), the following shall also be deemed to be disputes, namely:—

(a) a claim by the society for any debt or demand due to it from a member or the nominees heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;

(b) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor whether such debt or demand is admitted or not;

(c) any dispute arising in connection with the election of the Board of Management or any officer of the Society.

Explanation:— A dispute arising at any stage of an election commencing from the convening of the general body meeting for the election shall be deemed to be a dispute arising in connection with the election.

(3) No dispute arising in connection with the election of the Board of Management or an officer of the Society shall be entertained by the Registrar unless it is referred to him within one month from the date of the election.

(4) If any question arises whether a dispute referred to the Registrar under this section is a dispute as defined in clause (i) of Section 2 the decision thereon of the Registrar shall be final."

"Section 2 (i) "dispute" means any matter touching the business, constitution, establishment or management of a society capable of being the subject of litigation and includes a claim in respect of any sum payable to or by a society, whether such claim be admitted or not."

5. Counsel for the appellant relied on the decisions of this court in *Malabar Co-operative Central Bank Limited, Kozhikode v. State of Kerala*, 1963 Ker LT 705, *Kerala State Handloom Weavers' Co-operative Society Ltd. v. State of Kerala*, 1964 Ker LJ 175 and *Kaloor Vadakkummury Service Co-operative Society Ltd. v. Assistant Registrar, Mukundapuram*, 1973 Ker LT 523 in support of his submission that the first respondent had no jurisdiction to determine the questions that were dealt with by him in Exts. P-1 and P-2. Counsel for the appellant seems to us to be well-founded in this submission. But on behalf of the respondents it has been urged that having invited the decision from the first respondent and having taken the chance of the decision being in its favour and not having raised such a point before the first respondent or even the second respondent the appellant should not be permitted to raise this point in proceedings under article 226 of the Constitution for the first time and request this court in the exercise of a special jurisdiction to set aside the awards on the ground of want of jurisdiction.

6. There is a catena of decisions of this court in which the view has been taken that if the question of jurisdiction had not been taken before the authority or the tribunal, the contention should not be allowed to be raised for the first time in proceedings under Article 226 of the Constitution. The earliest decision on the subject brought to our notice is in *P. M. John v. State*, 1955 Ker LT 568. The court declined jurisdiction on the following grounds:—

"The High Court is entitled to know what the tribunal has to say on the question of jurisdiction which the petitioner wants to agitate before the court. Besides, the tribunal which is brought before the court should itself be given an opportunity to decide that it has no jurisdiction before the High Court is called upon to give its decision."

Justice P. T. Raman Nayar as he then was in *Madhava Iyer Venkitasubramonia*

Iyer v. Catholic Bank of India Ltd, 1957 Ker LT 411 = (AIR 1957 Ker 109) refused to exercise the special powers under Article 226 of the Constitution on the ground that "the petitioner submitted to their jurisdiction and took the chance of obtaining an order in his favour. Therefore he cannot be heard to raise the objection before the High Court." In Gopalan v. Central Road Traffic Board, Trivandrum, 1958 Ker LT 410 = (AIR 1958 Ker 341) the same view has been taken by Vaidialingam J. in S. M. Rawther v. Agricultural I. T. & S. T. Officer 1958 Ker LT 958. M. S. Menon J. as he then was relied on the observations of Coutts-Trotter, C. J. in AIR 1927 Mad 130 (FB) which was cited with approval before the Supreme Court in AIR 1957 SC 397 (412). The passage from the Chief Justice's judgment runs thus:—

"the test that they lay down is whether the applicant armed with a point either of law or fact, which would oust the jurisdiction of the lower court has elected to argue a case on its merits before that court. If so he has submitted himself to a jurisdiction which he cannot be allowed afterwards to seek to repudiate. We are of opinion that the applicant has so conducted himself as to preclude this Court from exercising a discretionary jurisdiction in his favour. The petition will, therefore, be dismissed with taxed costs."

Varadaraja Iyengar J. in Ponkunnam Erattupetta Motor Service v. Regional Transport Authority, Kottayam, 1958 Ker LT 1034 has also referred to the decision in AIR 1957 SC 397. A Division Bench of this Court in S. Kumaraswamy Reddiar v. S. Noordeen, 1960 Ker LT 778 = (AIR 1961 Ker 117) expressed the view:

"Ordinarily such a conduct would preclude the petitioner from claiming the writ unless a cogent explanation is furnished by stating the necessary facts upon affidavit which should satisfy the court that the failure to raise the objection relating to jurisdiction was not deliberate or that the petitioner had no knowledge of facts on which the objection could be based."

Another Division Bench of this Court consisting of Chief Justice Ansari and Justice Madhavan Nair in Kumaran v. Ist Addl. Income-Tax Officer, Kozhikode, 1960 Ker LT 1340 = (AIR 1961 Ker 182) was more categorical.

"It is well-established that a petition cannot succeed on the ground against the

jurisdiction of the authority, whose order he is challenging unless he has taken the ground before the authority making the order. Such failure amounts to absence of diligence on the part of the petitioner." One of us in Mariyan v. State of Kerala 1965 Ker LT 1 reiterated the view as follows:—

"The principle is that the High Court refuses to exercise its jurisdiction in favour of a writ applicant who sat on the fence, took the chance of the decision before that authority and then turned round and challenged the jurisdiction of the authority."

7. It is thus clear that this court has been for nearly two decades declining jurisdiction when the lack of jurisdiction of a Tribunal or authority was not taken before that Tribunal or authority but was urged for the first time in proceedings under Art. 226 of the Constitution. The exercise of a writ jurisdiction being discretionary in nature this court ordinarily must exercise its discretion against those who take the chance of a decision and were not diligent enough to urge the lack of jurisdiction of a Tribunal or authority before the Tribunal or authority itself. But it has been contended by counsel on behalf of the appellant that there is a clear distinction between a latent lack of jurisdiction and a patent lack of jurisdiction. Based on this distinction the argument ran as follows. A latent lack of jurisdiction can itself arise when the lack of jurisdiction has to be spelt out on the basis of certain facts which may or may not be known to the writ applicant. If he knew the facts at the time he took the chance of the decision before the Tribunal and did not disclose those facts and did not raise the point of jurisdiction before the Tribunal but took it for the first time in proceedings under Art. 226 of the Constitution this court should certainly decline jurisdiction. But if on the other hand, the lack of jurisdiction was not latent in that manner but was a patent one the fact that he knew about the lack of jurisdiction when he took the chance of the decision before the Tribunal did not matter and this court would be entitled to and even might find it necessary to exercise its jurisdiction under Article 226 and declining jurisdiction would help the creation of a precedent that a certain Tribunal has jurisdiction to deal with matters which it dealt with, when in reality it had none. In cases where there

was really no jurisdiction and the lack of it was patent this court ought to interfere.

8. The decision of Chief Justice Chagla in *Gandhinagar Motor Transport Society v. State of Bombay*, AIR 1954 Bom 202 was referred to with approval in most of the decisions of this court. But in a later decision in *S. C. Prashar v. Vasantsen Dwarkadas* AIR 1956 Bom 530 the learned Chief Justice drew the distinction between a case of patent lack of jurisdiction and latent lack of jurisdiction and interfered in a case arising under the Indian Income-tax Act, 1922 on the ground that the Income-tax Officer who issued notice under Section 34 of that Act had patently no jurisdiction to do so and that such lack of jurisdiction was apparent on the face of the records and on a reading of the section Counsel for the appellant has pressed the acceptance of the principle of the decision in *S. C. Prashar v. Vasantsen Dwarkadas*, AIR 1956 Bom 530.

9. And Lord Denman in '*Bodenham v. Ricketts*', (1836) 6 N & M 170 rested the reasoning in support of interference where there was patent lack of jurisdiction thus:

"to be for the sake of the public 'lest the case might become a precedent if allowed to stand without impeachment'." The leading English Case that has decided that interference can be had in the case of patent lack of jurisdiction is that in *Farquharson v. Morgan* (1894) 1 QB 552. Lord Halsbury stated:

"It is a want of jurisdiction of which the court is informed by the proceedings before it and which the Judge should have observed, and of which he himself should have taken notice."

10. The decisions of this court already referred to have not, as we understand the decisions, laid down as a rule of law that this court cannot interfere when there is lack of jurisdiction. All that has been laid down is that the discretion will not be exercised in favour of an applicant who did not raise it before the Tribunal or authority and had taken the chances of a decision. We may add that in a given case a petitioner may be able to explain why he was not able to raise the want of jurisdiction before the Tribunal or authority and if this court is satisfied that the explanation is valid and

acceptable this court will interfere. Excepting raising the contention that the lack of jurisdiction is a patent one no explanation has been offered by the appellant. If he was vigilant he could have raised the objection before the Deputy Registrar. He has, we think, precluded himself from raising it now by his conduct. This view is in accordance with the consistent view that this court has taken for two decades. We may add that it is difficult to say in all cases whether lack of jurisdiction is latent or patent. By reading Section 69 of the Act alone it is not at all clear that matters relating to disputes which can be tried by an industrial tribunal cannot be dealt with by the Registrar. The words used in the section are "touching the business of the society" or relating to the business of the society. It is difficult to say that the matters in these disputes with which we are concerned did not touch the business of the society. In that sense the lack of jurisdiction of the first respondent was not patent. But there were two decisions of this court in *Malabar Co-operative Central Bank Limited, Kozhikode v. State of Kerala*, 1963 Ker LT 705 and *Kerala State Handloom Weavers' Co-operative Society Ltd. v. State of Kerala*, 1964 Ker LJ 175 which could have been relied on by the appellant, if he had been diligent. If he was aware of these decisions and still had not taken the point his position is worse. The decision in *Kaloor Vadakkumury Service Co-operative Society Ltd. v. Assistant Registrar, Mukundapuram*, 1973 Ker LT 523 was no doubt rendered only a few days before Exts. P-1 and P-2 awards were passed. But we are not satisfied that considering all aspects this is a case in which we should interfere.

11. We dismiss this appeal and direct the parties to bear their respective costs.

Appeal dismissed.

the Additional Government pleader who appeared for the State was unable to state any satisfactory reason for not answering the interrogatories. He also did not apply for grant of further time to answer the interrogatories. The Additional District Judge held that there was gross negligence on the part of the State in not answering the interrogatories. He, therefore, ordered that the defence in the five suits be struck off. The learned Government Advocate has submitted before us that there was no wilful default on the part of the State in its failure to answer the interrogatories. Reliance has been placed on *Jawand Singh v. Krishna Kumar*, AIR 1950 Nag 8 which lays down that defence should not be struck off under Order 11, rule 21 unless the default is wilful. In our opinion, the argument cannot be accepted. The learned Government Advocate has not been able to explain why the interrogatories were not answered. If for any reason it was not possible to answer the interrogatories within the time allowed by the Court, the Government pleader should have applied for more time in the trial Court for answering the interrogatories. It appears that there was no intention on the part of the State to give answers to the interrogatories and it was for the reason that no application for grant of time was made. No oral assurance was also given that the State intended to answer the interrogatories if time was allowed. In the circumstances, the default was clearly wilful. The State must have also known that for wilful default the defence was likely to be struck off. The Additional District Judge was, therefore, justified in striking off the defence. However, we do not think that any serious prejudice was caused to the State because of this order. We have earlier said that all the six suits were consolidated for purposes of recording evidence. One of such suits was Civil Suit No. 2-B of 1970 in which the defence was not struck off and as the questions of fact and law involved were common, the State was free to lead all the evidence that it wanted to lead in that suit on all the questions in dispute.

4. The next contention of the learned Government Advocate is that the suits were barred by limitation under Section 68 of the Madhya Pradesh Excise Act, 1915. This section reads as follows:—

"68. Limitation of suits.— No suit shall lie against the Government or

against any Excise, Police or Land Revenue Officer in respect of anything done, or alleged to have been done, in pursuance of this Act, unless the suit is instituted within six months from the date of the act complained of."

The special limitation of six months prescribed by Section 68 relates to suits 'in respect of anything done or alleged to have been done in pursuance of this Act'. The excise licences to vend country liquor in retail were no doubt granted to the plaintiffs under the Excise Act and the rules made thereunder. But the plaintiffs do not complain of any act of the State done or omitted to be done in pursuance of the Act. Their grievance is of non-supply of liquor in contravention of the terms of the contracts incorporated in the licences. The suits filed by the plaintiffs are thus for recovery of damages for breach of contract and not for anything done or alleged to have been done in pursuance of the Excise Act. The language of Section 68 is inappropriate for embracing a suit for breach of contract. In *Bombay Housing Board v. Karbhase Naik and Co.*, (1975) 1 SCC 828 = (AIR 1975 SC 763) the Supreme Court construed Section 64 of the Bombay Housing Board Act, 1948, which prescribes special period of limitation for a 'suit for anything done or purporting to have been done in pursuance of' that Act. The Supreme Court held that Section 64 did not cover a suit for breach of contract. The decision of the Supreme Court in the aforesaid case fully supports our conclusion that Section 68 of the Excise Act does not govern the limitation of suits filed by the plaintiffs.

5. It is then contended by the learned Government Advocate that the plaintiffs were not entitled to deduct the unpaid licence fee from the amount of compensation and to sue for the balance. It was submitted that the suits were not maintainable to the extent the plaintiffs claimed adjustment of the arrears of the licence fee. Reference in this connection was made to Sections 150 and 257 (h) of the Madhya Pradesh Land Revenue Code. Reliance was also placed on the decision of learned Single Judge in *Pritam Singh v. State of M. P.*, C. R. No. 579 of 1974, D/- 24-3-1975 (Madh. Pra.).

6. It is not disputed that a suit for damages for breach of an excise contract against the State is maintainable in civil Court and is not barred by any of the provisions of the Land Revenue Code. The only objection is that the plaintiffs are

not entitled to adjust the arrears of licence fee from the amount of compensation and to have this adjustment adjudicated upon by the civil Court. In this connection it is pertinent to notice clause 2-E of the licence which reads as follows:

"At the close of the period of the licence, final adjustments regarding the amount payable to the State Government under this agreement shall be made."

The right of adjustment of the amount payable to the State Government thus arises under the terms of the contract. Thus, if the plaintiff has to recover say a sum of Rs. 10,000 against the State under the contract and the balance of the amount payable to the State under the contract is say Rs. 5,000, the amount payable to the State gets automatically adjusted under the terms of the contract and the plaintiff can sue only for the excess amount of Rs. 5,000. In suing the State for compensation the plaintiffs were thus bound to give adjustment of the amounts payable to the State.

7. The arrears of licence fee payable to the State under an excise licence can be recovered as arrears of land revenue under Section 64 (1) (c) of the Excise Act. The procedure provided for realisation of land revenue in Chapter XI of the Land Revenue Code can, therefore, be utilised by the State for recovering licence fee due under an excise contract. If proceedings are taken for recovery under this chapter, the person against whom recovery is sought can pay the amount claimed under protest before his property is knocked out at a sale. He can then object to the Sub-Divisional Officer that no amount was due or that the amount due was less than the amount for which the recovery proceedings were started. If the Sub-Divisional Officer overrules the objection so raised, the person aggrieved can institute a civil suit. This procedure is prescribed in Section 150 of the Land Revenue Code. Section 257 of the Code in so far as relevant reads as follows:

"257. Except as otherwise provided in this Code or in any other enactment for the time being in force, no civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board of Revenue, or any Revenue Officer is, by this Code, empowered to determine, decide or dispose of, and in particular and without prejudice to the generality of this provision, no

Civil Court shall exercise jurisdiction over any of the following matters:—

.....

(h) any claim against the State Government connected with or arising out of, the collection of land revenue or the recovery of any sum which is recoverable as land revenue under this Code or any other enactment."

8. It is a settled principle of law that the exclusion of jurisdiction of Civil Courts is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. The House of Lords and the Supreme Court have both emphasised the importance of this principle and have observed that "it is a principle by no means to be whittled down" [See *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government*, (1959) 3 All ER 1 at p. 6 (HL); *London Borough of Ealing v. Race Relations Board*, (1972) 1 All ER 105 at p. 108 (HL); *Pabbojan Tea Co. v. Dy. Commr., Lakhimpur*, AIR 1968 SC 271 at p. 275 and *Madhav Rao Scindia v. Union of India*, AIR 1971 SC 530 at p. 576]. As a necessary corollary of this principle, provisions excluding jurisdiction of Civil Courts and provisions conferring jurisdiction on authorities and tribunals other than Civil Courts are strictly construed. This principle has to be borne in mind while construing Section 257 of the Land Revenue Code. The question to be considered is as to what is the meaning of the words "any claim against the State Government connected with or arising out of the collection of Land Revenue or the recovery of any sum which is recoverable as land revenue under this Code or any other enactment" which occur in clause (h) of Section 257. The words employed in this clause are no doubt general. But it would be seen from clauses (d), (e) and (i) that certain matters which in a general sense may be said to be connected with or arising out of the collection of land revenue are expressly provided for in these clauses. Clauses (d), (e) and (i) make provision for exclusion of jurisdiction of Civil Courts inter alia on the following matters: (1) Any claim against the State Government to hold land free of land revenue or at less than the fair assessment of land revenue; (2) the amount of land revenue assessed or re-assessed; and (3) Any claim against the State for remission or suspension of land revenue. Had the words 'any claim' in clause (h) been intended to be given a wide construction as embracing

every question connected with or arising out of the collection of land revenue, the matters covered by clauses (d), (e) and (i) would not have been separately provided for as they would then be redundant. Clauses (d), (e) and (i), therefore, show that the words 'any claim' in clause (h) have a limited meaning. Further, Section 150 of the Code permits a suit for recovery of the amount deposited in protest towards payment of land revenue. Such a suit envisages that the Civil Court will have jurisdiction to decide that the amount recovered as land revenue was not actually payable. Again, Rule 45 (2) contained in Schedule I of the Code also provides for a suit to set aside a revenue sale on the ground of fraud or on the ground that the arrears for which the property was sold were not due. The suits contemplated by Section 150 and Rule 45 (2) in a broad sense relate to questions connected with or arising out of the collection of land revenue. These provisions thus show that the bar of jurisdiction enacted in Section 257 (h) does not exclude claims against the State Government for adjudication that no arrears were due or that the arrears due were less than the amount claimed by the State. In our opinion, the words 'any claim against the State Government connected with or arising out of the collection of land revenue or the recovery of any sum which is recoverable as land revenue' as they occur in cl. (h) of Section 257 relates to a claim for compensation or damages on account of loss suffered by a person in the process of collection of land revenue or the recovery of any sum which is recoverable as land revenue. For example, if A's property is sold for certain alleged arrears which are not really due, A cannot sue the State for compensation for loss of property and he can only claim the amount realised by the State towards the arrears. Again, if B's property is wrongly sold in proceedings for recovery of arrears against A, B will have no claim against the State for injury done to him and he can only pursue his remedies against A or the auction purchaser. We have mentioned these examples, which are not exhaustive to illustrate the nature of claims which will be hit by clause (h) of Section 257. In our opinion, the suits with which we are concerned in these appeals do not fall under that clause. But then it is submitted that the plaintiffs after depositing under protest the arrears of licence fee in recovery proceedings under Section 150 could have applied to the Sub-Divisional Officer

for adjudication that the arrears were not due as they stood adjusted against the amount of compensation payable to them. It is further argued that the remedy of suit could be resorted to by the plaintiffs only after following this procedure and after rejection of their claims of adjustment by the Sub-Divisional Officer. In our opinion, Section 150 is not open to any such construction. All that the section means is that if the defaulter wants to have first a summary decision of the Sub-Divisional Officer, which is open to challenge in a civil suit, he should deposit the amount of arrears claimed by the State under protest before the sale of his property is knocked down. If Section 150 is construed as laying down the exclusive procedure for approaching the Civil Court, most illogical result will follow. For example, if the person proceeded against is not in a position to raise money for making deposit before his property is knocked down, he will have no remedy anywhere to challenge the quantum of arrears and to save his property. So an indignant person proceeded against must beg, borrow or steal for making deposit of the alleged arrears to save his property and to claim adjudication. Section 150 was not intended to give rise to these consequences. The object of the section is to provide an alternative summary remedy before the Sub-Divisional Officer and to lay down conditions for its enforcement and the section is not designed to bar the normal jurisdiction of Civil Courts.

9. In our opinion, neither Section 150 nor Section 257 of the Code prevents a plaintiff in adjusting the amount of arrears of licence fee against the compensation payable to him for breach of contract by the Government and in suing for the balance amount of compensation. By giving adjustment in the plaint of the arrears due, the plaintiff admits the claim of the State to that extent. The Civil Court trying the suit is not to adjudicate upon the arrears of licence fee because that is admitted by the parties. The Court only determines the amount of compensation payable to the plaintiff for breach of contract and if the amount of compensation is more than the amount due to the State on account of licence fee, a decree for the balance is passed in favour of the plaintiff. A claim of this nature cannot be adjudicated upon by any Revenue Officer. No Revenue Officer is empowered to determine and decree the amount of compensation payable for breach of contract,

which is the only question to be determined in a suit of this nature. The State is in no way prevented by institution of such suits in recovering the amount of arrears which it claims. It is pertinent to note that reliefs for injunction which were in the beginning claimed by the plaintiffs were later given up by amendment of the plaints and no injunction has been granted by the Court below. It is true that after the Court has adjudicated the amount of compensation payable to the plaintiffs and after it is found that the arrears of licence fee are partly or wholly adjusted against the amounts of compensation payable to the plaintiffs, the State will not be in a position to recover the licence fee to the extent it is found to be adjusted. But from this consequence it cannot be said that the suits instituted by the plaintiffs were a device for stopping recovery without payment. The learned Government Advocate has placed strong reliance on the following observations in Pritam Singh's case, C. R. No. 579 of 1974, D/- 24-3-1975 (Madh. Pra.).

"I have no doubt that this contention cannot be accepted. It is only another form of stopping recovery. To accept the contention will be to recognize a device by which every recovery proceedings can always be stopped by a civil suit. This can be demonstrated thus. If there is a proceeding against you for recovery of Rs. 5,000, you bring a suit for Rs. 10 against the Government by raising a claim of Rs. 5,010 in your own favour and giving adjustment of Rs. 5,000 you will then argue 'my claim is independent of the recovery. I have to recover Rs. 5,010 and I have already given adjustment of Rupees 5,000'. Thus by creating a claim in one's favour and giving adjustment of the amount for which recovery proceedings have been initiated, such proceedings will be defeated or at least delayed until the disposal of the suit. This will be repugnant to the letter and spirit of Sections 150 and 257 of the Land Revenue Code."

For the reasons earlier given by us, we do not agree with the view taken in Pritam Singh's case that Sections 150 and 257 bar the jurisdiction of Civil Courts in adjudicating upon a question that arrears sought to be recovered by the State as land revenue have been paid or adjusted and are not really due. Moreover, the observations quoted above from Pritam Singh's case wrongly assume that the moment a suit of the nature envisaged in

the said observations is filed, the Civil Court will grant an injunction as a matter of course preventing the State in proceeding to recover the arrears which it claims against the plaintiff. A grant of injunction by a Civil Court is not automatic. Injunctions are granted on settled principles after judicial determination that the plaintiff has a strong prima facie case and the balance of convenience lies in granting the injunction. Further, before granting an injunction the Court has to keep in mind Section 41 (h) of the Specific Relief Act, 1963, which provides that no injunction can be granted 'when equally efficacious relief can certainly be obtained by any other usual mode of proceeding'. In this context the Court will consider whether on the facts of the particular case the remedy provided in Sec. 150 of the Code can be obtained by the plaintiff and whether that remedy would be equally efficacious. However, that question does not arise in the cases before us. The plaintiffs in these suits only sued for compensation. They were bound to give adjustment of any amount due from them to the State under the terms of the contract. Their suits are not hit by any of the provisions of the Land Revenue Code.

10. The next point argued by the learned Government Advocate is that there was no obligation on the part of the State to supply any liquor to the plaintiffs. It is argued that it was no doubt expected that the liquor would be supplied to the licensees from the warehouse, but there was no obligation to supply any particular quantity. The plaintiffs on the other hand contend that under the terms of the licences the Government was bound to supply such quantity of liquor as may be demanded by them for the purpose of selling in the shops covered by the licences.

11. To appreciate the rival contentions it is necessary to have a look at the terms and conditions of the licences issued to the plaintiffs. All these licences were in Form O. S. 2 prescribed by the rules made under the Excise Act. The important conditions are contained in clauses 1-A, 2-A, 2-B, 2-C and 2-D, which read as follows:

"1-A. You shall get supply of country spirit of the following description at the rates mentioned against each and shall sell the same at the rates specified in the last column thereof:—

Description	Kind	Strength	Issue rates	Selling rates
1	2	3	4	5
(i) Flavoured liquor	Orange Masala	25 u. p. 25 u. p.	— —	— —
(ii) Plain spirit	Dubara Rasi	45 u. p. 60 u. p.	— —	— —

2-A. Under the cover of this licence you will not possess at any place other than the licensed premises, country spirit beyond the limit of individual possession without a permit or pass prescribed under the rules or sell any spirit at any such place.

2-B. If country spirit issued to the licensed shop is found to have been misused, the Collector shall be competent to fix a quota for such shop.

2-C. The minimum quantity for taking issues from the warehouse for sale is fixed at..... proof litres spirit and..... proof litres plain spirit. On your failure to taking in any month the monthly average of the total minimum quantity, you shall be liable to pay compensation to the State Government at the rate of Rs..... per proof litre spiced spirit and Rs..... per proof litre plain spirit falling short of such monthly minimum average and such compensation shall be paid by the 10th of the month next following month of which such shortfall relates.

2-D. You shall be bound to sell the minimum quantity of issues taken from the warehouse. On your failure to sell the minimum quantity of issue taken, you shall be liable to pay to the State Government compensation at the rate of Rs. per P. litre spiced spirit and Rs.... per P. litre plain spirit on the issues remaining unsold during the period of contract to which the licence relates."

12. A perusal of the conditions contained in the clauses will show that although there is an express obligation placed on the licensee to obtain supplies from the warehouse, there is no express obligation on the Government that supplies will be made from the warehouse to the licensee. Clause 2-C requires the licensee to purchase at least minimum quantity of liquor mentioned in that clause. On failure to purchase the specified minimum quantity, the licensee is liable to pay compensation to the Government. This clause does not expressly provide that the Government is bound to sell the specified quantity to the licensee. The question for consideration therefore, is whether a necessarily implied obligation

to sell liquor from the warehouse can be inferred. The rule of construction applicable in such a situation was laid down with great clarity in *Churchward v. The Queen*, (1865) 1 QB 173 which may be usefully quoted:

"Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. As in the case cited by Sir Hugh Cairns—If A covenants or engages by contract to buy an estate of B, at a given price, although that contract may be silent as to any obligation on the part of B to sell, yet as A cannot buy without B selling, the law will imply a corresponding obligation on the part of B to sell. So, if a man engages to work, and renders services which necessitate great outlay of money, time and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration. Numerous other cases might be put of the same kind, but in all these instances, where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and, above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties."

It will be seen that the licensee binds himself to take supplies of the specified minimum quantity of liquor from the Government warehouse and, in case of his failure, he is made liable for payment of compensation. Now this obligation,

which is laid upon the licensee, cannot be performed unless there is a corresponding obligation upon the State to supply liquor at least upto the minimum quantity to the licensee. In our opinion, such an obligation must, therefore, be inferred as a matter of necessary implication from the terms and conditions of the licence which we have earlier quoted. The obligations upon the licensee to purchase minimum quantity of liquor as specified in the licence and in default to pay compensation is not a condition for payment of duty on liquor or excise duty and validity of such a condition is now beyond doubt [see *Pannalal v. State of Rajasthan*, (1975) 2 SCC 633 = (AIR 1975 SC 2008) *Bimal Chandra Banerjee v. State of M. P.*, (1970) 2 SCC 467 = (AIR 1971 SC 517)]. A licensee takes the licence at the auction on the assurance that he will get supplies of liquor from the State and on the expectation that he will be in a position to pay the licence fee from the profits that he will make by sale of liquor. The amount of licence fee bid at the auction by the licensee is naturally correlated to the supply of liquor which he expects to get from the State. The licence amounts to contract between the parties as held in *Pannalal's case* (supra). We find no difficulty in holding that the implied obligation on the State to supply liquor upto the minimum quantity was binding and enforceable. However, we do not think that there was any obligation on the part of the State to supply more than the specified minimum quantity of liquor. It is no doubt true that even for supplies beyond the minimum quantity the licensee had to apply to the Government warehouse and the warehouse could make supplies. But there was no obligation on the State to meet the requirement of the licensee beyond the minimum quantity just as the licensee was not bound to purchase beyond the minimum quantity from the State.

13. The learned Government Advocate has submitted that it was open to the Excise Commissioner to close a warehouse for such periods as he deemed proper and no compensation could be claimed by the licensee on that account. In this connection, the learned Government Advocate has referred to clause 1 of the licence. This clause authorises the Excise Commissioner to close a warehouse either wholly or for such period "as the absence of demand in the locality may justify". It is further provided that in such cases no compensation will be given on account

of such closure. The closure referred to in clause 1 is the closure ordered by the Excise Commissioner on the ground of absence of demand in the locality. Now, in the instant case the failure to supply liquor to the plaintiffs, as is alleged by them, was not because there was absence of demand in the locality but because there was shortage of liquor in the Government warehouse. Clause 1, therefore, is not attracted. We may, however, mention that the language of clause 1 impliedly shows that in case of closure of warehouse for reason not covered by this clause, the State may be liable to pay compensation to the licensee.

14. It was then submitted that the plaintiffs who had not paid the full amount of licence fee were not entitled to this supply of liquor even upto the minimum quantity and they were not entitled to compensation for non-supply of liquor. Rule II of the rules relating to General Licence Conditions deals with payment of fee. The licence fee for country liquor is paid in 12 equal monthly instalments. Clause (4) of Rule II provides that if the licence fee of any shop is in arrear, the Collector may, at his discretion, prohibit the supply of intoxicant to that shop or order the supply to the defaulter at the selling price. It will thus be seen that in case of non-payment of licence fee the Collector can prohibit the supply or may order the supply at the selling price. Unless the Collector in his discretion passes an order under clause (4) of Rule II, the licensee is entitled to have the supply on payment of issue price as provided in clause 2 of the licence, even though he may have committed default in payment of licence fee. In these cases the Collector did not pass any order under clause (4) of Rule II prohibiting the supply of liquor to the plaintiffs or directing supply to them at the selling price on account of non-payment of licence fee. It cannot, therefore, be said that the obligation of the State to supply liquor in accordance with the terms and conditions of the licence had ceased as the plaintiffs had committed default in payment of licence fee.

15. The next question is whether there was default in supply of liquor to the plaintiffs from the warehouse. The plaintiffs have all examined themselves and have stated that there was no adequate stock of liquor in the warehouse and they were refused supplies. The learned Additional District Judge in para. 36

of his judgment has referred to a number of orders passed by the District Excise Officer on the applications of the plaintiffs. The plaintiffs in their applications wanted a larger quantity of liquor but the District Excise Officer issued orders for supply of less quantity. Ex. P-61 is an order of the Collector passed on 26th October 1967. By this order, the Collector decided that "looking to the pouring demand of the contractors it will be a fair decision if the contractors are issued liquor by quota on the basis of the licence fee of the shop". This order shows that the warehouse was not able to meet the demand of the plaintiffs for supply of liquor. A copy of this order was forwarded by the District Excise Officer to the Warehouse Officer, Chhindwara for information and strict compliance as is proved by the endorsement on Ex. P-61. Ex. P-62 is an order of the District Excise Officer passed on 15th November 1967. This order is issued to the Warehouse Officer, Chhindwara, again instructing him to issue supplies of liquor according to the quota fixed by the Collector. Ex. P-2 is the memorandum issued by the Excise Commissioner on 15th November 1967. In this memorandum it is acknowledged that in 1967-68 the supply of country liquor was not adequate. It is further recited therein that the question of paying compensation to these licensees who suffered loss because of non-supply would be taken up after the expiry of the contract period. Some relief to the licensees was proposed by staying the recovery of licence fee. Further orders were issued by the Excise Commissioner on the same matter on 3rd December 1967 (Ex. P-3). It has been stressed by the Excise Commissioner in Ex. P-3 that if the licensees defaulted in paying licence fee because of failure to supply liquor to them, further supply of liquor should not be stopped. It was further ordered that if it was not possible to supply liquor in accordance with the demand quota should be fixed in proportion to the minimum guarantee; and in cases where there was no minimum guarantee, quota should be fixed in proportion to the licence fee. Ex. P-4 is another memorandum of the Commissioner dated 5th February 1968. This memorandum also acknowledges that the supply of liquor was not in accordance with the demand of the licensees and their shops had to remain closed for non-supply. This order mentions certain principles which were accepted by the Government on the question of grant of compensation to the

licensees. To assure the licensees that they will have good supply of liquor during the year 1968-69, a public notice was issued by the Commissioner on 8th November 1967. This notice recites that adequate arrangements had been made for maintenance of supply of liquor for the year 1968-69. It is also recited in the notice that the contractors who did not get supplies in 1967-68 should apply for compensation to the Collector through the District Excise Officer. All these documents strongly support the evidence of the plaintiffs that there was default on the part of the State in making supplies to the plaintiffs of country liquor from the Government Warehouse and even the minimum quantity specified in the licences was not supplied.

16. It will now be convenient to take up each case separately for determining what amount of compensation should be decreed in favour of the plaintiffs.

First Appeal No. 31 of 1972 (Civil Suit No. 11-A of 1970).

17. The plaintiff in this case is Nandlal Jaiswal who was a licensee for Parasia shop. The licence fee agreed was Rs. 1,11,000. The licensee had paid Rupees 71,336 towards licence fee and the balance due from him in favour of the Government was Rs. 44,665. The minimum quantity of liquor which the licensee had agreed to purchase was 33,804 proof litres. The actual supply to the licensee was of 21,791 proof litres. The case of the plaintiff was that he required supply of 40,564 proof litres and thus the Government did not supply him 18,733 proof litres and he was entitled to the loss of profits for non-supply of this quantity of liquor. After giving adjustment for the amount of unpaid licence fee, the plaintiff sued for Rs. 14,000. The trial Court has granted a decree for the whole of this amount. On the finding reached by us earlier that there was no obligation on the State to supply more than the minimum quantity agreed in clause 2-C of the licence, the claim of the plaintiff that he ought to have been supplied 40,564 proof litres cannot be sustained. He can claim compensation on the basis that he ought to have been supplied 33,804 proof litres which was the minimum quantity fixed under clause 2-C. The difference between the minimum quantity which ought to have been supplied and the actual supply works out to 12,013 proof litres. The average difference in rate between the selling

price and issue price fixed under the licence is Rs. 3.30 per proof litre. Because of the breach committed by the State in not supplying 12,013 proof litres, the plaintiff suffered a loss of Rs. 39,642.90. As against this the plaintiff has to pay the licence fee amounting to Rs. 44,665. Making an adjustment of this amount, the plaintiff is still liable to pay Rs. 5,022.10 to the State on account of balance of licence fee and he is not entitled to get any decree against the State. First Appeal No. 31 of 1972 will, therefore, be allowed and the suit dismissed. The parties will bear their own costs throughout.

First Appeal No. 32 of 1975 (Civil Suit No. 13-A of 1970).

18. The plaintiff in this case is Ganga Prasad. He obtained the licence for Damua shop. The licence fee agreed for this shop was Rs. 37,100. The plaintiff paid Rs. 29,900 towards licence fee. The balance amount of licence fee on account of Damua shop is Rs. 7,200. The minimum quantity of liquor agreed to be purchased under the licence for Damua shop was 10,227 proof litres out of which 6,331 proof litres were supplied. The balance of minimum quantity which was not supplied comes to 3,846 proof litres. Ganga Prasad had also obtained a licence for Katangi shop. The licence fee for this shop was Rs. 5,100 out of which Rs. 4,600 were paid. The balance of licence fee on account of Katangi shop is Rs. 500. The minimum quantity of liquor which was to be purchased under the licence for Katangi shop was 2,089 proof litres out of which only 920 proof litres were supplied. Thus on account of Katangi shop there was non-supply of 1169 proof litres. Calculating the loss of profits on the basis of the difference between the sale price and issue price, the compensation payable to the plaintiff works out to Rupees 28,062.04. After adjusting the balance of licence fee, the amount of compensation payable to the plaintiff comes to Rupees 20,363.04. The plaintiff restricted his claim to Rs. 12,000 which was decreed by the trial Court. The learned Government Advocate pointed out that the plaintiff had included in his claim damages for non-supply of Masala liquor and that there was no obligation to supply Masala liquor because no minimum quantity for supply of this variety of liquor was agreed in the licence. It is true that there is no minimum quantity fixed for Masala liquor in the licence; but the claim on account of Masala liquor in this case is negligible

and as the plaintiff has already reduced his claim from Rs. 20,363 to Rs. 12,000, there is no room for further reducing the claim of the plaintiff. This appeal is, therefore, dismissed with costs and the decree of the trial Court is affirmed.

First Appeal No. 33 of 1972 (Civil Suit No. 1-A of 1971).

19. Abdul Azim, the plaintiff, in this suit was granted the licence for Um-reth shop on a licence fee of Rs. 20,500. The plaintiff paid Rs. 16,414 towards the licence fee. The balance amount of licence fee in this case is Rs. 4,086. The minimum quantity of liquor which the plaintiff agreed to purchase is 4,092 proof litres. The liquor that was supplied to him was 2,450 proof litres, leaving a difference of 1,642 proof litres. The plaintiff claimed that he needed 4,588 proof litres of liquor and that the State failed to issue that quantity of liquor to him. On this basis the plaintiff claimed a decree for Rupees 12,700 after giving adjustment for the balance of the licence fee and after giving up about Rs. 7,000 from profits. The trial Court decreed the claim for Rupees 9,695.22 only. We have already held that the State was not bound to supply more than the minimum quantity of liquor specified in the licence. It has also been stated that there was no minimum quantity fixed for Masala liquor. The average profit rate of Dubara and Rasi liquors as mentioned in the licence comes to Rupees 10.72 per proof litre. The plaintiff in this case was supplied 1642 proof litres, less than the minimum quantity. He, therefore, suffered loss of profits amounting to Rs. 17,602.24. Adjusting from it the balance amount of licence fee, i.e. Rs. 4,086, the plaintiff could claim from the State Rs. 13,516.24. The amount decreed against the State is considerably less. This appeal, therefore, must fail. It is accordingly dismissed with costs.

First Appeal No. 34 of 1972 (Civil Suit No. 10-A of 1970).

20. In this case the plaintiff Vijay Kumar Jaiswal took a group of six shops known as Diwanchipura shops on a licence fee of Rs. 4,13,000. The plaintiff paid Rs. 3,09,752 towards the licence fee leaving a balance of Rs. 1,03,248. The plaintiff also took a contract for Lawaghori shop for Rs. 8,175. Out of which Rs. 6813 were paid towards the licence fee leaving a balance of Rs. 1,362. The plaintiff also took another contract of Ubhegaon for Rs. 9,300. Rs. 6,975 were paid as licence fee towards this shop leaving a balance

of Rs. 2,325. The total minimum quantity of liquor which was to be supplied under all these licences is 46,631 proof litres. The plaintiff was supplied only 35,459 proof litres. Thus 11,172 proof litres is the difference between the minimum quantity which was to be supplied and the quantity actually supplied. According to the plaintiff's case, he suffered a loss of Rs. 1,30,405.20 on account of non-supply of the minimum quantity of liquor. The total amount of licence fee remaining unpaid under these licences comes to Rupees 1,06,935. Giving adjustment of this amount, the plaintiff claimed that he was entitled to get Rs. 23,470.20 from the State. But further reducing his claim, the plaintiff sued only for Rs. 13,000. The learned Government Advocate submitted that in calculating Rs. 23,470.20 as the loss of profits, the plaintiff had included Rs. 4,809.37 as loss for non-supply of Masala liquor. It is argued that as there was no minimum quantity fixed for Masala liquor, the plaintiff was not entitled to claim any loss of profits on that account. It is true that there was no quantity fixed for supply of Masala liquor and, therefore, the plaintiff is not entitled to claim any loss of profits on that account. The plaintiff, however, has already reduced his claim from Rs. 23,470 to Rs. 13,000. There is, therefore, no room left for further reducing the claim on account of Masala liquor. This appeal must, therefore, fail. It is accordingly dismissed with costs.

First Appeal No. 35 of 1972 (Civil Suit No. 28 of 1970).

21. Somti Bai, who is the plaintiff in this suit, obtained the licence for the Batariya Bazar shop for Rs. 1,38,100. The entire amount of licence fee was paid. The minimum quantity of liquor which was to be supplied under this licence is 27,111 proof litres. Only 12,358 proof litres were supplied to the plaintiff. The plaintiff, therefore, claimed loss of profits with reference to 9,753 proof litres (17,112 litres) at the average rate of Rs. 1.44 per litre. The suit was filed for Rs. 27,000. The suit has been decreed for Rs. 24,666.28 by the trial Court. There is no room for any interference in the decree. The appeal fails and is dismissed with costs.

First Appeal No. 36 of 1972 (Civil Suit No. 10-A of 1970).

22. Sunderlal Jaiswal, who is the plaintiff in this case, obtained the licence for Dighwari shop for Rs. 39,000. He paid

Rs. 26,000 towards the licence fee of this shop. Rs. 13,000 is the amount of licence fee which remained due. The plaintiff was to be supplied 8,369 proof litres as the minimum quantity of liquor under this licence. As against this, the plaintiff was supplied only 5,089 proof litres, leaving a difference of 3,282 proof litres. The plaintiff obtained another licence for Pagara shop for Rs. 10,850. He paid Rs. 7,234 towards the licence fee. The balance of licence fee in respect of this licence is 3,616. The minimum quantity of liquor to be supplied under this licence was 3,257 proof litres out of which 1,642 proof litres were supplied, leaving a balance of 1,395 proof litres. The plaintiff claimed that he ought to have been supplied 11,717 proof litres in respect of Dighwari shop. Similarly, he claimed that he should have been supplied 4,046 proof litres in respect of Pagara shop. On this basis and after giving adjustment for the balance of licence fee of Rs. 16,616 due under the two licences, the plaintiff claimed a decree for Rs. 11,000. The suit has been decreed by the trial Court for Rs. 4,720. We have earlier stated that there was no obligation on the State to supply more than the minimum quantity of liquor mentioned in the licences. The plaintiff, therefore, is not entitled to get damages in respect of non-supply of liquor over the minimum quantity. The average profits in respect of Rasi and Dubara liquors is Rs. 3.30 per proof litres. The plaintiff was not supplied 3,282 proof litres out of the minimum quantity agreed in respect of Dighwari shop. The loss of profits on account of Dighwari shop, therefore, comes to Rs. 10,830.60. In respect of Pagara shop, the plaintiff was not supplied 1,395 proof litres out of the minimum quantity of liquor agreed for this shop. The loss of profit at the average rate of Rs. 3.30 per proof litre for Rasi and Dubara in respect of this shop, therefore, works out to Rs. 4,603.50. The total loss on account of both these contracts thus comes to Rupees 15,434.10. The balance of licence fee due under these licences, as earlier as stated, is Rs. 16,616. After giving an adjustment of the balance of licence fee, the plaintiff has still to pay Rs. 1,182 to the State. The plaintiff is, therefore, not entitled to any decree. It may further be mentioned that the plaintiff had included in his claim loss of profit on account of non-supply of Masala liquor. We have earlier stated that there being no specification of minimum quantity of Masala liquor under the licence, there was no obligation on the

State to supply Masala liquor. The loss of profit on account of non-supply of Masala liquor, therefore, cannot be claimed. This appeal has to be allowed. The decree of the trial Court is set aside and the suit of the plaintiff is dismissed. Both the parties will bear their costs throughout.

23. In the result, First Appeals Nos. 31 and 36 of 1972 are allowed and the suits giving rise to these appeals are dismissed, but the parties will bear their own costs throughout. First Appeals Nos. 32, 33, 34 and 35 all of 1972 are dismissed with costs.

Order accordingly.

AIR 1976 MADHYA PRADESH 186

SHIV DAYAL, C. J. AND K. K. DUBE, J.

Son Singh, Petitioner v. Board of Revenue of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 43 of 1973, D/- 27-3-1976.

(A) Constitution of India, Art. 226 — Laches and delay — Petition challenging order of allotment of agricultural land filed more than two years after passing of order of Board of Revenue — Respondent allottee investing large amount of money in carrying out certain improvements — Petition dismissed on ground of laches. AIR 1967 SC 1450, Foll. (Paras 2 to 4)

Cases Referred: Chronological Paras

AIR 1967 SC 1450 = (1968) 1 SCJ 364 2
(1874) 5 PC 221 = 22 WR 492 2

C. L. Kotecha, for Petitioner; R. C. Rai, for Respondent No. 4.

SHIV DAYAL, C. J.:— The grievance in this petition is two-fold. Firstly, that the Board of Revenue, after having held that a revision lay before the Commissioner, should have sent back the case to the Commissioner; instead, the Board decided the matter against the petitioner on merits; and, secondly, under Section 35 of the Ceiling on Agricultural Holdings Act, 1960, the allotment order was not legal. Respondent No. 4, the allottee is not an 'agricultural labour' within the definition contained in the Act. It is also contended that the procedure laid down in Rule 8 (ii) and R. 8 (iii) of the Ceiling on Agricultural Holdings Rules, was not complied with.

2. Shri Rai, learned counsel for the allottee, raises a preliminary objection that this petition should be dismissed on the ground of laches. The Board of Revenue decided the revision before it on November 11, 1970. The petitioner applied for certified copy of the order of the Board of Revenue on March 2, 1971. Shri Kotecha tells us that the certified copy was delivered on April 29, 1971. Even so, this petition was filed on January 9, 1973. Now, it is stated in the return and affidavit that in the meanwhile the allottee (respondent No. 4) invested Rs. 5,000 on improvement of the land allotted to him in order to make it cultivable. He also constructed Bandhans all round the field and also constructed a well and, above all, an agricultural house thereon. According to the petitioner himself, the respondent No. 4 is a blacksmith. If, during the time, which the petitioner allowed to run from the date of the order of the Board of Revenue to the date of filing of this petition, the allottee incurred such heavy expenses and even constructed an agricultural house thereon, the petitioner cannot now be heard to say that there were any procedural errors or that the order of the Board of Revenue was erroneous. He should have approached this Court with due diligence and promptness. In *Moon Mills v. M. R. Meher*, President, Industrial Court, Bombay, AIR 1967 SC 1450 at page 1454, their Lordships said:

"It is true that the issue of a writ of certiorari is largely a matter of sound discretion. It is also true that the writ will not be granted if there is such negligence or omission on the part of the applicant to assert his right as, taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party." The decision in *Lindsay Petroleum Co. v. Hurd*, (1874) 5 PC 221 at p. 239 was quoted by their Lordships with approval.

3. In our opinion, the preliminary objection is right.

4. The petition is dismissed on the ground of laches. Parties shall bear their own costs. The amount of security deposit shall be refunded to the petitioner.

Petition dismissed.

AIR 1976 MADHYA PRADESH 187**G. P. SINGH AND S. M. N. RAJNA, JJ.**

Parmanand Jain, Appellant v. Firm Babulal Rajendra Kumar Jain and another, Respondents.

First Appeals Nos. 111 and 153 of 1971, D/- 25-3-1976.*

(A) M. P. Money Lenders Act (13 of 1934), S. 2 (vii) — Loan — Essentials of.

The essence of the definition of loan under the Act is that it should be an actual advance whether of money or in kind at interest. The inclusive clause in the definition that loan shall include 'any transaction which the Court finds to be in substance a loan' in the context only means that even when apparently there is no actual advance of money or in kind at interest, a transaction would be a loan if in substance it amounts to an actual advance of money or in kind at interest. The definition does not depart from the basic conception of a loan and transactions which in law create relationships different from lender and borrower are not included within it. The most common illustration of the application of the inclusive part of the definition can be found in those cases where the money is not actually put in the hands of the borrower by the lender but in substance the transaction amounts to that. (Para 9)

In the facts and circumstances of the case it was held that, at the stage when the plaintiff's goods were sold by the defendant the defendant became liable to pay the price of the goods to the plaintiff and the relationship of seller and buyer came into existence. This relationship created a debt in favour of the plaintiff but the debt did not amount to a loan even though the plaintiff allowed the unpaid price to remain with the defendant and the defendant paid interest on it. The parties, however, settled the accounts and the defendant executed a hand-note for a sum which was found due against him promising to pay it at 12 per cent interest. This document recites that the amount was received in cash by the defendant. The transaction was in substance a loan. (Para 10)

(B) M. P. Money Lenders Act (13 of 1934), S. 2 (v) — Money lender — Who is.

*(Against judgment and decree of S. S. Sharma, 2nd Addl. Dist. J., Sagar, D/- 28-8-1971.)

DT/FT/B307/76/MVJ

Money lender means 'a person who in the regular course of business advances a loan'. The words 'in the regular course of business' signify a certain degree of system and continuity of transactions. Every person who has advanced a loan, therefore, is not a money-lender. Thus by advancing two loans a person does not become a money lender. (Para 11)

(C) Stamp Act (1899), Ss. 44 and 35 — Bond — Objection by defendant that it was understamped and invalid — Plaintiff paying required stamp duty and penalty — Plaintiff can recover these amounts from defendants and they could be included in costs in the suit under Section 44 (3). AIR 1945 Nag 178, Followed.

(Para 14)

(D) Hindu Law — Joint family business — Liability of son.

It is now settled law that debts incurred by the father in the course of a business started by him are not avyavaharika debts and the sons are under a pious obligation to discharge such debts. The text of Gautama to the effect that the sons are not liable for their father's commercial debts has long become obsolete. (Para 15)

(E) Civil P. C. (1908), O. 20, R. 11 (2) — Grant of instalments — Power of Court.

It would be open to the defendants to apply under sub-rule (2) of Order 20, Rule 11 for grant of instalments. Under a local amendment of this sub-rule, instalments can be allowed without the consent of the decree-holder even after the passing of decree. (Para 17)

Cases Referred: Chronological Paras

1975 MPLJ 419 =	1975 Jab LJ 475	11
AIR 1970 SC 2007 =	(1971) 1 SCR 657	11
AIR 1967 SC 181 =	1966 Supp SCR 1	6
AIR 1967 SC 727 =	(1967) 1 SCR 68	15
AIR 1967 SC 1118 =	(1967) 1 SCR 190	9
AIR 1966 SC 495 =	1966 Cri LJ 457	7
(1964) 2 All ER 583 =	(1964) 1 WLR 978	8
(1961) 3 All ER 1163 =	1962 AC 209	8, 11
AIR 1953 SC 485 =	1954 SCR 117	7, 9
AIR 1948 Nag 173 =	1948 Nag LJ 164	6
AIR 1946 PC 145 =	59 Mad LW 595	9
AIR 1945 Nag 178 =	1945 Nag LJ 180	14
AIR 1941 Nag 177 =	1941 Nag LJ 194	11
AIR 1939 Mad 561 =	(1939) 1 Mad LJ 493	15
AIR 1939 Nag 192 =	1939 Nag LJ 161	15
(1938) 3 All ER 275 =	159 LT 332	8
(1932) 1 KB 691 =	101 LJKB 185	9
AIR 1924 PC 50 =	51 Ind App 129	15

1910 AC 422 = 79 LJKB 815 11
 (1906) 1 KB 584 = 75 LJKB 447 11
 (1861-73) All ER (Reprint) 261 9

Y. S. Dharmadhikari, for Appellant;
 B. C. Verma, for Respondents.

SINGH, J.:— This judgment shall also dispose of First Appeal No. 153 of 1971. The facts giving rise to these appeals are that the plaintiff Parmanand Jain filed a suit on 9th October, 1968 for recovery of a sum of Rs. 10,041 against the defendants Choudhary Babulal and his son Rajendra Kumar. The plaintiff alleged that the defendants borrowed from him on 24th November 1967 a sum of Rs. 9,081 at 12 per cent interest. It was further alleged that the defendant Babulal executed a hand-note on the same date in the plaintiff's favour. The plaintiff in addition to the principal amount of Rs. 9,081 claimed interest amounting to Rs. 954 upto the date of the suit at 12 per cent and Rs. 6 as notice charges. The decree against Rajendra Kumar was claimed on the basis that the defendants carried on a joint business of Adhat in the name of Babulal Rajendra Kumar and the loan was taken for this business. The defendant Rajendra Kumar pleaded that he had nothing to do with the suit transactions and that the business carried on by Babulal was his separate business. The defendant Babulal pleaded that the plaintiff carried on the business of moneylending, that the plaintiff used to deposit in the defendant's shop cash from time to time, and that on 24th November 1967 the account of the deposits made by the plaintiff was gone into and Rs. 9,081 were found due against the defendant. According to Babulal's case, the hand-note was executed for this amount which was found due after accounting and that nothing in cash was advanced as loan on that date to the defendants. It was also pleaded that the hand-note amounted to a bond and being understamped was invalid. It was further pleaded that the amount of the bond included interest to which the plaintiff was not entitled as he never sent annual accounts to the defendant as required under the law.

2. The trial Court held that no cash was advanced to the defendants on 24th November 1967, and that the amount of Rs. 9,081 was found due after the previous accounts between the parties were gone into. It was also held that the plaintiff was a money-lender and that as he did not send annual accounts as required under the Money Lenders Act, he was not

entitled to any interest. The Court further held that the hand-note amounted to bond. The document was, however, admitted after payment of duty and penalty. As regards Rajendra Kumar, the Court held that he was also liable. In view of these findings, the trial Court decreed the suit for the sum of Rs. 9,081 with interest pendente lite at the rate of 4 per cent on the condition that the plaintiff should produce a valid registration certificate under the Money Lenders Act within two months from the date of the decree. The parties were directed to bear their own costs. It is against this decree that the plaintiff has filed First Appeal No. 111 of 1971 and the defendants have filed First Appeal No. 153 of 1971. As both the parties have come up in appeal, the entire controversy is again open in this Court.

3. The first question to be decided in this case is whether the plaintiff is a money lender. The plaintiff has examined himself as P.W. 1. His statement is that he is a farmer and that he used to sell his agricultural produce in the Adhat of the defendants who carried on Adhat business. The sale price of the agricultural produce sold by him in the Adhat used to remain lying with the defendants on which they paid interest. The plaintiff has further stated that he used to obtain from the defendants from time to time as much money as he needed from his account. The plaintiff has also stated that he does not do any money lending business. As regards the transaction in suit, the plaintiff's case is that two days before 24th November 1967 the parties settled their accounts and the plaintiff received Rs. 9,081 which he advanced as loan on that date to defendants and the defendant Babulal executed the hand-note Ex. P-1 promising to repay that amount at 12 per cent interest. The plaintiff admitted in cross-examination that on 10th October 1966 there was a similar transaction and after the accounts were gone into the plaintiff received Rs. 8,000 from the defendants which he advanced as loan to them on a hand-note executed by the defendant Babulal. The said hand-note is Ex. D-1. Babulal examined himself as D.W. 4. He has stated that the plaintiff used to sell foodgrains in his Adhat and he also used to deposit cash from time to time. Babulal has further stated that six monthly accounts used to be settled and he used to give hand-notes in respect of the amount found due in favour of the plaintiff. Babulal has also stated that the plaintiff did not advance

any cash loan either on 24th November, 1967 when Ex. P-1 was executed, or on 10th October 1966 when Ex. D-1 was executed. On a consideration of the evidence, it appears to us that no cash was advanced by the plaintiff to the defendants either on 10th October 1966 or on 24th November 1967. The fact appears to be that on these dates the parties settled the accounts of the sale-proceeds of the agricultural produce which the plaintiff used to sell in the defendant's Adhat and in respect of the amount found due in favour of the plaintiff the defendant Babulal executed the hand-notes Ex. D-1 and Ex. P-1. It also appears that when Ex. P-1 was executed the old hand-note Ex. D-1 was returned to the defendants. However, we do not accept the statement of Babulal that the plaintiff used to deposit cash in his shop or that the accounts used to be settled six monthly. The defendants' books of account have been produced in Court. But the learned counsel for the defendants frankly admitted before us that in the Rokad the sale-proceeds of agricultural produce are also shown as cash transaction and that on the basis of the accounts produced it cannot be said whether any particular item was a cash advance or an entry relating to sale price of the plaintiff's agricultural produce sold in the defendants' Adhat. The examination of the accounts produced by the defendants goes to show that they have not produced the Nakal Bahi relating to sale of the agricultural produce. Had that Bahi been produced, it could possibly have been found out whether all the transactions in the Rokad relate to sale of agricultural produce or whether the plaintiff on any occasion made any cash deposit with the defendants. We may here mention that the defendants have produced those entries of the Nakal Bahi which relate to calculation of interest. But the entries relating to the sale of agricultural produce have not been produced. The non-production of the relevant entries of the Nakal Bahi is a circumstance which goes against the case of the defendants that the plaintiff apart from selling his agricultural produce or other foodgrains in the Adhat of the defendants also used to make cash advances or cash deposits. Certain entries in the Rokad purport to be signed by the plaintiff, but the signatures have neither been proved nor put to the plaintiff. The alleged cash deposits have also not been put to the plaintiff in his cross-examination. Our conclusion, therefore, is that the plaintiff never made any cash de-

posit in the defendants' shop nor did he make any cash advance to the defendants.

4. The letters Exs. P-4 and P-6 written by the defendant Babulal to the plaintiff go to show the nature of the dealings between the parties. Babulal's business was of an Adhatia. The plaintiff is a farmer. The plaintiff used to send his agricultural produce to the defendants for being sold. After selling the same the defendants used to intimate the plaintiff that his goods have been sold at a particular rate. After the plaintiff's goods were sold, the defendant used to enter the price payable to the plaintiff in the Rokad. The plaintiff used to receive the price of his goods as and when needed and the defendants used to pay on the balance remaining with them interest at the rate of 9 or 12 per cent. On 10th October 1966 the parties went through the accounts and the defendant Babulal executed the hand-note Ex. D-1, promising to repay Rs. 8,001 at 12 per cent interest. Ex. D-1 states that the amount has been obtained in cash from the plaintiff. Again on 24th November 1967 the accounts were gone into and Babulal executed another hand-note Ex. P-1 in which he promised to repay Rupees 9081 with interest at 12 per cent. This document also mentions that the amount was obtained in cash from the plaintiff. The question to be decided on the basis of these dealings is whether the plaintiff carried on the business of money-lending. But before we direct our attention to this point it is necessary to discuss some other evidence which the defendants have produced to show that the plaintiff carried on money lending business.

5. Kamlesh Kumar (D.W. 2) has stated that on 2nd December 1970 he obtained a sum of Rs. 200 as loan from the plaintiff at the interest rate of 2 per cent per week, and that he repaid the same after a week. The witness produced a receipt Ex. D-2 dated 9th December, 1970. The whole of the receipt except the signature is in the handwriting of the witness. The plaintiff has denied that he ever advanced any loan to Kamlesh Kumar. His explanation about the receipt is that it has been forged on some paper which bore his signature and which the defendants have somehow managed to obtain. We have seen the receipt. The receipt shows that the gap between the lines has gradually increased towards the end and a conscious effort has been made to complete the writing above the signature. Even then there is a considerable gap between the signature and the

end of the body writing. Further, the body writing when compared with the signature appears to be in a different ink. The paper of Ex. D-2 is torn from the top. The appearance of the document supports the case of the plaintiff that the receipt was scribed on a piece of paper which was already signed by him. Kamlesh Kumar (D.W. 2) in his cross-examination stated that he has no other document except Ex. D-2, although he obtained loans from the plaintiff on various occasions and repaid those loans after obtaining similar receipts. The explanation that he offered for non-production of other receipts is that all those receipts have been lost. The evidence of Kamlesh Kumar read as a whole does not inspire any confidence, and, in our opinion, he is not a truthful witness. Another witness produced by the defendants in the same context is Jeewan Kumar (D.W. 3). His evidence is that in September 1967 the plaintiff told him that if he did not want to retain the sale-proceeds of the plaintiff's foodgrains sent to him for sale, he may send the same to Singhai Rajaram Tulsiram on which he sent Rs. 8,000 to Singhai Rajaram's shop in the account of the plaintiff. The evidence of Jeewan Kumar (D.W. 3) does not show that any loan was advanced to him by the plaintiff. It may incidentally be mentioned that Jeewan Kumar is brother-in-law of the defendant Babulal, Singhai Komalchand who carries on business in the name of Singhai Rajaram Tulsiram has been examined as D.W. 5. He admits to have received a sum of Rs. 8,000 on 29th September 1967 from Jeewan Kumar in the account of the plaintiff. He states that the plaintiff recovered this amount in three or four instalments. He further states that there was no agreement to pay interest, but he paid interest to the plaintiff amounting to Rs. 263.90 at the rate of 12 per cent because he had utilised the money in his shop and had profited from it and he could have got deduction of interest in income-tax assessment. The witness states that the plaintiff did not demand any interest and that it was on his request that the plaintiff accepted to take interest. Reading the statement of Komalchand it cannot be said that his evidence establishes any advance of loan from the plaintiff to him. Another witness produced by the defendants is Bhagwandas (D.W. 6). This witness states that the plaintiff carries on regular business of money-lending and advances loans to all and sundry. The witness states that he himself took loan from the plaintiff ten

years before, i.e. in 1961. The cross-examination of the witness shows that he came to depose on the asking of one Jagannath Singh. The evidence of Bhagwandas does not inspire any confidence. We may further mention that the alleged transactions of loan deposited to by Komalchand (D.W. 5) and Bhagwandas (D.W. 6) were not put to the plaintiff to obtain his explanation. In our opinion, the evidence discussed above does not establish that the plaintiff apart from his dealings with the defendants carried on any business of money lending.

6. The question now to be examined is whether the plaintiff's dealings with the defendant Babulal go to show that he was carrying on any money lending business. We have already stated that there is no evidence to show that the plaintiff made cash deposits with the defendant. The plaintiff only used to sell his agricultural produce in the Adhat of the defendant. The defendant after selling the plaintiff's goods used to enter the price payable to the plaintiff in his account books and paid interest on the price so entered. In an Adhat business of the nature carried on by the defendant the Adhatia is an agent only upto the stage of sale of the goods of his constituent. The parties to whom the goods are sold are not brought into any jural relationship with the constituent and their names are not disclosed to him. The Adhatia only intimates the rates at which the goods are sold. It is the Adhatia who is liable to his constituent for the price. This course of business is clear from Exs. P-4 and P-6. Having regard to the nature of dealings and the course of business, after the plaintiff's goods were sold by the defendant Babulal through his Adhat, the relationship of seller and buyer arose between the parties and the defendant became liable to pay the price of the goods to the plaintiff. The course of dealings goes to show that the defendant's position was that of a Pakka Adatiya who acts as a principal in relation to his constituent (Shop Bakshiram Rodmal v. Firm Jasroop Srinath, AIR 1948 Nag 173). "It is well established", said the Supreme Court in Gordon Woodroffe and Co. v. Shaik M. A. Majid and Co., AIR 1967 SC 181 at p. 185 "that even an agent can become a purchaser when an agent pays the price to the principal on his own responsibility." Simply because the defendant in his account books entered the price which he was liable to pay to the plaintiff as cash

received by him from the plaintiff or because the plaintiff allowed the amount of price to lie with the defendant, it cannot be held that the relationship of lender and borrower was created between the parties. Payment of interest on the amount of price by the defendant is also inconclusive on the question of change of relationship because even a buyer is liable to pay interest on the unpaid price according to contract or usage of the market and the Court is also empowered to allow interest even though there may be no specific contract for payment of interest; (See Section 61, Sale of Goods Act).

7. The Madhya Pradesh Money Lenders Act, 1934, defines 'loan' to mean 'an actual advance made within twelve years from the date of the last transaction whether of money or in kind at interest', and to include 'any transaction, which the Court finds to be in substance a loan'. The definition further goes on to provide that certain transactions are not included in the definition. We are not concerned with this part of the definition. The definition of loan must be read in the background of the legal concept of loan. Although a loan creates a debt but every debt is not a loan. The concept of debt is much wider than that of loan. In *Ram Ratan Gupta v. Director of Enforcement*, AIR 1966 SC 495 the Supreme Court in holding that foreign exchange deposited in the Current Account of a foreign Bank to be used whenever necessary did not amount to a transaction of loan, observed as follows:

"What is the meaning of the expression 'lend'? It means in the ordinary parlance to deliver to another a thing for use on condition that the thing lent shall be returned with or without compensation for the use made of it by the person to whom it was lent. The subject-matter of lending may also be money. Though a loan contracted creates a debt, there may be a debt created without contracting a loan, in other words, the concept of debt is more comprehensive than that of loan." Similarly, in *Shree Ram Mills Ltd. v. Commr. of E. P. T.*, AIR 1953 SC 485 it was held that when managing agents allowed the commission payable to them under the managing agency agreement to lie with the company, the arrears of commission became a debt, but there was no borrowing or loan. In the course of its judgment, the Court said:

"Of course, money so left could, by a proper agreement between the parties, be

converted into a loan, but in the absence of an agreement mere inaction on the part of the managing agents cannot convert the money due to them, and not withdrawn, into a loan. A loan imports a positive act of lending coupled with an acceptance by the other side of the money as a loan. The relationship of borrower and the lender cannot ordinarily come about by mere inaction."

8. If the legal nature of the transaction is not lending of money, the transaction cannot be regarded as a loan although it may carry out the same economic function which is performed by entering into a transaction of loan. It is on this reasoning that hire-purchase agreements are not regarded as money-lending under the English Moneylenders Act: (See *Olds Discount Co. Ltd. v. John Playfair Ltd.* (1938) 3 All ER 275 and *Premore Ltd. v. Shaw Brothers*, (1964) 2 All ER 583 at pp. 588, 589. On the same logic the business of purchase of bills at discount, which is a business quite distinct from moneylending, was not regarded as moneylending within the Malayan Moneylenders Ordinance: (See *Chow Yoong Hong v. Choong Fah*, (1961) 3 All ER 1163 (PC).)

9. The essence of the definition of loan under the Moneylenders Act is that it should be an actual advance whether of money or in kind at interest. The inclusive clause in the definition that loan shall include 'any transaction which the Court finds to be in substance a loan' in the context only means that even when apparently there is no actual advance of money or in kind at interest, a transaction would be a loan if in substance it amounts to an actual advance of money or in kind at interest. The definition does not depart from the basic conception of a loan and transactions which in law create relationship different from lender and borrower are not included within it. The most common illustration of the application of the inclusive part of the definition can be found in those cases where the money is not actually put in the hands of the borrower by the lender but in substance the transaction amounts to that. This is consistent with the general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet and agree to set the one against the other they need not go through the form and ceremony of handing the money back-

wards and forwards': (See Spargo's case (1861-73) All ER (Reprint) 261 at p. 265). This principle is reflected in the case of Beninson v. Shiber, AIR 1946 PC 145, where it was held by the Privy Council that if a man finds money for another and expends it on that other's behalf and in accordance with his request, he is lending it although he never physically transfers it to the borrower. It is on the same principle that the Supreme Court in the passage that we have earlier quoted from Shree Ram Mill's case (AIR 1953 SC 485) (supra) recognised that the parties may by an agreement convert arrears of commission due to one of them into a loan and bring into existence the relationship of lender and borrower. And, it is an application of the same principle that when a loan is renewed by the execution of a fresh document, the Courts find no difficulty in holding that the former loan is repaid by borrowing a fresh loan on the document of renewal: (see B. S. Lyle Ltd. v. Chappell, (1932) 1 KB 691, referred with approval in Jiwanlal v. Rameshwarlal, AIR 1967 SC 1118 at p. 1121.

10. Let us now revert to the transactions entered into between the plaintiff and the defendant Babulal. As earlier stated, at the stage when the plaintiff's goods were sold by the defendant the defendant became liable to pay the price of the goods to the plaintiff and the relationship of seller and buyer came into existence. This relationship created a debt in favour of the plaintiff but the debt did not amount to a loan even though the plaintiff allowed the unpaid price to remain with the defendant and the defendant paid interest on it. The parties, however, on 10th October 1966 settled the account and the defendant executed a hand-note for a sum of Rs. 8,001 which was found due against him promising to pay it at 12 per cent interest. This document recites that the amount was received in cash by the defendant. Applying the principle that it is not always necessary for the creation of a relationship of lender and borrower that the money should actually be placed in the hands of the borrower by the lender, the accounting and the acceptance of the hand-note of Rs. 8,001 which recites that the money was paid in cash, had the legal consequence of creating the relationship of lender and borrower between the plaintiff and the defendant. The nature of the transaction was as if Rs. 8,001 had been paid by the defendant to the plaintiff and

the same had been advanced as a loan to the defendant. Therefore, under the definition of loan contained in the Moneylenders Act the transaction was in substance a loan. Similarly, when the accounts were again gone into on 24th November 1967 and the old hand-note was renewed by execution of another hand-note Ex. P-1, it can be said that the transaction amounted to a fresh loan. The result, therefore, is that the plaintiff advanced two loans to the defendant within the meaning of the definition of loan in the Moneylenders Act on the dates when he accepted the aforesaid hand-notes from the defendant.

11. So the evidence produced by the parties does disclose that the plaintiff who is a farmer and who in the normal course sells his agricultural produce in the Adhat of the defendant Babulal advanced two loans to him. Now the question is whether the plaintiff on the basis of this evidence can be described as a moneylender as defined in the Act. Moneylender, as defined in the Act, and in so far as relevant for our purposes, means 'a person who in the regular course of business advances a loan.' The words 'in the regular course of business' signify a certain degree of system and continuity of transactions. Every person who has advanced a loan, therefore, is not a moneylender. Under the corresponding English Act, moneylender includes every person whose business is that of moneylending. Adverting to this definition, in *Kirkwood v. Gadd*, 1910 AC 422 Lord Loreburn L. C. remarked that 'it imports a series or repetition of acts. Each separate piece of business may consist of many stages and incidents, and the business as a whole comprises many separate pieces'. In *Chow Yoong Hong v. Choong Fah* (1961-3 All ER 1163) (supra) Lord Devlin, in the context of the definition of moneylender in the Malayan Moneylenders Ordinance, said that 'to lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender, it is necessary to show some degree of system and continuity in his moneylending transactions'. Referring to the definition of moneylender in our Act, the Supreme Court in *Gajanan v. Brindaban*, AIR 1970 SC 2007 observed as follows:

"There is a long catena of authorities on the statutes regulating and controlling moneylenders in which the expression 'moneylender' has been so construed as

to exclude isolated transaction or transactions of moneylending. Vivian Bose J. while dealing with the Act which concerns us, in *Sitaram Shrawan v. Bajya Parnya*, AIR 1941 Nag 177 said:

"The word 'regular' shows that the plaintiff must have been in the habit of advancing loans to persons as a matter of regular business. If only an isolated act of moneylending is shown to the Court it is impossible to state that that constitutes a regular course of business. It is an act of business, but not necessarily an act done in the regular course of business." The definition of moneylender was also recently considered by a Division Bench of this Court in *Rajaram v. Nandkishore*, 1975 MPLJ 419 where the learned Judges said:

"Speaking generally a man who carries on a moneylending business who is ready and willing to lend money to all and sundry, provided that they are from his point of view eligible. We do not, of course, mean to say that a moneylender can evade the Act by limiting his clientele to those whom he chooses to designate as 'friends' or otherwise, as observed by Farwell, J. in *Litchfield v. Dreyfus*, (1906) 1 KB 584. It is, therefore, a question of fact in each case whether a person was really carrying on the business of moneylending as a business, or was merely lending money as an incident of another business or to a few old friends by way of friendship."

12. It is clear from the aforesaid discussion that by advancing two loans under the hand-notes Exs. D-1 and P-1 to the defendant Babulal through whose Adhat the plaintiff sold his agricultural produce, the plaintiff did not become a moneylender. Indeed, the second loan is really not even an independent loan as it is in the nature of renewal of the first loan. We are clearly of opinion that on the evidence produced the defendants have failed to make out that the plaintiff is a moneylender. The finding of the trial Court on this point is erroneous.

13. In view of our finding that the plaintiff is not a moneylender, he could not be deprived of interest and costs simply on the ground that he did not send annual statement of accounts as is required to be done by a moneylender under the Moneylenders Act. For the same reason, the plaintiff was not required to get himself registered under the Act for bringing the suit.

14. The next question to be considered in this appeal is about the plaintiff's

right to recover from the defendant Babulal duty and penalty paid under Section 35 of the Stamp Act on Ex. P-1. We have already stated that the defendants raised an objection that Ex. P-1 was a bond and that being under-stamped it was invalid. This objection was accepted by the trial Court and the plaintiff had to pay Rs. 1,210 as duty and penalty under Section 35 for making the document admissible in evidence. The plaintiff claimed that he is entitled to recover this amount from the defendant under Section 44 of the Act. As provided in Section 29 of the Act, the expense for providing the proper stamp on a bond is to be borne by its executor. Ex. P-1 was executed by the defendant Babulal. The duty to bear the expense for providing the proper stamp on Ex. P-1 was, therefore, on him. In accordance with sub-section (1) of Section 44 the plaintiff is entitled to recover the duty and penalty paid by him under Section 35 from the defendant and this amount can be included as costs in the suit as provided in sub-section (3) of the same section: (See *Lokmat Motor Service v. New Lokmat Lodging*, AIR 1945 Nag 178).

15. The question that now remains for our decision is whether the defendant Rajendra Kumar can be made liable. We have already said that the hand-note Ex. P-1 is executed by the defendant Babulal alone. The plaintiff seeks to make Rajendra Kumar liable on the allegation that the business carried on in the name of Babulal Rajendra Kumar is a joint business of both Babulal and Rajendra Kumar. There is no evidence that this business was an ancestral business or that it was opened with the help of joint family funds or joint funds. The evidence of Babulal is that the business was started by him in 1954-55 after obtaining loans from Singhai Karelal Kundanlal and that this was an entirely new business started by him in which Rajendra Kumar had no interest or share. It is true that the name of Rajendra Kumar is associated in the name under which the business is carried on. It is also true that there is evidence that Rajendra Kumar helped his father Babulal in carrying on the business. But these facts are insufficient to hold that Rajendra Kumar had any interest in the business. It is a common practice to associate the name of sons and other members of the family in the business. It is also natural for a son to help his father in the business. But these facts cannot

give rise to an inference that the son whose name is associated in the business or who helps the father in his business has any interest in the business. We are, therefore, of opinion that Rajendra Kumar cannot be made personally liable for payment of the money due under Ex. P-1. Rajendra Kumar, however, being the son of Babulal is under a pious obligation to discharge his debts. It has been admitted by Babulal that there has been no partition between him and Rajendra Kumar. Although Babulal in his evidence denies existence of any joint Hindu family property, no enquiry has been made in that direction. It is now settled law that debts incurred by the father in the course of a business started by him are not avyavaharika debts and the sons are under a pious obligation to discharge such debts. The text of Gautama to the effect that the sons are not liable for their father's commercial debts has long become obsolete (Mulla, Hindu Law, 13th Edition, p. 353; Mayne, Hindu Law, 11th Edition, p. 400; Venkateswara Rao v. Ammayya, AIR 1939 Mad 561 and Ramsingh v. Jalamsingh, AIR 1939 Nag 192.) Rajendra Kumar, therefore, although not personally liable can be made liable for the payment of the amount due under Ex. P-1 to the extent of his share in the joint family property, if any: (see the 2nd proposition in Brij Narain v. Mangala Prasad, AIR 1924 PC 50 at p. 56 approved Faquir Chand v. Harnam Kaur, AIR 1967 SC 727).

16. It was argued by the learned counsel appearing for the defendants-respondents that as the plaintiff has come with a false case that cash was advanced to the defendant Babulal at the time when Ex. P-1 was executed and as he persisted in saying that in his statement, costs should not be allowed. We are, however, not inclined to accept this argument. It is true that the plaintiff's evidence is false in this respect that no cash was actually received by him before execution of Ex. P-1 and no cash was actually handed over by him to the defendant at the time when Ex. P-1 was executed. But the legal result of the transaction as discussed earlier was the same. Therefore, we do not find that there is sufficient ground to disallow costs of the suit to the plaintiff.

17. Learned counsel for the defendants prayed before us for grant of instalments under sub-rule (1) of Order 20, Rule 11, C.P.C. There is, however, no material to know as to what is the present financial position of the defendants. In

the absence of any material on that point we are not in a position to examine the merits of the prayer for instalments made by the learned counsel. It would, however, be open to the defendants to apply under sub-rule (2) of Order 20, Rule 11 for grant of instalments. Under a local amendment of this sub-rule, instalments can be allowed without the consent of the decree-holder even after the passing of decree.

18. In the result, First Appeal No. 111 of 1971 filed by the plaintiff Parmanand is allowed with costs. In addition to the amount of Rs. 9081 decreed by the trial Court, the plaintiff will be entitled to get Rs. 6 as notice expenses and Rupees 954 as interest upto the date of the suit. The plaintiff will get interest pendente lite and till payment at 4 per cent as allowed by the trial Court. The plaintiff will also recover costs of the suit incurred by him in the trial Court. The amount of Rs. 1,210 paid as duty and penalty on Ex. P-1 shall be included in the costs of the suit which the plaintiff shall recover from the defendants. The liability of the defendant Rajendra Kumar will, however, be limited to the extent of his share in the joint family property, if any. First Appeal No. 153 of 1971 is dismissed, subject to this direction to be incorporated in the decree that the liability of Rajendra Kumar shall be limited to the extent of his share in the joint family property, if any. The parties shall bear their own costs of this appeal.

Order accordingly.

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A. P. SEN AND R. K. TANKHA, JJ.

Daryao Singh and others, Appellants
v. Smt. Halkibai and others, Respondents.

First Appeal No. 120 of 1971, D/- 22-1-1976.*

(A) Transfer of Property Act (1882),
S. 41 — Benami transaction — Test to determine.

The doctrine of advancement is not applicable in India and, therefore, when property is purchased by a father in the name of his son, or by a brother in the name of his widowed sister dependant on

* (From decree of R. L. Sanghani, 3rd Addl. Dist. J., Bhopal, in C. S. No. 10-A of 1968, D/- 2-9-1971.)

him, it must be presumed that they are benamidars, and if they claim it as their own by alleging that the father or the brother intended to make a gift of the property to them, the onus rests upon them to establish such a gift. (Para 5)

The fact that the consideration has been paid by a person other than the ostensible owner is not necessarily in itself sufficient to establish that such a transaction is benami. That test is subject to the qualification "in the absence of all other relevant circumstances". It is, therefore, of utmost importance in determining the question to consider (i) the surrounding circumstances, (ii) the position of the parties and their relations to one another, (iii) the motives which could govern their actions, (iv) their ex-subsequent conduct, and (v) possession of the title deed. (Para 9)

Held, on a consideration of the surrounding circumstances and the probable cause likely to have operated on the minds of the parties to bring about the transaction, that the sale was taken by one G in the name of his son and his widowed sister with the object that the property should belong to them and it should not be within the reach of one D or himself. The property was mutated in their names. They were in possession and enjoyment of the same. They were dealing with it as their own. There was apparently no reason for G to purchase the property benami in their names. (Para 15)

Cases Referred: Chronological Paras

(1966) Criminal Revn. No. 293 of 1965, D/-
18-8-1966 (Madh Pra) 3
AIR 1957 SC 49 = 1956 SCR 691 7
AIR 1949 FC 88 = 1945 FLJ 98 8
AIR 1925 PC 181 = 52 Ind App 286 5, 10

B. K. Pandey, for Appellants; R. D. Hundikar, for Respondents.

A. P. SEN, J.:— This judgment will also govern the disposal of First Appeal No. 121 of 1971 (Daryao Singh v. Smt. Halkibai and others).

These appeals brought from a common judgment of Shri R. L. Sanghani, IIIrd Addl. District Judge, Bhopal, dated 2nd September 1971, raise a common question and, therefore, they are disposed of by a common judgment.

2. The relevant facts, in brief, are as follows: The field Khasra No. 77/6/2, area 29.54 acres, situate in village Kon-dari, belonged to Major Wali Mohammad. By an agreement dated 14-6-1954, Ex. P-19, he agreed to sell the field to Bare-

lal for Rs. 3692.50 p. pursuant to the agreement, he received Rs. 1,000 by way of earnest money. On 2-8-1954 Barelal paid him Rs. 700, vide receipt, Ex. P-20. Barelal paid Rs. 1,848 in all but could not arrange for the balance and evidently abandoned the contract in favour of Ganesh Singh, his brother-in-law, i.e., wife's brother. The balance consideration of Rs. 1844.50 was, accordingly, paid by Ganesh Singh. Wali Mohammed executed a sale-deed on 22-6-1955, Ex. P-21, of the said field in favour of Sunder Singh minor son of Ganesh Singh and Mst. Mathura Bai, his widowed sister and their names were duly mutated as the khatedars of the same. On 28-5-1965, Sunder Singh and Mst. Mathura Bai entered into an agreement, Ex. D-2, to sell the land to Barelal and Ramratan for a consideration of Rs. 24,000. They received Rs. 18,000 under the agreement and placed the purchasers in possession. Incidentally, Barelal is the father-in-law of Sunder Singh, and Ramratan, the brother-in-law of Ganesh Singh. This led a dispute relating to possession between Daryao Singh on the one hand (party No. I) and Ramratan on the other (party No. II), and there was an imminent apprehension of breach of peace, and on the report of the Station House Officer, Bari, proceedings under Section 145 of the Code of Criminal Procedure were started. On 6-10-1965, the Sub-Divisional Magistrate, Bareilly, passed a preliminary order under Section 145 (4) of the Code, requiring the parties to file their statements in respect of their respective claims, and placed the disputed land under attachment on 27-10-1965. The party No. I, Daryao Singh, claimed to be in possession of the disputed land in pursuance of an earlier agreement dated 6-8-1964, Ex. P-5, entered into with Ganesh Singh, acting as guardian of his minor son Sunder Singh, and Mst. Mathura Bai, under the terms of which Ganesh Singh had agreed to sell the land to him for a consideration of Rs. 21,000, and alleged that he had paid Rs. 10,750 towards part-payment of the price. On the other hand, the Party No. II, Ramratan, claimed to be in possession along with Barelal, by virtue of the aforesaid agreement dated 28-5-1965, Ex. D-2, entered into with Sunder Singh and Mst. Mathura Bai, on their paying Rs. 18,000.

3. On 15-11-1965, i.e., after passing of the aforesaid preliminary order, Sunder Singh and Mst. Mathura Bai executed the sale-deed, Ex. D-3, in favour of Barelal and Ramratan, on receipt of the

balance consideration of Rs. 6,000. On 17-11-1965, Barelal and Ramratan instituted Civil Suit No. 12-A of 1965 for declaration of their title too, and for grant of perpetual injunction in respect of Khasra No. 77/6/2, on the strength of their sale-deed, Ex. D-3, against Daryao Singh, his brothers Sethji and Dadu Bhaiya, and sons Hanumat Singh and Himmat Singh, who, in their written statement filed on 1-2-1966 alleged that Sunder Singh and Mst. Mathura Bai were not the real purchasers, under the sale-deed dated 22-6-1955, Ex. P-21, executed by Major Wali Mohammad, but were benamidars for Daryao Singh. During the pendency of this suit, the Sub-Divisional Magistrate passed a final order dated 19-4-1966, declaring Ramratan (Party No. II) to be in possession of the disputed land on the date of the preliminary order and two months next before the date of such order. The final order of the Sub-Divisional Magistrate, Bareilly was eventually upheld by the High Court in Criminal Revn. No. 298 of 1965 *Daryao Singh v. Ramratan* on 18-8-1966. Thereafter, on 10-10-1966 Daryao Singh and his two minor sons Sher Singh and Achhe Bhaiya alias Daulat Singh brought Civil Suit No. 10-A of 1968, for specific performance of the agreement dated 1-10-1964, Ex. P-5, against Ganesh Singh. They subsequently amended the plaint and sought a declaration that the sale-deed dated 22-6-1955, Ex. P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai was a benami one for Ganesh Singh. The points involved in both the suits were common and the evidence was also common, and, therefore, the parties requested that the suits be tried together; and, consequently the evidence was recorded in Civil Suit No. 10-A of 1968, and the documents which were on the file of Civil Suit No. 12-A of 1965, were brought on the record of that suit.

4. The learned Addl. District Judge, in a carefully written judgment, has found on the evidence that though Daryao Singh paid the balance of consideration amounting to Rs. 1844.50 p., he was not the real purchaser under the sale-deed dated 22-6-1955, Ex. P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai; and, that they were, therefore, not benamidars for him, but were in possession of the property in their own rights, before they sold the same to Barelal and Ramratan by the sale-deed dated 15-11-1965, Ex. D-3,

for a consideration of Rs. 24,000. He has also found that when Ganesh Singh paid the balance consideration of Rs. 1844.50 p. to Major Wali Mohammad on 22-6-1955 for execution of the sale-deed dated 22-6-1955, Ex. P-21, in favour of Sunder Singh and Mst. Mathura Bai, he intended that title should pass to them and not that they should be mere benamidars for him. He has further found that since Sunder Singh had attained majority, his father Ganesh Singh had no authority in him to act as his guardian and, therefore, the alleged agreement dated 1-10-1964, Ex. P-5, entered into by Ganesh Singh, purporting to act as guardian of his minor son Sunder Singh, in favour of Daryao Singh, was not binding on Sunder Singh and thus did not create any right in Daryao Singh to obtain a sale-deed from Sunder Singh. On these findings, the learned Addl. District Judge has dismissed Civil Suit No. 10-A of 1968 whereby Daryao Singh and his two minor sons claimed specific performance of the alleged agreement dated 1-10-1964, Ex. P-5, entered into by Ganesh Singh, purporting to act as guardian of his minor son Sunder Singh, and Mst. Mathura Bai, and decreed Civil Suit No. 12-A of 1965 brought by Barelal and Ramratan declaring that they were the owners of the suit land, and granting a perpetual injunction restraining Daryao Singh, his brothers Sethji and Dadu Bhaiya, and sons Hanumat Singh and Himmat Singh, from interfering with their possession of the land.

5. The short point involved in these appeals is whether Sunder Singh and Mst. Mathura Bai were mere benamidars for Ganesh Singh and, therefore, the agreement dated 1-10-1964, Ex. P-5, entered into by him was specifically enforceable. It is urged that the learned Addl. District Judge was in error in holding that Ganesh Singh intended that title under the sale-deed should pass to his son Sunder Singh and widowed sister Mst. Mathura Bai for which, it is said, there is no foundation in the pleadings. The submission is that the doctrine of advancement is not applicable in India and, therefore, when property is purchased by a father in the name of his son, or by a brother in the name of his widowed sister dependant on him, it must be presumed that they are benamidars, and if they claim it as their own by alleging that the father or the brother, as here, intended to make a gift of the property to them, the onus rests upon them to establish such a gift. In other words, the contention is

that the presumption is, therefore, in favour of the transaction being benami and reliance is placed on *Lakshmiah Chetti v. Kothandrama Pillai*, AIR 1925 PC 181 and on certain other decisions. There can be no dispute with the proposition. The difficulty, however, lies in the application of that principle to the facts of the present case.

6. Mayne in his *Treatise on Hindu Law*, 11th Edn., makes the following observation at p. 953:

"A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating an intention to benefit the other. The benamidar, therefore, has no beneficial interest in the property or business that stands in his name; he represents in fact the real owner and so far as their relative legal position is concerned, he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The general rule and principle of the Indian law as to resulting trusts differs but little if at all, from the general rule of English law upon the same subject."

7. Venkatarama Aiyar J. in delivering the judgment of the Supreme Court in *Sree Meenakshi Mills Ltd. v. Income-tax Commr.*, AIR 1957 SC 49, states:

"In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is

only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B."

8. The burden was, in the instant case, upon Daryao Singh to prove that the purchase was benami. There is no presumption in Hindu Law that transactions standing in the name of the wife are the husband's transactions. The decision of the Court must not rest upon suspicion, surmises and mere conjectures but upon legal grounds and on legal testimony, and the onus of establishing that a transaction is benami is on the person asserting benami nature of the transaction and it must be strictly made out. In the absence of such evidence, the apparent title must prevail. (See *Gangadara Ayyar v. Subramania Sastrigal*, AIR 1949 FC 88).

9. Even in cases where there is positive evidence that money is contributed by the husband and not the wife, that will not conclude the matter as to its being benami, though that is an important criterion. The fact that the consideration has been paid by a person other than the ostensible owner, is not necessarily in itself sufficient to establish that such a transaction is benami. That test is subject to the qualification "in the absence of all other relevant circumstances". It is, therefore, of utmost importance in determining the question to consider (i) the surrounding circumstances, (ii) the position of the parties and their relations to one another, (iii) the motives which could govern their actions, (iv) their ex-subsequent conduct, and (v) possession of the title deed.

10. The pronouncement of their Lordships of the Privy Council in *Sura Lakshmiah Chetty v. Kothandarama Pillai* (supra) cannot be interpreted as laying down broadly that a purchase in India by a husband in the name of his wife is always to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. It is to be noted that their Lordships never intended to lay down a proposition like this. There, the husband purchased the property in the name of his wife with his own money. The law on the point was thus laid down by Sir John Edge:

"There can be no doubt that a purchase in India by a native of India of property in the name of his wife unexplained by other proved or admitted facts is to

be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife."

It is clear from the rule thus enunciated that the fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property had been purchased. It is only when the purchase is "unexplained by other proved or admitted facts" that the conclusion should follow that the transaction is benami for the husband.

11. In our view the appeals must fail for various reasons. In the first place, the plaintiffs in this suit, i.e., Daryao Singh and his two minor sons, are not very sure of their stand. Daryao Singh filed two plaints. In the first plaint presented on 1-10-1966 the prayer sought in para 20 (a) was that it be declared that the sale-deed dated 22-5-1955, Ex. P-21, executed by Major Wali Mohammad in favour of Sunder Singh and Mst. Mathura Bai was a benami one for Ganesh Singh. In the second plaint, i.e., the amended plaint filed on 20-9-1967 that relief was deleted but it was nonetheless alleged in para 8 (1) that the transaction throughout was benami and that Ganesh Singh was the real purchaser and sole beneficiary and he alone utilised the usufruct thereof, meaning thereby that Sunder Singh and Mst. Mathura Bai were mere benamidars. In the connected suit, Civil Suit No. 12-A of 1965 which was prior in point of time, Daryao Singh and others impleaded as the defendants, had in their written statement filed on 1-2-1966, i.e., much earlier, alleged in para 15 thereof that Sunder Singh and Mst. Mathura Bai were benamidars for Daryao Singh. In view of these conflicting pleas, it is clear that Daryao Singh and others have not come to Court with a definite case. They have been challenging their stand from time to time as it suits their purpose. We pointedly asked the learned counsel appearing for them, and he unequivocally stated before us that he adopts the stand taken in the amended plaint, i.e., the one filed on 20-9-1967 in this suit. He also advanced his arguments upon the basis that Sunder Singh and Mst. Mathura Bai were benamidars for Ganesh Singh. The learned counsel having given up the plea that Sunder Singh and Mst. Mathura Bai were benamidars for Daryao Singh, the finding of the learned Addl. District Judge that they were not benamidars for Daryao Singh must be upheld.

12. Upon a consideration of the evidence in the light of all the circumstances appearing, the learned Addl. District Judge has, however, held that purchase by Ganesh Singh of the suit land in the name of his son Sunder Singh, and widowed sister Mst. Mathura Bai, with his own funds, was with the object that it should belong to them and should not be within his reach and, therefore, the transaction was not benami. That conclusion of his is, in our view, unassailable on the evidence on record. In a benami purchase of land, the person who is proved, as a fact, to be the beneficial owner, is the actual owner.

13. Bearing these principles in mind, we find that there was no particular motive or reason for Ganesh Singh to have purchased the suit land benami in the names of his son Sunder Singh and widowed sister Mst. Mathura Bai. The reason put forward by Daryao Singh in the plaint in Civil Suit No. 10-A of 1968, and in the written statement in Civil Suit No. 12-A of 1965 for going in for the benami transaction was that though he had paid to Wali Mohammad Rs. 1844.50 p. under agreement dated 14-6-1954 Ex. P-19, but still balance of Rs. 1844.50 p. remained payable and so he requested orally his brother-in-law Ganesh Singh to lend him that amount, and he agreed orally to advance it on condition that a benami sale-deed should be executed in the name of his minor son Sunder Singh and his widowed sister Mst. Mathura Bai, who had come to live permanently under his roof, and also that, i.e. Ganesh Singh was to remain in possession of, and enjoy the usufruct of that part of the land, which was not bid, and had already been brought under cultivation, for 8 years from the date of sale, and after the expiry of that period, he would convey the property back to Daryao Singh by a deed of re-conveyance and also restore possession to him, and thus the loan of Rs. 1844.50 p. shall stand fully paid off. It was upon those terms, Daryao Singh alleged that he in good faith and bona fide belief accepted the proposal and requested Major Wali Mohammad to execute a sale-deed in the name of Sunder Singh and Mst. Mathura Bai. It was further alleged that the transaction was, in fact, a sort of oral usufructuary mortgage in favour of Ganesh Singh by Daryao Singh. The stand taken in the amended plaint is, therefore, that Daryao Singh and not Ganesh Singh was the real purchaser and Sunder Singh and Mst.

Mathura Bai were mere benaminars for him.

14. In support of his arguments, learned counsel appearing on behalf of Daryao Singh and others drew our attention to the testimony of Zafar Ali Hus-sain (P.W. 13), agent of Major Wali Mo-hammad, Narbada Charan (P.W. 1) petition writer, Premnarayan (P.W. 3), Nar-bar Singh (P.W. 6), village patel, Daryao Singh (P.W. 7), Kishore Singh (P.W. 8), Kamal Singh (P.W. 11) and Pritam Singh (P.W. 12). Their evidence tends to prove the alleged oral agreement between Daryao Singh and Ganesh Singh. The evidence was to substantiate the plea that Daryao Singh was the real purchaser, and the balance of consideration of Rupees 1,844.50 p. was advanced by Ganesh Singh under the arrangement pleaded. That evidence is, therefore, of no avail. Besides, we have no manner of doubt that the evidence is got-up. It appears to us that Daryao Singh and Ganesh Singh have joined hands to defeat the rights of Barelal and Ramratan. It would be sufficient if we refer to the testimony of Zafar Ali Hus-sain (P.W. 13), agent of Major Wali Mo-hammad. This witness would have us believe that when the sale-deed, Ex. P-21 was executed, it was settled orally between Daryao Singh and Ganesh Singh, that in lieu of the loan of Rs. 1,844.50 p. advanced by Ganesh Singh, he would remain in possession of the lands in suit and enjoy the usufruct thereof, and after expiry of the period, execute a deed of reconveyance in favour of Daryao Singh. The testimony of this witness does not inspire confidence. He admits during his cross-examination, that the talk took place in the village. He was the agent of Major Wali Mohammad. He would, therefore, be present at the office of the Sub-Registrar at the time of the execution, and not at the time of the alleged talk in the village. The evidence of the other witnesses is no better.

15. In our judgment, the learned Additional District Judge has rightly held, on a consideration of the surrounding circumstances and the probable causes likely to have operated on the minds of the parties to bring about the transaction, that the sale was taken by Ganesh Singh in the name of his son Sunder Singh and his widowed sister Mst. Mathura Bai, with the object that the property should belong to them and it should not be within the reach of Daryao Singh or himself. The property was mutated in their names.

They were in possession and enjoyment of the same. They were dealing with it as their own. There was apparently no reason for Ganesh Singh to purchase the property benami in their names. The two documents on which Daryao Singh relies, Exs. P-6 and P-18, are destructive of his case that Sunder Singh and Mst. Mathura Bai were mere benamidars of Ganesh Singh. Ganesh Singh has put his signature for and on behalf of Sunder Singh, and not on his own behalf. This indicates that at the time of execution of these documents, both Daryao Singh and Ganesh Singh considered that Sunder Singh and Mst. Mathura Bai were the real owners, and that Ganesh Singh could act only on their behalf, and not in his own right. The alleged agreement, Ex. P-5, executed by Ganesh Singh also amounts to an admission by him that, in fact, Sunder Singh and Mst. Mathura Bai were the real owners of the suit lands. We also uphold the finding of the learned Additional District Judge that since Ganesh Singh was not the real owner, and inasmuch as there was no lawful authority in him to act on behalf of Sunder Singh and Mst. Mathura Bai, the agreement dated 1-10-1964, Ex. P-5, executed by Ganesh Singh on behalf of Sunder Singh as his guardian, would not be binding on Sunder Singh, and could not create any right in Daryao Singh to obtain a sale-deed from Sunder Singh, in pursuance of the said agreement.

16. The appeals must, accordingly, fail and are dismissed with costs. Counsel's fee as per schedule, if certified.

Appeals dismissed.

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A. P. SEN AND R. K. TANKHA, JJ.

Union of India and others, Appellants v. Chouthmal, Respondent.

First Appeal No. 1 of 1971, D/- 20-12-1975.*

(A) Constitution of India, Art. 299 (1) — Contract with Government — Provisions of Art. 299 (1) are mandatory — Non-compliance of, renders the contract void and unenforceable — No question of estoppel or ratification arises in such case.

*(From decree of P. C. Gupta, 1st Addl. Dist. J., Raipur, in Civil Suit No. 1-B of 1967, D/- 18-9-1970.)

GT/HT/C348/76/KSB

A contract between the Union and a private individual must comply with the form required by Art. 299 (1) of the Constitution. The three conditions required by Art. 299 (1) for the making of the contract are (1) it must be expressed to be made by the President of India, (2) it must be executed and (3) the execution should be by such person and in such manner as the President may direct or authorise. The provisions of Art. 299 (1) are mandatory in character and a contravention thereof nullifies the contract and makes it void. The provisions are embodied in the Constitution on the grounds of public policy and protection of general public and these formalities cannot be waived or dispensed with. That is the reason why the plea of estoppel or ratification cannot be permitted in such a case. AIR 1962 SC 110; AIR 1962 SC 113; AIR 1962 SC 779; AIR 1963 SC 1685; AIR 1964 SC 152; AIR 1967 SC 203 and AIR 1968 SC 1218, Rel. on. (Para 8)

A binding contract by tender and acceptance can also come into existence, if the acceptance is by a person duly authorised in this behalf by the President of India. AIR 1972 SC 915 and AIR 1972 Madh Pra 43, Rel. on. (Para 10)

Held on facts that neither the Chief Administrator, Dandakaranya Project nor the conservator of forests had the requisite authority and therefore, the offer of the plaintiff to supply 2,000 sal electric Transmission poles, Ex. D-3, was not in pursuance of an invitation issued by or on behalf of the President of India; nor was there any acceptance in writing which was expressed to be made in the name of the President and executed on his behalf by a person authorised in that connection. Hence, no binding contract came into existence and the Union of India could not be made liable in damages for the breach thereof by subsequent cancellation. (Para 18)

Cases Referred: Chronological Paras

AIR 1972 SC 915 = (1972) 3 SCR 437 11

AIR 1972 Madh Pra 43 = 1971 Jab LJ 862 10

AIR 1968 SC 1218 = (1968) 3 SCR 214 8, 9

AIR 1967 SC 203 = (1966) 3 SCR 919 8, 9

1967 MPLJ 104 = 1966 Jab LJ 1102 8, 9

AIR 1964 SC 152 = (1964) 2 SCR 859 8, 9

AIR 1963 SC 1685 = (1964) 3 SCR 164 8, 10

AIR 1962 SC 110 = (1962) 1 SCR 827 8, 9

AIR 1962 SC 113 = (1962) 2 SCR 880 8, 9

AIR 1962 SC 779 = 1962 Supp (1) SCR 876 8, 9

A. R. Choubey and Ku. Rama Gupta, for Appellants; R. S. Dabir and K. M. Agarwal, for Respondent.

A. P. SEN, J.:— This appeal, preferred by the Union of India and the Chief Administrator, Dandakaranya Project, is directed against the judgment of the First Addl. District Judge, Raipur, decreeing the plaintiff's suit for recovery of Rupees 42,500 as damages for breach of a contract.

2. The facts shortly stated are as follows. In 1964, the Dandakaranya Project was in immediate need of about 5,000 wooden poles for laying electric Transmission lines to the Mana Camp. The plaintiff had evidently approached the Chief Administrator in that connection. On 14-4-1964, while Shri F. A. Lahiri, Conservator of Forests, Dandakaranya Project, was camping at Raipur, the plaintiff made a written offer, Ex. D-3, to the Chief Administrator, Dandakaranya Project for supply of 2,000 sal Electric Transmission poles at the rate of Rs. 40 per pole F.O.R. Kurud.

The Conservator of Forests after obtaining the approval of the Chief Administrator by his memo. No. CF-64/1284, dated 18-4-1964, Ex. P-1, placed an order for the supply of the poles as per specifications given. The terms of the order stipulated, among other things, that the plaintiff would supply 1,000 poles by 5-5-1964. By this memo the plaintiff was also required to deposit by way of security Rs. 4,000, i.e., 5% of the total value of the goods contracted for, and the deposit was, accordingly, made.

3. By his telegram dated 6-5-1964, followed by his confirmatory memo. No. TH/165/W/Cf-64/1598 of even date, Ex. P-7, the Conservator of Forests, however, cancelled the order. This was done at the instance of Secretary to Dandakaranya Development Authority, Government of India, Ministry of Rehabilitation, since the Government were able to locate alternative sources of supply at much cheaper rates, i.e., from the Government of Madhya Pradesh, Forest Department. The plaintiff's case is that the unilateral cancellation of the order constitutes a breach of contract on the part of the Union of India and, therefore, it was liable to pay an amount of Rs. 42,500 as damages for the alleged breach.

4. The learned Addl. Dist. Judge has decreed the plaintiff's claim for

damages in its entirety with pendente lite and future interest thereon at 6% per annum till realization against the Union of India the defendant No. 1. As respects the Chief Administrator, Dandakaranya Project and Shri F. A. Lahiri, Conservator of Forests, Dandakaranya Project, the defendants Nos. 2 and 3, the learned Judge has held that they were not acting in their personal capacity but by virtue of their office, they could not, therefore, be made liable for the alleged contract.

5. The defendant No. 3, Shri F. A. Lahiri, died during the pendency of the appeal, and his name has been struck off from the array of respondents.

6. The short question for consideration in the appeal is whether there was a binding, valid and concluded contract between the parties. The Union of India and the Chief Administrator, the defendants Nos. 1 and 2; as well as the defendant No. 3, the Conservator of Forests, in their written statements pleaded, *inter alia*, that under the law the so-called order was not a contract and was not binding on the Union of India, as it was not placed for and on behalf of the President of India. They further pleaded that the Chief Administrator and the Conservator of Forests, the defendants Nos. 2 and 3, were not persons authorised to make a contract on behalf of the President of India and, therefore, the alleged contract was not binding or enforceable against the Union of India. That was obviously a plea questioning the validity of the contract because the provisions of Art. 299 (1) of the Constitution had not been complied with. The learned Addl. District Judge is, therefore, wrong in observing that there is no such plea in the written statements alleging the non-compliance of Art. 299 (1).

7. In the appeal filed by the Union of India, the principal point taken is that there was no binding contract in view of the breach of Art. 299 (1) of the Constitution. In the alternative, the second point taken is that, even if the requirements of Art. 299 of the Constitution had been complied with, the plaintiff having himself committed a breach of the contract, his claim for damages was not maintainable. In the view that we take on the question whether or not the provisions of Art. 299 (1) of the Constitution have been complied with, there is no need for us to go into the question of breach.

8. It is now well settled that where a contract between the Government and

a private individual is not in the form required by Art. 299 (1) of the Constitution, it was void and could not be enforced and, therefore, the Government cannot be sued by a private individual for breach of such a contract. Article 299 (1) lays down three conditions for the making of a contract by a Governor of a State. They are: it must be expressed to be made by the Governor; it must be executed, and the execution should be by such person and in such a manner as the Governor may direct or authorise. The principle is that provisions of Art. 299 (1) are mandatory in character and the contravention thereof nullifies the contracts and makes them void. There is no question of estoppel or ratification in such a case. The reason is that the provisions of Art. 299 (1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in the Constitution on the ground of public policy—on the ground of protection of general public and these formalities cannot be waived or dispensed with. That is the reason why the plea of estoppel or ratification cannot be permitted in such a case. [See, *Bhikraj Jaipuria v. Union of India*, AIR 1962 SC 113; *State of West Bengal v. B. K. Mondal & Sons*, AIR 1962 SC 779; *State of Bihar v. Karam Chand Thapar & Bros. Ltd.*, AIR 1962 SC 110. *Union of India v. A. L. Rallia Ram*, AIR 1963 SC 1683; *New Marine Coal Co. v. Union of India*, AIR 1964 SC 152; *State of Madhya Pradesh v. Ratanlal*, 1967 MP LJ 104 (SC); *K. P. Chowdhry v. State of Madhya Pradesh*, AIR 1967 SC 203 and *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218].

9. In *Karamchand Thappar's case*, (AIR 1962 SC 110) (supra), their Lordships of the Supreme Court laid down that the authority need not be by a general but could be by an *ad hoc* order. The dictum laid down in that case was applied in *Bhikraj Jaipuria v. Union of India*, (AIR 1962 SC 113) (supra), their Lordships pointed out that the manner of conferment of authority upon persons of Government for the purpose of execution of contract may differ from case to case. Sometimes a rule, sometimes a notification and sometimes a special authority may validly issue. Nevertheless, in all the cases, their Lordships have laid down that all the three tests indicated must be satisfied and that Art. 299 (1) of the Constitu-

tion is mandatory. In *State of Madhya Pradesh v. Ratanlal*, (1967 MPLJ 104) (SC) (supra), their Lordships have reiterated these principles. In *State of West Bengal v. B. K. Mondal & Sons*, (AIR 1962 SC 779) (supra) and *New Marine Coal Co. v. The Union of India*, (AIR 1964 SC 152) (supra), their Lordships said that even if the contract fails, payment may be ordered quantum meruit on the basis of Section 70 of the Contract Act. That view was reiterated in *Mulamchand v. State of Madhya Pradesh*, (AIR 1968 SC 1218) (supra). In *K. P. Chowdhry v. State of Madhya Pradesh*, (AIR 1967 SC 203) (supra), their Lordships have held that the provisions of Art. 299 (1) of the Constitution do not contemplate implied contract between the Government and any other person.

10. It is now settled by their Lordships that though the words 'expressed' and 'executed' in Art. 299 (1) of the Constitution might suggest that it should be by a deed or a formal written contract, a binding contract by tender and acceptance can also come into existence, if the acceptance is by a person duly authorised on this behalf by the President of India. This was stated by me in the *State of Madhya Pradesh v. Firm Gopichand Sarju Prasad*, AIR 1972 Madh Pra 43:

"There was a controversy whether the words 'expressed to be made' in Article 299 (1) of the Constitution required a formal deed and excluded contracts by mere correspondence. But the controversy has been set at rest by their Lordships in *Union of India v. A. L. Rallia Ram*, (AIR 1963 SC 1685) (supra), holding that a contract by tender and acceptance would be valid, provided the other requirements of Art. 299 (1) are fulfilled, their Lordships made the following pronouncement:—

"It is true that Section 175 (3) uses the expression 'executed' but that does not by itself contemplate execution of a formal contract by the executing parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is 'expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would confirm to the requirements of Section 175 (3)."

11. In *Union of India v. N. K. (Pvt.) Ltd.*, AIR 1972 SC 915 their Lordships, in somewhat similar circumstances,

where the Secretary to the Railway Board, on whose behalf offer of a company for purchase of rails was accepted, was not the person authorised to enter into a contract on behalf of the President of India, held that even if the letter of acceptance written by such authority was assumed to be a concluded contract, there was no valid and binding contract brought into existence. It is pertinent to notice their observations in that connection:—

"It is now settled by this Court that though the word 'expressed' in Article 299 (1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the President of India. A contract whether by a formal deed or otherwise by persons not authorised by the President cannot be binding and is absolutely void."

In that case, the only person authorised to enter into the contract on behalf of the President was the Director, Railway Stores. It was, however, urged that the Members of the Railway Board were Secretaries to the Central Government and hence the Board on whose behalf the Secretary communicated the acceptance could enter into a binding contract. In repelling the contention, their Lordships observed:—

"This submission also is without force because there is no material before us to conclude that the Board was so authorised. In these circumstances, even if the correspondence shows that the formalities necessary for a concluded contract have been satisfied and the parties were ad idem by the time the letter of acceptance of the 15th July, 1968 was written, about which we do not wish to express any opinion, there is no valid or binding contract because the letter of acceptance, on the evidence before us, is not by a person authorised to execute the contracts for and on behalf of the President of India."

That precisely is the case here.

12. There is no material before us to conclude that Chief Administrator, Dandakaranya Project much less the Conservator of Forests, were persons authorised to enter into such a contract. The learned Addl. District Judge has, however, by his finding dated 17-2-1969 strangely enough, holds that they were so authorised. That finding is based on an alleged admission which is not there, and

on a mis-reading of the relevant orders Shri Dabir, learned counsel for the respondent, frankly confessed that he would add very little beyond the finding of the learned Addl. District Judge. The learned Judge first spells out the so-called admission, stating:—

"In the present case, the copy of the Resolution placed by the defendants on record show clearly that the Government of India had set up a Central Authority to be known as Dandakaranya Development Authority and that the Chief Administrator of Dankaranya Project (defendant No. 2 in this case) was nominated as the Chief Executive Authority. The plaintiff had in this case called upon, with the permission of the Court, to answer the following interrogatory:

"Under what authority or power did the defendant No. 2 ask the defendant No. 3 to make the contract with the plaintiff and to place an order for supply of the contracted goods with the plaintiff?"

All the three defendants, including the Union of India, have answered the above interrogatory in the following manner:

"As per resolution of the Government of India, Ministry of Rehabilitation, dated 12-9-58, the Chief Administrator, Dandakaranya Project, is the Chief Executive Officer of the Dandakaranya Development Authority. Defendant No. 3 as Conservator of Forests, in the Dandakaranya Project, was directly subordinate to the Chief Administrator (defendant No. 2) in all matters and in duty bound to carry out all orders received from him time to time. The Chief Administrator (defendant No. 2) is also 'Head of Department' as defined in Rule 2 (10) of the Supplementary Rules issued by the Govt. of India.

2. That it was under the above authority and power that defendant No. 2 (Chief Administrator) asked defendant No. 3 to make purchase of poles of electric lines at Mana. Accordingly defendant No. 3 placed orders for supply of electric transmission poles with the plaintiff."

13. It is pertinent here to observe that upon the trial of issue No. (1) as a preliminary issue under Order 14, Rule 1 of the Code of Civil Procedure, the plaintiff sought leave to deliver three interrogatories to the defendants under Order 11, Rule 1 of the Code by his application dated 7-11-1968. The learned Judge, however, by order dated 8-11-1968, permit-

ted only interrogatory No. (2) to be served on the defendants Nos. 2 and 3. There was no leave granted to serve interrogatory No. (1), namely:

"Whether there is any written authorisation from the President of India or a person authorised by him in favour of the defendant No. 2 and/or the defendant No. 3 for making contracts on behalf of the defendant No. 1."

That was the material interrogatory, and since it was not served, there is no question of admission on the part of the Union of India.

14. By making a wrongful assumption, that there is such an admission, the learned Judge has held that the order placed by Shri F. A. Lahiri, Conservator of Forests, the defendant No. 3, acting under the orders of the Chief Administrator, Dandakaranya Project, the defendant No. 2, amounts to a contract expressed to be made in the name of, and for and on behalf of the President of India and, therefore, a valid and concluded contract between the parties. This is what the learned Judge observes:—

"It is hence not denied that the defendant No. 2 acting through the defendant No. 3 was duly authorised by the Union of India to make the contract. It is also not contended that the defendant No. 2 or the defendant No. 3 had not acted on behalf of the Union of India. The letter, by which the order was placed (Ex. P-1) is titled as coming from Govt. of India. It was signed by the defendant No. 3 in his official designation. It is also clear from the document Ex. D-4, a letter written by the defendant No. 3, to the defendant No. 2, that the letter approved the said order. The goods were being purchased for a Project of the Govt. of India. No rules have been placed before me to show that the President of India has made any rules that in executing a contract for the said Project the officer authorised in that behalf must describe himself as signing on behalf of the President. Hence, the facts of our case clearly show that the order placed by the defendant No. 3 acting under the orders of the defendant No. 2, amounts to a contract expressed to be made by the President of India and executed on behalf of the President of India. Hence, in answer to issue No. 1, I find that the agreement relied upon by the plaintiff is a valid and legal contract, and the issue is answered in the affirmative." This finding is wholly unwarranted and proceeds on a deliberate mis-construction of the relevant orders.

15. It is rather strange that the learned Addl. District Judge should have rejected the application made by the Union of India for examining Shri V. Natrajan, Secretary to the Dandakaranya Development Authority, Government of India, Ministry of Rehabilitation, on commission to prove the relevant order for delegation of powers, though he allowed the document to be filed, under Order 13, Rule 1 of the Code of Civil Procedure by order dated 4-3-1970. Curiously enough, the learned Judge has made use of the document, and yet treated it as an unproved document. The document is an authenticated copy of the order, and is on record. The reasons for rejecting it are neither sound nor sufficient. The document is above suspicion and of an unimpeachable character. The Union of India contends that the document is a certified copy of the public document and, therefore, needs no proof. There is no necessity for us to go into the question as the Union of India has since produced the original order, and also copies of the relevant Resolutions of the Government of India, Ministry of Rehabilitation, signed by the Secretary. These documents have been admitted by the respondent and, therefore, there is no need for us to remit the case for formal proof of the documents.

16. The interpretation placed by the learned trial Judge on the documents is patently wrong. The Government of India, Ministry of Rehabilitation has created an authority called the 'Dandakaranya Development Authority' for the effective and expeditious execution of Refugee Re-settlement in the Dandakaranya area and for the areas integrated development vide its Resolution dated 12th September, 1958 published in the Gazette of India dated 20th September 1958. According to this Resolution, the Chief Administrator of the Dandakaranya Project shall be the Chief Executive Officer of the Authority. The Authority has been vested with vast powers to create posts, appoint officers, sanction schemes and make direct purchase etc. The Authority also can delegate to the Chief Administrator, Dandakaranya Project, such of its powers as it may deem necessary for the speedy execution of the scheme. As per this Resolution, the Chief Administrator can, in turn, re-delegate with the concurrence of the Financial Advisor and the Chief Accounts Officer any of his powers to his subordinate officers in order to have

smooth and efficient running of administration.

17. According to the above Resolution, the Chief Administrator re-delegated purchase powers for purchase of materials on single tender basis including proprietary article upto Rs. 500 (in emergent cases, upto Rs. 1,000) to the Superintending Engineers, Director of Reclamation, and Store Purchase Officer. (Hq.) This was the document relied upon in the lower Court by the defendants. The Chief Administrator himself has got powers only upto Rs. 1,000 in this case and hence he had no authority or powers to order purchases more than this amount. The learned Judge, however, has linked the matter with an item in which the purchase power of the Chief Administrator is upto Rs. 15 lakhs. This is only for purchase after invitation of tenders and on negotiation. This has, therefore, no relevance at all in this case, as neither tenders were called for nor the letter was signed on behalf of the President of India. The Conservator of Forests, Dandakaranya Project, who signed the letter, Ex. P-1, had also not been empowered to do so, as only Superintending Engineers, Director of Reclamation and the Store Purchase Officer were authorised.

18. It, therefore, follows that the offer of the plaintiff to supply 2,000 sal electric transmission poles, Ex. D-3, was not in pursuance of an invitation issued by or on behalf of the President of India; nor was there any acceptance in writing which was expressed to be made in the name of the President and executed on his behalf by a person authorised in that connection. The Conservator of Forests' memo. No. CF-64/1284, dated 18-4-1964, Ex. P-1, placing an order for the supply of poles would not be sufficient compliance of the requirements of Article 299 (1) of the Constitution. As a result, no binding contract came into existence and the Union of India could not be made liable for damages for any breach thereof.

19. In view of the discussion aforesaid, there is no need for us to deal with the other questions. We would, however, like to mention that there was a breach of contract on the part of the plaintiff himself, by reason of his failure to supply 1,000 poles by 5-5-1964. The question of such breach is, however, immaterial as the plaintiff must fail for the reasons already stated. There being no binding, valid and concluded contract between the parties, the so-called order was

not a contract and not binding on the Union of India, as it was not placed for and on behalf of the President of India. The plaintiff is, therefore, not entitled to recover any damages for breach of contract.

20. The result, therefore, is that the appeal must succeed and is allowed. The plaintiff's suit is, accordingly, dismissed with costs throughout.

Appeal allowed.

AIR 1976 MADHYA PRADESH 205

A. P. SEN AND G. P. SINGH, JJ.

E. Nageshwar Rao, Appellant v. Dinesh Chandra Verma, Respondent.

First Appeal No. 195 of 1974, D/- 17-12-1975.*

(A) Transfer of Property Act (1882), S. 8 — Identity of property agreed to be sold — Determination — Principles. (Registration Act (1908), Ss. 21 and 22).

The description of property to be sold is essential to the validity of the agreement. Ordinarily, it may be inserted in the body of the deed or in the schedule annexed to the deed. If the description is short and, therefore, may conveniently be entered in the body of the deed, there may not be any objection to such incorporation. The description of the property to be sold should, however, be sufficient for the purpose of identification of the property. The area, situation, and holding or premises number should be given, the character of the land, boundaries thereof, its existing or former occupancy may sometimes be necessary. The conveyancer would do well to insert such description of the property as is in conformity with the provisions of Sections 21 and 22 of the Registration Act. Lands in cities and towns are very often surveyed and measured before the sale is completed. The purchaser, who is more often a stranger is enabled thereby to know the exact parcel of land he is purchasing. The survey and measurement of land being overt acts done at the site, the neighbouring owners may dispute the boundary and other persons having claims upon the land are likely to put forward their claims and

objections, if any, so that they may finally settle before the sale is completed.

(Para 6)

Held on facts that the agreement to sell contained description of the plot sufficient to locate the same. (Para 8)

B. C. Verma, for Appellant; P. C. Pathak, for Respondent.

A. P. SEN, J.:— These two appeals, First Appeals Nos. 195 and 238 of 1974, arise out of a suit for specific performance—Appeal No. 195 by the defendant is against the judgment of the IIIrd Addl. District Judge, Bilaspur, decreeing the plaintiff's claim for specific performance, while Appeal No. 238 is by the plaintiff against disallowing of costs.

2. The relevant facts, shortly stated, are as follows. The defendant, E. Nageshwar Rao, entered into a contract with the plaintiff, to sell a plot out of the compound of his bungalow at Link Road, Bilaspur, measuring 35'×60' @ Rs. 7 per sq. ft. The terms of the contract are embodied in writing, Ex. P-2, dated 31-1-1971. The defendant received Rs. 1,000 as earnest money in pursuance of the contract. The plaintiff brought the suit on the allegation that the sale-deed was to be executed and registered and possession of the plot delivered on 1-3-1971 but in spite of his requests the defendant did not turn up for execution of the sale-deed, that, even thereafter, he approached the defendant on many occasions, who orally, as also in writing, postponed the registration of the sale-deed on some pretext or the other, and that, finally he served a notice on the defendant to which no reply was sent, and that, the defendant continues in possession of the plot but wants to avoid the performance of contract.

3. To the plaintiff's claim for specific performance, the defendant pleaded, *inter alia*, that he was always willing to perform the contract and had no intention to dishonour the commitment; that it was due to certain other engagements that he had to postpone the matter; that the plot was not demarcated and the plaintiff did not give opportunity for that work; that though he wrote several letters to the plaintiff for postponement, he finally asked him to meet him on 6-2-1973, but the plaintiff did not turn up and himself did not avail of the opportunity and had instead in hot-haste and maliciously dragged him into the litigation; and, that though the expenses were to be borne by the parties equally, initially the plaintiff was to purchase the stamp-paper for the

*(From decree of R. K. Trivedi, Addl. Dist. J., Bilaspur, in Civil Suit No. 5-A of 1973, D/- 7-8-1974.)

sale deed and to incur expenses of registration, later half of the amount was to be deducted from the remaining sale consideration, and this was not done. In other words, his case was that the plaintiff himself was in breach and, therefore, not entitled to the relief of specific performance. That plea of his has not prevailed and the learned Addl. District Judge has decreed the plaintiff's claim for specific performance.

4. The only questions of substance that were urged before us, were, first, that the writing, Ex. P-2, does not contain any description of the land sought to be conveyed and, therefore, the identity of the plot cannot be fixed; and secondly, the plaintiff himself was in breach as there was failure on his part to purchase a stamp-paper and to get the sale-deed executed and registered. There is, in our opinion, no substance in any of these contentions.

5. The writing Ex. P-2, which is an earnest-receipt and has been impounded as an agreement, reads:—

"Received Rs. eleven hundred only as earnest money for proposed sale vacant plot of land measuring 35'×60' belonging to E. Nageshwar Rao at the rate of Rs. 7 per square feet. The vacant plot of land is situate behind Main Hospital and is in front of P.W.D. Office and is in corner of three blocks of houses situated there. The registration will be done by 1st March 1971 after the remaining amount is paid in full by the purchaser Shri Dinesh Chandra Verma (M. Lal).

Sd/- E. Nageshwar Rao
31-1-71."

To our mind, the document contains sufficient description of the plot so as to fix its location.

6. There can be no doubt that the description of the property to be sold is essential to the validity of the agreement. Ordinarily, it may be inserted in the body of the deed or in the schedule annexed to the deed. If the description is short and, therefore, may conveniently be entered in the body of the deed, there may not be any objection to such incorporation. The description of the property to be sold should, however, be sufficient for the purpose of identification of the property. The area, situation, and holding or premises number should be given, the character of the land, the boundaries thereof, its existing or former occupancy may sometimes be necessary. The conveyancer would do well to insert such description of the pro-

perty as is in conformity with the provisions of Sections 21 and 22 of the Registration Act. Lands in cities and towns are very often surveyed and measured before the sale is completed. The purchaser, who is more often a stranger is enabled thereby to know the exact parcel of land he is purchasing. The survey and measurement of land being overt acts done at the site, the neighbouring owners may dispute the boundary and other persons having claims upon the land are likely to put forward their claims and objections, if any, so that they may finally settle before the sale is completed.

7. In the present case, however the writing, Ex. P-2, contains sufficient description, which gives the location of the plot. The measurement of the plot is also given. The price of the land being fixed at a certain sum for a unit of measurement, such as per sq. ft., it is usual to insert a clause in the agreement that the property should be surveyed and measured by the purchaser or his surveyor in the presence of the vendor or his agent, who shall show or point out the boundaries thereof and the plan prepared on such measurement shall be accepted as final by both parties and the price thereof shall be calculated accordingly. The writing, Ex. P-2, is no doubt silent on this aspect. But looking to the location of the plot proposed to be sold and its situation, its identity cannot be anything but that given in the plaintiff's map, Ex. P-1. This would be clear on a comparison with the defendant's map, Ex. D-1. The proposed plot as shown in the plaintiff's map, Ex. P-1, is behind Main Hospital and in front of P.W.D. Office and is in corner of three blocks of houses situated there.

8. In dealing with the question, the learned Additional District Judge observes:—

"The defendant E. Nageshwar Rao (D.W. 1) has virtually accepted that the plot shown in map Ex. P-1 is the same which he intended to sell to the plaintiff he says:—

प्रदर्श पी. २ में सही सही लिखा है वादी को वह प्लॉट दिया जावेगा जो तीन ब्लॉक के कार्नर में है और पी. डब्लू. डी. आफिस के सामने और घर्म अस्पताल के पीछे पड़ता है प्र. पी. १ का नक्शा उसी जमीन का दिखाई पड़ता है देखकर साक्षी ने कहा ।

The defendant has admitted that the plot sold to the plaintiff contains a temporary structure of motor garage. It is in occupation of a tenant (Shri. Bhandari). The

defendant has sent the letter Ex. P-18 to this tenant to vacate the garage. The defendant admits this letter and it is clearly derived from its recitals that the motor garage is included in the plot sold to the plaintiff. There then remains no difficulty in the location of plot. The corner referred to in Ex. P-2, will be the starting point for measurement. This corner clearly lies on the triangular meet of the roads towards south in the map Exs. D-1 and P-1. The plaintiff Dinesh Chandra (D.W. 1) has stated that the plot sold to him is the one shown in map Ex. P-1 and no other. He says that he had seen the spot with the defendant a week before the finalisation of contract. From what the defendant has deposed in para 5 of his statement it is manifest that he got a description of plot from the plaintiff who had carefully seen the plot and told him that 35' x 60' area would be available. The plaintiff's version has therefore to be accepted that plot intended to be sold is as shown in Ex. P-1. It tallies with the description contained in the agreement Ex. P-2."

The learned counsel did not challenge the finding. We also see no reason to differ from the conclusion arrived at by the learned Judge. Accordingly, the first point fails.

9. As to the second point, the learned Addl. District Judge has held that there was no agreement as is now alleged by the defendant about stamp-paper and expenses. He observes that the agreement, Ex. P-2, could be the guide but it is silent on the point. According to him, the ordinary rule governing the law of vendor and purchaser is that the expenses of execution of conveyance have to be borne by the executant. In his view, there being no cogent proof of any special arrangement, it has to be taken that the normal practice has to be followed in this case. We are not aware of any law which casts the burden on the executant to bear the cost of stamp-paper and expenses of registration. Nor was our attention drawn to any such authority on the point. The normal practice is, as it should be, unless there is a contract to the contrary, that the purchaser should provide stamp-paper and also bear expenses of registration. We, however, express no final opinion on the question as the point was not argued.

10. We are inclined to accept the view expressed by the learned Addl. District Judge on this aspect. That is what the learned Judge has to say:—

"It is pertinent to note that the defendant sent so many telegrams and chits to the plaintiff asking him to come and finalise the conveyance but he did not ask any time to bring stamp papers. This shows that there was no special contract as is now alleged by the defendant about stamp paper and expenses. The allegation of the plaintiff's default or non-performance in this regard is therefore not correct."

As to this, the learned counsel for the appellant had no comments to offer. It cannot, therefore, be said that there was any failure on the part of the plaintiff to procure a stamp-paper and to incur expenses of registration, as alleged. The defendant should have, in any of his several letters, insisted upon the fulfilment of this condition, and upon failure of the plaintiff to comply, rescinded the contract. That, however, was not done. The matter must rest at that. It goes without saying that these expenses shall be borne by the plaintiff. The second point must, therefore, also fail.

11. As regards the plaintiff's appeal, it is devoid of substance. The usual rule is that costs should follow the event and the successful party is entitled to get his costs, but the rule may, in a proper case, be departed from, according to its circumstances. The learned Addl. District Judge has given good and sufficient reasons to deprive the plaintiff of his costs. Here, the defendant had never resiled from the contract or dishonoured his commitment. On the contrary, he frankly offered to abide by it even in his written statement. The delay in execution of the sale-deed was due to his personal circumstances including sickness, by which he was prevented from executing the sale-deed. In fact, he kept the plaintiff informed in writing by his several letters asking for postponement. In the circumstances, the learned Judge rightly exercised his discretion in disallowing the costs to the plaintiff. Before us, the learned counsel for the defendant adhered to the same attitude, and signified the willingness of the defendant to execute the agreement in pursuance of the contract. Indeed, we did not call upon the respondent to reply. That being so, the costs throughout shall be borne by the parties as incurred.

12. The result, therefore, is that the appeals fail and are dismissed. There shall be no order as to costs.

Appeal dismissed.

AIR 1976 MADHYA PRADESH 208

J. S. VERMA AND B. R. DUBEY, JJ.

State of M. P., Appellant v. Pehlajrai Dwarakadas and another, Respondents.

First Appeal No. 55 of 1965, D/- 17-12-1975.

(A) Motor Vehicles Act (1939), Section 110-F — Bar of jurisdiction of Civil Court — Claims Tribunal already constituted — Injury sustained in accident arising as a result of driver's negligence — Suit for damages is barred.

The contention that the word 'accident' in S. 110 means an inevitable accident and, therefore, the jurisdiction of the Claims Tribunal to entertain applications for compensation was limited only to cases of inevitable accidents and that the jurisdiction of Civil Court to entertain suits for damages based on negligence of the driver is not taken away by Section 110-F is not sound. Firstly, there is no reason why the word 'inevitable' should be added before the word 'accident'. Secondly, the only effect of enacting Ss. 110 to 110-F is to provide a cheap remedy for adjudication of such claims for compensation by a change of the forum from Civil Courts to the Tribunals, also prescribing the procedure to be followed by such Tribunals. Negligence is required to be proved by the claimant in order to succeed before the Tribunal as is necessary under the ordinary law of torts and the Fatal Accidents Act. In short in every case of accident the proof of negligence is necessary to raise the liability for payment of compensation. The net result, is, that no occasion for payment of compensation would arise in the case of an inevitable accident, there being no negligence in such a case. On this basis, the question of providing any forum to adjudicate upon claims for compensation in respect of inevitable accidents would be wholly meaningless and the constitution of such Tribunals under the Act would be only for adjudication of cases in which no compensation can be paid. The whole object of enacting Ss. 110 to 110-F would, therefore, be a mere exercise in futility. It follows that where a Claims Tribunal has been constituted for the area from a date prior to the accident the Civil Court has no jurisdiction to try the suit for damages by virtue of S. 110-F. AIR 1970 Madh Pra 168; AIR 1971 Madh Pra 5 (FB); AIR 1976 SC 237, Followed. (Paras 6, 7, 10)

BT/CT/A623/76/JHS

Cases Referred: Chronological Paras

AIR 1976 SC 237 = 1976 ACJ 128	9
(1975) C. R. No. 143 of 1975, D/- 8-10-1975 (Madh Pra)	16
AIR 1971 SC 1283 = 1971 Cri LJ 1081	11
AIR 1971 Madh Pra 5 = 1970 MPLJ 1 (FB)	4, 8
AIR 1970 Madh Pra 168 = 1970 MPLJ 273	7, 8
(1969) 3 All ER 257 = (1969) 1 WLR 1266	15
(1954) 1 QB 29 = (1953) 2 WLR 564	13
(1927) 2 KB 311 = 96 LJKB 729	13
(1921) 3 KB 327 = 90 LJKB 1118	14
1914 AC 667 = 83 LJPC 220	13

M. G. Upadhyaya, for Appellant.
S. L. Garg, for Respondent No. 1.

J. S. VERMA, J.:— This first appeal is by defendant No. 1 against the judgment and decree dated 18-1-1965, passed by the Additional District Judge, Shajapur, in Regular Civil Suit No. 2-B of 1962.

2. The suit is to recover damages for personal injuries sustained by the plaintiff in a motor accident on 4-5-1961 at about 4 P.M. near the Dak Bungalow at Shajapur, when a jeep MPZ 1020 belonging to defendant No. 1 and driven by defendant No. 2 Yusufkhan collided headlong with the Ambassador car BMS 5800 owned by the plaintiff in which the plaintiff was travelling on his way from Bombay to Calcutta. The collision took place about 40 feet outside the gate of the Dak Bungalow when the plaintiff's car was going to the Dak Bungalow and the Jeep was coming out of it. The plaintiff alleges that the Jeep was being driven rashly and negligently by its driver and it came out abruptly from the gate of the Dak Bungalow giving no opportunity to the car driver to avert the collision. Injuries were sustained by the plaintiff in this accident and in all a sum of Rs. 25,000 is claimed as damages under several heads.

3. There is no dispute that a Motor Accidents Claim Tribunal for the area had been duly constituted and was in existence from a date prior to the date of this accident. However instead of filing the claim before the Tribunal, the plaintiff filed a regular civil suit in the ordinary civil jurisdiction. An objection was taken to the filing of a regular civil suit, on the basis of Section 110-F of the Motor Vehicles Act. The court below negatived the objection on the ground that the word 'accident' occurring in Section 110-F of the Act does not cover a tortious act on which the claim is based. For this

R. Gandhi, for Petitioner.

ORDER:— The petitioner is the Chairman of the Thanthoni Panchayat Union. The said Panchayat Union consists of 26 members out of which 21 are elected from the Panchayats and 5 are nominated.

2. On 22-8-1975, one Karuppanna Gounder, a member of the Panchayat Union, along with another member, presented a notice of intention signed by 19 members, out of the total strength of 26 proposing to move a no-confidence motion against the petitioner under Section 153 (2) of the Tamil Nadu Panchayats Act 1958. The said notice also contained various charges against the petitioner in respect of which the no-confidence motion was intended to be moved. Later on 24-8-1975, the respondent, before whom a notice of intention to move the motion of no-confidence was presented, has communicated the said statement of charges along with the motion signed by 19 members, to the petitioner calling for his reply to the said charges within a week from the date of the receipt of his letter dated 24-8-1975. It has been alleged by the petitioner that on 26-8-1975, subsequent to the issue of the notice to the petitioner by the respondent seven of the members have sent individual letters to the Sub-Collector withdrawing their intention to move the no-confidence motion, presented earlier. In his answer to the notice issued by the respondent on 24-8-1975, the petitioner submitted his explanation to the various charges. In that explanation, he naturally pointed out that seven of the members have withdrawn their consent to the no-confidence motion and, therefore, the signatories to the notice of motion fall short of the requisite number required under Section 153 (2) of the Act. Ignoring this objection, the respondent has issued a notice dated 3-9-1975 under Section 153 (4) of the Panchayats Act convening a meeting on 25-9-1975, for consideration of the no-confidence motion. It is at this stage the petitioner has come to this court seeking a writ of prohibition prohibiting the respondent from holding the meeting on 25-9-1975 as notified.

3. The learned counsel for the petitioner contends that the respondent is in error in overlooking the fact that 7 out of the members, who have signed the notice of intention to make the no-confidence motion, have sent letters withdraw-

ing their intention to move the motion, if that fact has been taken into account, the notice of intention to move the no-confidence motion presented before the respondent earlier on 22-8-1975 will not satisfy the requirements contemplated by Section 153 (2) of the Act, and that the respondent has no jurisdiction to convene any meeting for the consideration of the no-confidence motion against the petitioner. It is also contended by the learned counsel that under Section 153 (3) of the Act, a copy of the actual motion of no-confidence should be communicated to him which has not been done in this case, that there is a violation of the procedure contemplated under Section 153 (3) of the Act in this case and that therefore, the convening of the proposed meeting for consideration of the no-confidence motion cannot be taken to be valid.

4. I am not inclined to agree with either of these contentions. Firstly, it is seen that the respondent has acted upon the notice of intention signed by 19 members of the Panchayat Union and presented before him under Section 153 (2) of the Act by issuing a notice to the petitioner on 24-8-1975 and calling for his reply to the said charges. From the fact that 7 members who were signatories to the notice of intention presented earlier, had withdrawn their consent, the action earlier initiated under Section 153 (3) of the Act on 24-8-1975 by the respondent will not become invalid. Once the petitioner has been called upon to explain the charges levelled against him in the statement of charges, he has to send a reply to the said charges and if the respondent considers that the petitioner's reply to the statement of charges is not convincing, he can proceed to convene the meeting for consideration of the no-confidence motion. The fact that subsequent to the initiation of the proceedings under Section 153 (3) of the Act 7 of the members have withdrawn their consent, will not take away the jurisdiction of the respondent which he has chosen to exercise properly on the presentation of a notice of motion under Section 153 (2) of the Act by the requisite number of members. As regards the second contention that the procedure contemplated in Section 153 (3) of the Act has not been followed, I find from the copy of the notice dated 24-8-1975 served on the petitioner that a statement of charges along with the motion has been sent to him. According to the learned counsel for the petitioner, it is not enough to merely serve a copy of the statement

of charges along with the notice of intention to make the motion. But it is necessary, under the said section to serve on the petitioner the actual no confidence motion to be moved. I do not understand the section in the manner suggested by the learned counsel. It is the copy of the notice of intention to make the motion which is referred to in Section 153 (2) of the Act and which is required to be served on the petitioner. That has been done in this case. The respondent's notice dated 24-8-1975 calling for the petitioner's explanation produced before me contains an enclosure which is in two parts the first part containing a notice of intention to make the motion and the other containing the statement of charges levelled against the petitioner. I do not think that apart from the copy of the notice of intention moved by the requisite number of members under Section 153 (2) of the Act, the actual no-confidence motion to be moved at the meeting is required to be served on the petitioner. Both the contentions therefore fail. The writ petition is therefore dismissed.

Petition dismissed.

AIR 1976 MADRAS 306

N. S. RAMASWAMI, J.

C. Balasundaram, Appellant v. The Indian Overseas Bank, by its Agent, Kancheepuram, Respondent.

A. A. O. No. 133 of 1975, D/- 27-8-1975.*

(A) Madras Agriculturists' Relief Act (IV of 1938), Sections 4, 8 (as amended by Act 8 of 1973) and 20 — Debts due to a banking company not liable to be scaled down — As such debts are exempted from the provisions of the Act, decree obtained by Bank not stayed — Plea that the debt in question, being one prior to amendment, it was entitled to the benefit, although Banks are exempted by the Amendment, was rejected. (Para 3)

B. Ramamurthi, for Appellant; R. Vijaya, for Respondent.

JUDGMENT:— This appeal is against the dismissal of an application under Section 20 of Act IV of 1938.

2. The appellant had borrowed moneys from the Indian Overseas Bank,

*(Against order of Sub-J., Kancheepuram, in I. A. No. 321 of 1974.)

who is the respondent in this appeal, and he wanted to take advantage of the amendment brought in by Act 8 of 1973 to Act IV of 1938. As the debt had been incurred prior to 1-3-1972, the appellant wants the decree, which has been passed in favour of Indian Overseas Bank, to be scaled down. Before applying for scaling down, he applied under Section 20 of the Act to stay the execution proceedings. The court below has held that the appellant is not so entitled to have the execution stayed, as the provisions of the Act are not applicable to debts due to the Bank. The correctness of this view is questioned in this appeal.

3. The contention of the learned counsel for the appellant is that only under Act 8 of 1973, a debt due to a banking company has been exempted from the provisions of Act IV of 1938, that such exemption would be applicable only to debts incurred after the coming into force of the amending Act viz., Act 8 of 1973, and that in the present case, the debt having been incurred very much prior to the coming into force of the said Amending Act, the same is not exempt from the provisions of Act IV of 1938. This contention is wholly untenable. But for the Amending Act (Act 8 of 1973), there is no question of the appellant having any right to apply for scaling down of the debt. As Section 8 of Act IV of 1938 originally stood, a debt can be scaled down only if the same had been incurred prior to 1st October, 1932. Admittedly, the debt in this case had been incurred subsequent to that date. If the appellant is to take advantage of the provisions introduced by the Amending Act (Act 8 of 1973), he cannot take one part of the amendment and shut his eyes to the other part of the amendment. While the Amending Act amended Section 8 so as to make the scaling down provision applicable to debts incurred before 1st March, 1972, it also provided that the Act is not applicable to debts due to a banking company. Section 4 of the parent Act has now been substituted by the Amending Act and as per the new Section (cl. (h)), debts due to a banking company are exempt from the provisions of the Act. The section says that nothing in the Act shall affect debts and liabilities of an agriculturist falling under the heads mentioned therein. Clause (h) is one of the heads which states that liability to a banking company (apart from a public company, State Bank of India etc.) is one such liability which is so exempt. That being so, the appel-

lant cannot be heard to say that he would take advantage of the provisions contained in the amending Act but, at the same time, he would not be bound by the amended provisions contained in Section 4 of the Act. I am quite clear that the appellant is not entitled to have the decree debt due to Indian Overseas Bank scaled down and therefore, he is also not entitled to get an order of stay of execution under Section 20 of the Act. The appeal is, therefore, dismissed. No costs. Appeal dismissed.

AIR 1976 MADRAS 307

N. S. RAMASWAMI, J.

Saranga Padayachi, Appellant v. Vairakannu Chettiar, Respondent.

A. A. O. No. 396 of 1975, D/- 26-2-1976.*

(A) Tamil Nadu Agriculturist Relief Act (4 of 1938), Sections 19, 20 proviso — Application under Section 19 for scaling down the debt — Application after expiry of sixty days from an order of stay of execution is barred.

It is true that if the judgment-debtor has not invoked Section 20 and obtained stay of execution, he can always approach the court (before the decree had been satisfied) for scaling down the debt. But once he invokes the jurisdiction of the court under Section 20 and obtains stay of execution, then proviso to Section 20 is attracted which prescribes period of sixty days for filing an application under Section 19. 1939-2 Mad LJ 308, Followed. (Paras 1, 4)

Cases Referred: Chronological Paras
(1976) 1 Mad LJ 10 = 89 Mad LW 89 5
(1975) 2 Mad LJ 34 = 88 Mad LW 173 5
(1939) 2 Mad LJ 308 3

K. Sampath, for Appellant; P. S. Ramachandran, for Respondent.

JUDGMENT:— The petitioner before me filed an application under Sec. 20 of Act IV of 1938 as early as 1973 and obtained an order of stay of execution by the order dated 18-3-1973. He did not care to file an application under Section 19 within sixty days of the said order, as contemplated under the proviso to Section 20. Later, i.e., on 11-4-1974, the application out of which the present civil miscellaneous appeal arises came to be filed

*(Against order of Sub-Court, Cuddalore in I. A. No. 887 of 1974.)

ET/FT/B508/76/MBR

under Section 19 for scaling down the debt. This is clearly barred by limitation.

2. It is contended on behalf of the appellant-judgment-debtor that Sec. 19 itself does not provide for any period of limitation, that an application under that section can be filed at any time and that, therefore the proviso to S. 20 should not be invoked in support of the contention that the application under Section 19 is barred by limitation. I am unable to agree with that contention.

3. The proviso to Section 20 clearly says that if an application under Section 19 had already not been filed and if such an application is not filed even within sixty days of the order of stay, then the decree shall be executed as it stands (without being scaled down). In *Kumarasami Pillai v. Thiruvengadam Aiyangar*, 1939-2 Mad LJ 308, a Division Bench of this Court had to consider whether the said proviso to Sec. 20 is a condition precedent which means that beyond the period of sixty days provided therein no application under Section 19 can be entertained, any delay cannot be excused, or whether it prescribes only a period of limitation in which event Section 5 of the Limitation Act can be invoked and the delay can be excused for proper and adequate reasons. The Division Bench held that the proviso prescribes only a period of limitation.

4. The contention on behalf of the judgment-debtor is that in spite of the above said proviso to Section 20, there is, no period of limitation at all in respect of an application under Section 19. It is true that if the judgment-debtor has not invoked Section 20 and obtained stay of execution, he can always approach the court which passed the decree (as long as the decree has not been satisfied), for scaling down the debt, if he is entitled to such scaling down on merits. But once he invokes the jurisdiction of the court under Section 20 and obtains stay of execution, then undoubtedly a period of limitation is prescribed by the proviso to that section which specifically says that unless an application under Section 19 (if it had not been already filed) is filed within sixty days from the order of stay the decree shall be executed as it stands.

5. The learned counsel for the judgment-debtor referred to my decision in *Dharmarajan v. Nagalinga Kandiar*, 1975-2 Mad LJ 34 and that rendered by Mohan, J., reported in *Krishnamurthi Iyer v. Sethurama Iyer*, 1976-1 Mad LJ 10,

in the course of his arguments. But these cases were concerned with the question whether if a court sale had taken place after the commencement of the Amendment Act, Act VIII of 1973, the judgment-debtor can invoke Section 23 (c) and pray for setting aside the same. It was held that the judgment-debtor having had enough opportunity to file an application under Section 19 (before the court sale takes place) in respect of sales which take place after the publication of Act VIII of 1973, Section 23 (c) cannot be invoked. Those decisions have nothing to do with the question of limitation that arises in the present case.

6. The conclusion of the court below that the present application under Section 19 is barred by limitation is correct. The appeal fails and the same is dismissed. However, there is no order as to costs.

Appeal dismissed.

AIR 1976 MADRAS 308

MOHAN, J.

Champalal Sowcar, Petitioner v. A. V. Rajaloo and others, Respondents.

C. R. P. No. 3342 of 1975, D/- 21-1-1976.*

(A) Civil P. C. (1908), Order 22, R. 3 — Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), Section 10 — Order exempting landlady from operation of provisions of 1960 Act passed — Suit by landlady for possession of premises — Death of landlady — Legal representatives can be brought on record.

Where after an order for exemption of the landlady from operation of the provisions of the 1960 Act was passed the landlady filed a suit to recover possession of the premises and died during the pendency of the suit it was held that the exemption granted to the deceased landlady was not personal but for housing her daughters and grand-children and therefore her legal representatives could be brought on record. AIR 1973 SC 2110 and (1975) 88 Mad LW 559, Dist.

(Paras 1, 2, 3)

Cases Referred: Chronological Paras (1975) 88 Mad LW 559 2, 4
AIR 1973 SC 2110 = (1973) 3 SCR 679 2

*(To revise order of City Civil Court, Madras, in I. A. No. 7429 of 1975.)

ET/FT/B467/76/GNB

K. G. Manickavasagam, for Petitioner; K. Venkataswami, for Respondents.

ORDER:— This revision illustrates how recalcitrant the tenant could be. An order of exemption was passed in G. O. Ms. No. 3397 dated 25-9-1969, on the application of one Smt. V. Alamelu Ammal, in respect of the premises No. 8 Prasanna Vinayakar Koil St. Mylapore, Madras, forming subject-matter of the present revision from the operation of the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil Nadu Act 18 of 1960). Thereupon, O. S. No. 7619 of 1974 was filed before the City Civil Court, Madras (6th Asst. Judge) for recovery of possession. Pending suit the landlady (V. Alamelu Ammal) died on 13-3-1975. Thereafter, I. A. No. 7249 of 1975 was taken out to bring on record petitioners 1 to 6 viz., the husband and other relations as legal representatives. It was contended on behalf of the revision petitioner that the exemption was granted in favour of the deceased plaintiff (V. Alamelu Ammal) and therefore the cause of action did not survive to enable the legal representatives to come on record and therefore the application was liable to be dismissed. The learned Sixth Asst. Judge did not agree with this contention and therefore allowed the application. It is to revise that order the present revision has been preferred.

2. Mr. K. G. Manickavasagam very strenuously contends before me that the exemption was granted in favour of Smt. V. Alamelu Ammal who was the sole plaintiff in the suit O. S. No. 7619 of 1974 and therefore there was no possibility of the legal representatives coming on record. In support of his submission, the learned counsel relies on Phool Rani v. Naubat Rai, AIR 1973 SC 2110 and Hajee Abdulla Sait v. K. D. Moorjani, (1975) 88 Mad LW 559. In the first of the decisions cited the question related to the maintainability of the petition before the Rent Control Court wherein the original landlord sought eviction of the tenant on the ground of personal occupation for himself and members of his family. In deciding that question it was laid down that the cause of action being personal, viz., bona fide need of the landlord the legal representatives cannot seek eviction in that petition and therefore the cause of action did not survive. This case has absolutely no application to the facts of the present case and therefore is clearly distinguishable. The order of

exemption as noted above has nothing to do with the individual. In other words, it is not personal to the grantee. However, Mr. Manickavasagam, learned counsel for the petitioner, would contend that a reading of the entire order would clearly show that what operated in the mind of the Government was only a personal relief for the erstwhile landlady (V. Alamela Ammal). In my view this is not the correct reading of the order. In the petition for exemption itself what the landlady put forward was that she purchased the premises in question solely with the idea of making it available for the occupation of her daughters and grand-children who were studying in the Rosary Matriculation School, Mylapore, very near to the premises but is unable to do so since the tenant has refused to vacate and that she has no remedy under the provisions of the Act to evict him.

3. In the operative portion of the order granting exemption it is also stated

"If the exemption applied for by the landlady is not granted her daughters may have to continue to live in a cramped quarter and her grand-children put to the difficulty of going to the school at Santhome, Mylapore from Royapettah." Apart from there being nothing to suggest that the exemption is personal to the grantee, the operative portion noted above would clearly show throughout the stress was to house the married daughters and the grand-children. Therefore, even looked at from that point of view, the argument that it was personal to the grantee cannot be countenanced.

4. Hajee Abdulla Sait v. Moorjani, (1975) 88 Mad LW 559, will also be of no assistance to the revision petitioner in the view I have just now indicated.

5. Finally it is argued on behalf of the revision petitioner that the question who are the proper legal representatives could be left open to be agitated by the revision petitioner, I find it rather difficult to follow this argument. Admittedly, the persons who are the legal representatives and who want to have the benefit of the order of exemption are seeking to come on record. If that be so, it is not open to the tenant to say who are the legal representatives and who are not. In a way, he should be thankful because if the suit were to be dismissed it will be binding upon all persons who have voluntarily chosen to come on record as legal representatives of the erstwhile landlady (V. Alamela Ammal). Thus, I am unable to see any merit in this revision.

Consequently it will stand dismissed. However, there will be no order as to costs.

6. Inasmuch as the order of exemption is dated 25-9-1969, the benefit of it had not been had by the respondents herein, I think it is a fit case wherein I should give direction for the expeditious disposal of the suit itself. Accordingly it is directed that the learned Sixth Asst. Judge, City Civil Court, will dispose of the suit before summer recess.

Revision dismissed.

AIR 1976 MADRAS 309

VARADARAJAN, J.

M. A. Rathinam, Petitioner v. Thangammal, Respondent.

C. R. P. No. 3428 of 1974, D/- 4-3-1975.*

(A) Tamil Nadu Agriculturists Relief Act (4 of 1938), Section 20 — Petition for stay of execution — Question whether petitioner is entitled to benefit of Act — Power of executing court to decide. (1974) 87 Mad LW 877 and decision in C. R. P. No. 2866 of 1973 (Mad), Dissent from.

Section 20 does not say that execution must be stayed in all cases where it is represented that an application under Section 19 would be filed. Therefore, when an application under Section 20 is filed and it is opposed on the ground that the petitioner is not a person entitled to the benefits of the Act, that question has to be gone into and considered before the stay can be granted under the section. (1974) 87 Mad LW 877 and decision in C. R. P. No. 2866 of 1973 (Mad), Dissented from. (Para 6)

Cases Referred: Chronological Paras
(1974) 87 Mad LW 877 5
(1973) C. R. No. 2866 of 1973 (Mad) 5

S. Nainarsundaram, for Petitioner;
S. Palaniswamy, for Respondent.

ORDER:— The petition is to revise the order of the learned Subordinate Judge, Udumalpet made in E. A. No. 360 of 1974 which was filed under Section 20 of the Tamil Nadu Agriculturists Relief Act, 1938 for stay of the execution of the decree obtained by the respondent against the petitioner in O. S. No. 231 of 1970 on the file of the same Court in E. P. R. No. 60 of 1974.

*(To revise order of Sub-J., Udumalpet, D/- 6-9-1974.)

CT/ET/A867/76/JHS

2. The petitioner alleged that after the decree had been obtained he paid Rs. 400/- on 22nd November, 1972, and that he is an agriculturist entitled to the benefits of Act IV of 1938 and to have the decree scaled down. He alleged that he would file a petition for the purpose of scaling down of the debt under Section 19 of the Act and prayed that the execution petition should therefore, be stayed under the provisions of Section 20 of the Act. The respondent opposed the petition contending that the petitioner was assessed to profession tax and owns two houses and one shop and pays property tax to the extent of Rs. 1,500/- per annum and is not an agriculturist entitled to the benefits of the Act. The petitioner produced the kist receipts Exs. A-1 and A-2 to show that he pays kist and owns agricultural lands. But, under Section 3 proviso (c) of the Tamil Nadu Agriculturists Relief Act, 1938, the person shall not be deemed to be an agriculturist, if he has, in all the four half years immediately preceding the 1st March, 1972, been assessed to property tax and house tax, provided that the aggregate annual rental value of such building and lands is not less than Rs. 1,200/-. On the basis of the extract from the property tax demand register Ex. B-1 the lower Court found that the petitioner was paying property tax on properties, the annual rental value of which exceeded Rs. 1,200/- and held that the petitioner is not an agriculturist entitled to the benefits of the Act, and, therefore, was not entitled to have the execution proceedings stayed under the provisions of Section 20.

3. The learned counsel for the petitioner raised two contentions, namely that the lower Court erred in finding that the annual rental value exceeds Rs. 1,200/- and that it also erred in going into the question whether the petitioner is an agriculturist entitled to the benefits of the Act in the petition filed under Section 20 of the Act for stay of his execution proceedings, while according to the learned counsel that question should be considered only in the enquiry under Section 19 of the Act for scaling down the debt.

4. There is nothing to show that the annual rental value arrived at in Ex. B-1 is not net annual rental value but the gross rental value. That objection also does not appear to have been taken before the lower Court. The learned Judge has found from columns 5 and 6 of Ex. B-1 that

the annual rental value comes to more than Rs. 1,200/-. The petitioner himself appears to have contended in the counter-statement filed in E. P. No. 60 of 1974 that the shop fetches a rent of Rs. 300/- per mensem and is worth Rs. 60,000/- and that the upset price may be fixed at Rs. 75,000/-. Therefore, there can be no doubt that the petitioner pays property tax on house properties whose annual rental value exceeds Rs. 1,200/- in the four half years. Therefore, the petitioner is not an agriculturist entitled to the benefits of the Act.

5. The learned counsel for the petitioner invites my attention to the decision of Natarajan, J., in C. R. P. No. 2866 of 1973 (Mad) and in Dorairajan v. Mohammad Kuthoose, (1974) 87 Mad LW 877 where the learned Judge has held that on the institution of an application under Section 20, the Executing Court should immediately grant a stay of the execution of the decree and that it would be anomalous to consider in that application whether the petitioner is entitled to the benefits of the Act and that this question would arise for consideration only in the application for scaling down the debt which may be filed by the petitioner. With respect, I am unable to agree with the learned Judge, for Section 20 reads thus:

"Every Court executing a decree passed against a person entitled to the benefits of this Act, shall, on application stay the proceedings until the Court which passed the decree has passed orders on an application made under Section 19."

6. The section does not say that execution must be stayed in all cases where it is represented that an application under Section 19 of the Act would be filed. Therefore, in my opinion when an application under Section 20 is filed and it is opposed on the ground that the petitioner is not a person entitled to the benefits of the Act, that question has to be gone into and considered before the stay can be granted under this section. There would be no question of any hardship in such a case, for the parties are at liberty to adduce oral and documentary evidence with respect to their contentions and any finding regarding the question whether the petitioner is an agriculturist entitled to the benefits of the Act or not will be binding on both the parties and it cannot be stated that any hardship is caused to one party or the other by an enquiry under Section 20 of the Act. Therefore, I hold that the

lower Court was right in going into the question whether the petitioner is an agriculturist entitled to the benefits of the Act in the petition filed under Section 20. The finding of the Court below that he is not such a person is correct, having regard to Ex. B-1.

7. This petition is, therefore, dismissed with costs.

Petition dismissed.

AIR 1976 MADRAS 311

N. S. RAMASWAMI, J.

Karupppammal and others, Appellants
v. T. U. Poosari and others, Respondents.

Appeals Nos. 304 and 660 of 1969, D/-25-2-1975.*

(A) Civil P. C. (1908), Order 9, Rule 13 — Ex parte decree — Matter not in controversy decided by Court to the detriment of ex parte defendant — Suit to set aside decree maintainable.

In a partition suit the plaintiff had alleged in the plaint that defendant X was entitled to a certain share. This position was also not controverted by any of the contesting defendants. X remained ex parte. The court, however, without appreciating the real controversy, held that X was not entitled to any share and passed a preliminary decree allotting 4/5th share to the plaintiff and 1/5th share to the other defendants. In view of the finding that X was not entitled to any share at all there was no further notice to him in the final decree proceedings also. In a suit filed by X to set aside the decree, held the court had acted without jurisdiction in that it decided a matter which was not in controversy before it and, therefore, the decree must be set aside. AIR 1944 Mad 513 and (1914) ILR 41 Cal 493 (PC), Distinguished.

(Paras 22, 23, 24, 26, 27, 28, 29)

Cases Referred: Chronological Paras

AIR 1944 Mad 513 = (1944) 2 Mad LJ 67
29

AIR 1921 Cal 34 = 24 Cal WN 723 (FB)
27

AIR 1915 PC 99 = 29 Mad LJ 165 27
(1914) ILR 41 Cal 493 = 40 Ind App
223 (PC) 29

JUDGMENT:— These two appeals arise out of a suit to set aside a decree

*(Against decree of Sub. J., Coimbatore, in O. S. No. 99 of 1963, D/- 23-1-1969.)

CT/FT/A875/76/JHS

passed in an earlier suit and consequential relief of possession in respect of part of the suit property and injunction in respect of the remaining part.

2. The property involved in the litigation is a vacant land whose total extent is 14 acres 47 cents and comprised in three Survey Numbers, namely S. No. 755, S. No. 756 and S. No. 94/4, Thottipalayam village, Palladam taluk, Coimbatore District. The land was said to be a waste, but now it has acquired considerable value as house sites. The abovesaid land is described in the A Schedule to the plaint, while in Schedules B, C and D, specific portions of the said land are described. There are three plaintiffs in the suit out of whom, plaintiffs 1 and 2 are brothers. They claim title to the portions described in Schedules B and C and they seek to recover possession of those portions from the first defendant in the suit. The third plaintiff claims title to the portion described in D Schedule and as he continues to be in possession of the property, he seeks a permanent injunction restraining defendants 2 to 4 to the suit from in any way interfering with the same.

3. O. S. No. 456 of 1950 on the file of the Court of the Subordinate Judge Coimbatore was a suit for partition and separate possession filed by Shanmugam Chettiar, the first defendant herein, in respect of the abovesaid land. He has purchased a specific plot measuring 3 acres 68 cents in the abovesaid land from the previous owner but he claimed general partition and allotment of the abovesaid extent impleading all the other persons claiming shares in the land. The learned Subordinate Judge who tried O. S. No. 456 of 1950 passed a preliminary decree in favour of Shanmugham Chettiar (the plaintiff in that suit and the first defendant herein) for 4/5th of the entire extent of 14 acres 47 cents of land, the remaining 1/5th going to defendants 2 to 4 herein. There was a final decree in accordance with the abovesaid preliminary decree. The plaintiffs in the present suit were not parties to O. S. No. 456 of 1950 but their predecessors-in-title were. According to the plaintiffs the decree in O. S. No. 456 of 1950 had been obtained by fraud, that the decree had been passed without jurisdiction and that therefore the same is liable to be set aside. As the first defendant, in pursuance of the decree in O. S. No. 456 of 1950 has taken possession of the B and C Schedule plots, which plaintiffs 1 and 2

have purchased from the previous owner, they prayed for possession of those plots. As defendants 2 to 4 were trying to interfere with the possession of the plot described in the D Schedule to the plaint, claimed by the third plaintiff, injunction is prayed for in respect of the same.

4. The learned Subordinate Judge, Coimbatore who tried the present suit agreed with the contentions of the plaintiffs and has set aside the decree in O. S. No. 456 of 1950 and granted the other reliefs prayed for by the plaintiffs.

5. The second defendant died during the pendency of the suit and his legal representatives have been impleaded as defendants 5 to 8. The first defendant also died during the pendency of the suit and his legal representatives have been impleaded as defendants 9 to 15. A. S. No. 304 of 1969 is by the legal representatives of the first defendant. A. S. No. 660 of 1969 is filed by defendants 3 and 4 along with the legal representatives of the second defendant (defendants 5 to 8).

6. Though it has been the case of the plaintiffs in the Court below that the decree in O. S. No. 456 of 1950 was a result of fraud played upon the court, such a case is not pressed before me by the plaintiffs who are respondents in the two appeals. The only contention is that the decree in that suit (O. S. No. 456 of 1950) is one passed without jurisdiction.

7. Before considering the above question I would dispose of the question of limitation raised on behalf of the defendants. If the contention of the plaintiffs that the court which passed the decree in O. S. No. 456 of 1950 lacks inherent jurisdiction to pass that decree is correct, then the decree is void and that need not be set aside. It can just be ignored. In that event, unless the title to the property is lost by adverse possession, the plaintiffs would be entitled to the reliefs claimed. It is not the case of the defendants that the plaintiffs' title if any had been lost by adverse possession. Therefore, the real question arising in these two appeals is whether the decree in O. S. No. 456 of 1950 is one passed without jurisdiction. To appreciate the controversy, more facts have to be stated.

8. The land in question along with other lands bearing different Survey Numbers originally belonged to a family of Boyans. According to the plaintiffs, the entire land (14 acres 47 cents) belonged to one Peria Palani Boyan. The land was said to have been dealt with in

the following manner. The said Peria Palani Boyan executed a simple mortgage over a half share of the property and created a usufructuary mortgage in respect of the other half. The simple mortgage was in favour of one Palani Boyan son of Nayunda Boyan (referred to as N. Palani Boyan). The usufructuary mortgage was in favour of the said N. Palani Boyan and his brothers Sella Boyan and Mara Boyan. These mortgages were of the year 1875. The equity of redemption in the undivided half share, subject-matter of the simple mortgage, had been sold to the mortgagee (N. Palani Boyan) himself. The said N. Palani Boyan, had filed a suit in O. S. No. 51 of 1908 on the file of the District Munsif's Court, Tiruppur for enforcing the mortgage but that came to be dismissed because of the above sale. Petha Boyan the grand son of Peria Palani Boyan, filed O. S. No. 48 of 1908 on the file of the same Court for redemption of the other half which was the subject-matter of the usufructuary mortgage. That suit came to be decreed by the Court on the same day on which O. S. No. 51 of 1908 came to be dismissed. Petha Boyan got possession through court of the half share which was the subject-matter of the usufructuary mortgage, and later executed another usufructuary mortgage in favour of one Veerammal who is no other than the daughter-in-law of N. Palani Boyan.

9. The abovesaid Petha Boyan executed two sales, one under Exhibit A-81 dated 4-6-1938 and the other under Exhibit A-82 dated 21-1-1943 both in favour of his son T. P. Palaniswami. The equity of redemption in a half share in the land (which had been usufructuarly mortgaged to Veerammal) had been conveyed under those two sales. Eventually T. P. Palaniswami redeemed this half share from Veerammal.

10. N. Palani Boyan, as already said, had two brothers by name Sella Boyan and Mara Boyan. The purchase of half share by N. Palani Boyan is said to be for the benefit of the family consisting of the abovesaid three brothers. Mara Boyan died and therefore N. Palani Boyan and his brother Sella Boyan were said to be entitled to an undivided 1/4th share each in the entire land. N. Palani Boyan had five sons. After the death of N. Palani Boyan, the five sons became entitled to an undivided 1/20th share in the land. One Chinna Mara Boyan purchased the undivided shares of three of the

sons of N. Palani Boyan. He also purchased the 1/4th share of Sella Boyan, the brother of N. Palani Boyan. That apart, he had taken a sale from one Raju Boyan who is said to be the paternal cousin of Petha Boyan in respect of an 1/4th share. This is on the basis that the half share which Petha Boyan had usufructually mortgaged to Veerammal, belonged not only to him but also to the above said Raju Boyan.

11. Two sons of N. Palani Boyan had sold their shares to Kandappa Goundar, father of defendants 2 to 4 herein. The several sales in favour of Chinna Mara Boyan referred above and the sales in favour of Kandappa Goundar were all much earlier than the sale by Petha Boyan in favour of his son T. P. Palaniswami.

12. T. P. Palaniswami filed O. S. No. 90 of 1943 on the file of the court of the District Munsif, Tirupur for partition and separate possession of the land. By that time Kandappa Goundar had died and out of his three sons (who are now defendants 2 to 4) Venkatappa Gounder alone had been impleaded as a defendant. He seems to have represented the family consisting of himself and the two brothers. Of course Chinna Mara Boyan was also a party to that suit. That suit related not only to the land in question (14 acres 47 cents) but also to another Survey Number, namely Survey Number 94/3 with which we are not now concerned. Chinna Mara Boyan who had taken sales from three sons of N. Palani Boyan (1/20th share each) and Sella Boyan, the brother of N. Palani Boyan (1/4th share) and also from one Raju Boyan, the paternal cousin of Petha Boyan (another 1/4th share) seems to have claimed in O. S. No. 90 of 1943, a 13/20th share in the land, conceding only 1/4th (5/20th share) to T. P. Palaniswami and 2/20th share to the sons of Kandappa Goundar. But the Court held that T. P. Palaniswami was entitled to a half share (5/10), that Chinna Mara Boyan was entitled only to 4/10th share and Venkatappa Gounder (the second defendant herein) was entitled to an 1/10th share. This is on the basis that Chinna Mara Boyan did not get any title to any share under the sale executed by Raju Boyan, the paternal cousin of Petha Boyan, as Petha Boyan was full owner of the half share which had been usufructually mortgaged to Veerammal. N. Palani Boyan and his brother Sella Boyan were found to be entitled to the other half and therefore

by the sale by Sella Boyan, Chinna Mara Boyan became entitled to an 1/4th share (5/20) and by the sales of three out of the five sons of N. Palani Boyan he became entitled to 3/20th share. That is how the Court held that Chinna Mara Boyan was entitled to a 4/10th share.

13. After the preliminary decree but before the final decree in that suit, Chinna Mara Boyan sold his undivided 4/10th share to one Sellamuthu Boyan under Exhibit A-4 dated 29-7-1946. It was this Sellamuthu who got himself impleaded as a party to O. S. No. 90 of 1943 applied for final decree in pursuance of the abovesaid preliminary decree. The final decree was passed on 11-3-1947 as evidenced by Exhibit A-3.

14. Under the abovesaid final decree, the entire land measuring 14 acres 47 cents had been divided into ten plots marked in the plan as A, B, C, D, E, F, G, H, J and K. The plots marked A, B, C, and D which are the four western most plots were allotted to Sellamuthu. The next plot marked E was allotted to Venkatappa Gounder and all the five plots marked as F, G, H, J and K came to be allotted to T. P. Palaniswami towards his half share.

15. In the meantime, that is during the pendency of O. S. No. 90 of 1943, one Peria Mara Boyan and one Roja Boyan (along with another) who are brothers of Chinna Mara Boyan, filed O. S. No. 336 of 1946 on the file of the Court of the District Munsif, Tirupur claiming a share in the land in question. This is on the basis that the purchases made by Chinna Mara Boyan were for the benefit of the family consisting of Chinna Mara Boyan and his brothers. There was also another suit, namely O. S. No. 132 of 1947 on the file of the same court filed by some of the sons of the abovesaid N. Palani Boyan and a grandson through one of the sons. This again was a suit for partition and the basis of this suit is that by the sales executed by the sons of N. Palani Boyan (two to Kandappa Goundar and three to Chinna Mara Boyan), the share to which the family was entitled had not been exhausted and that some share still remained with the family. These two suits, namely O. S. No. 336 of 1946 and O. S. No. 132 of 1947, along with yet another suit which related to some other lands, came to be tried jointly by the court of District Munsif, Tirupur. By the time the abovesaid suits came up for trial, the final decree in O. S. No. 90 of

1943 had been passed, but the said decree was treated as infructuous on the ground that some of the sharers had not been impleaded in that suit and as O. S. No. 336 of 1946 had been filed even during the pendency of the earlier suit. By the common judgment dated 30-12-1948 O. S. No. 336 of 1946 was decreed and O. S. No. 132 of 1947 was dismissed. On appeal, the cases had been remitted for a fresh trial.

16. Meanwhile, the plaintiffs in O. S. No. 336 of 1946 (Peria Mara Boyan and others) who had claimed joint rights with Chinna Mara Boyan in respect of the purchases made by the latter, giving up that claim took a sale from Sellamuthu Boyan, the purchaser from Chinna Mara Boyan, Exhibit A-6 dated 23-1-1948 is the sale in favour of Periya Mara Boyan and Roya Boyan (brothers of Chinna Mara Boyan). Three months thereafter, that is under Exhibit A-124 dated 23-8-1948, the said Peria Mara Boyan and Roya Boyan sold to the first defendant herein what they had purchased under Exhibit A-6. The significant fact to be noted is that the property conveyed under these documents is a specific plot with four boundaries, measuring 3 acres 68 cents. This is out of the westernmost four plots which had been allotted to Sellamuthu in the final decree in O. S. No. 93 of 1943.

17. After the above sale under Exhibit A-124 the first defendant herein got himself impleaded as the fourth plaintiff in O. S. No. 336 of 1946. Ultimately the said suit (O. S. No. 336 of 1946) was withdrawn with permission to file a fresh suit on the same cause of action. It is under that permission, the first defendant herein filed O. S. No. 456 of 1950 on the file of the Court of the Subordinate Judge, Coimbatore. O. S. No. 132 of 1947 on the file of the Court of the District Munsif, Tirupur which was still pending, was transferred to the file of the Court of the Subordinate Judge, Coimbatore and numbered as O. S. No. 418 of 1950 on the file of that Court to be tried with O. S. No. 456 of 1950. The said Court by a common judgment dated 14-9-1957 dismissed O. S. No. 418 of 1950 and decreed O. S. No. 456 of 1950 declaring that the first defendant herein (plaintiff in that suit) was entitled to a 4/5th share in the entire extent of 14 acres 47 cents and that the remaining 1/5th was to be taken by the sons of Kan-dappa Goundar, defendants 2 to 4 herein. As already mentioned, in pursuance of

such a preliminary decree in O. S. No. 456 of 1950, a final decree was obtained and the first defendant herein had taken possession of a divided 4/5th share in the entire extent. Defendants 2 to 4 herein had also taken possession of their divided 1/5th share, except a small extent therein which is in the possession of the present third plaintiff.

18. Plaintiffs 1 and 2 claim title to the plots described in the Schedules B and C to the plaint, under two sale deeds, Exhibit A-60 dated 27-8-1951 and Exhibit A-79 dated 7-7-1952 executed by T. P. Palaniswami. As already seen, under the decree in O. S. No. 90 of 1943, T. P. Palaniswami became entitled to the eastern half share in the entire 14 acres 47 cents. The plots now described in Schedules B and C to the plaint are the said eastern half. But under the subsequent decree that is in O. S. No. 456 of 1950, the court having granted a 4/5th share in the entire extent of 14 acres 47 cents to the first defendant herein (even though he had purchased only a specific plot measuring 3 acres 68 cents and claimed in the suit the allotment of only that extent), he had taken possession in pursuance of that decree even the plot purchased by plaintiffs 1 and 2 from T. P. Palaniswami.

19. The third plaintiff claims title only to 10 cents of land and that is through Sellamuthu Boyan, Sellamuthu Boyan who sold 3 acres 68 cents (out of the western 4/10th share which he got under the decree in O. S. No. 90 of 1943) to Peria Mara Boyan and Roya Boyan which ultimately came to the first defendant herein, executed several other sale deeds all in respect of specific plots. Exhibit A-5 is a sale in respect of an extent of 1 acre in favour of one P. N. Ramaswami and one Senga Goundar, Exhibit A-7 is a sale in respect of a plot measuring 50 cents in favour of one V. Palanisami, Exhibit A-8 is in respect of a plot measuring 41 cents in favour of Senga Goundar. There having been a joint purchase by P. N. Ramaswami and Senga Goundar, there was a partition under Exhibit A-9. Thereafter P. N. Ramaswami settled 20 cents (which he got under the above partition) on his son Jagannathan under Exhibit A-17. Out of that 20 cents, 10 cents had been sold by the said Jagannathan to the third plaintiff herein under Exhibit A-18 dated 5-9-1957 and 10 cents to V. Palaniswami (brother-in-law of the third plaintiff under Exhibit A-12 dated 19-10-1957).

20. The point to be noted is that all the plots sold by Sellamuthu were out of the divided western 4/5th of the land which he got under the final decree in O. S. No. 90 of 1943. Under that final decree the total extent which came to Sellamuthu is 5 acres 78 cents being the area covered by the westernmost plots A, B, C and D in the plan in that final decree. Sellamuthu did not purport to sell, by the several sales, anything more than the above extent.

21. The third plaintiff has put up a construction on the 20 cents of land which he and his brother-in-law purchased. Defendants 2 to 4 herein who got only an 1/10th share in O. S. No. 90 of 1943 (Plot E in the plan attached to the final decree therein) tried to disturb the possession of the third plaintiff in pursuance of the subsequent decree, that is in O. S. No. 456 of 1950, as under that decree they got 1/5th instead of 1/10th.

22. The contention on behalf of the plaintiffs is that the decree in O. S. No. 456 of 1950 should be treated as a nullity as the Court which passed the said decree had acted without jurisdiction. It is pointed out that the first defendant herein (who was the plaintiff in that suit) having purchased a specific plot measuring 3 acres 68 cents, which is part of the divided 4/10th share which Sellamuthu got under the final decree in O. S. No. 90 of 1943, and he having prayed in that suit only for allotment of that extent to him (even though he claimed general partition) the Court had no jurisdiction at all to grant him a decree by which he was to take about 11 acres out of the extent of 14 acres 47 cents as 4/5th share in the entire land. This contention is not without force. It is true that in O. S. No. 456 of 1950, the first defendant has stated in the plaint therein that Chinna Mara Boyan was entitled to 13/20th share in the entire land, even though under the decree in O. S. No. 90 of 1943 he got only 4/10th share. He had contended so, not because he laid claim for anything more than 3 acres 68 cents which he had purchased, but because the brothers of Chinna Mara Boyan had contended in O. S. No. 336 of 1946 that they also had a share in the land on the basis that the purchases made by Chinna Mara Boyan were on behalf of the family. As already seen, the first defendant herein got himself impleaded as the fourth plaintiff in O. S. No. 336 of 1946 which was later withdrawn with permission to file a fresh suit on the same cause of action, and it

is after that he filed O. S. No. 456 of 1950. O. S. No. 132 of 1947 filed by some of the sons and a grandson of N. Palani Boyan who claimed that in spite of all the five sons of N. Palani Boyan having sold their shares (two to Kandappa Goundar and three to Chinna Mara Boyan) still they are entitled to some share in the land, was also pending. It is under such circumstances, the first defendant who evidently did not want to lose any part of 3 acres 68 cents which he purchased, has contended that Chinna Mara Boyan had acquired 13/20th share by the several purchases he had made. The basis of the claim that Chinna Mara Boyan had 13/20th share is that Raju Boyan, the paternal cousin of Petha Boyan conveyed good title to an 1/4th share, apart from Sella Boyan, brother of N. Palani Boyan conveying 1/4th share and three sons of N. Palani Boyan conveying 1/20th share each. It had been conceded in that plaint that a half share in the land belonged to Petha Boyan's branch even though Petha Boyan's exclusive title to the said half share had not been conceded. According to that plaint, Petha Boyan had an 1/4th share and his cousin Raju Boyan had an 1/4th share and that T. P. Palaniswami, the sons of Petha Boyan acquired title from his father only to an 1/4th share and not to a half share.

23. By some reasoning, the learned Judge who decided O. S. No. 456 of 1950 held that Petha Boyan's branch had no share at all after Peria Palani Boyan, the grand-father of Petha Boyan, had sold a half share to N. Palani Boyan. He proceeded on the footing that N. Palani Boyan and his brother Sella Boyan became the owners of the entire extent of 14 acres 47 cents and that by the sale by Sella Boyan, Chinna Mara Boyan got title to a half share and by the sale by the three sons of N. Palani Boyan the said Chinna Mara Boyan got 3/5th. This finding is without realisation that Sella Boyan has sold only an 1/4th share and the three sons of N. Palani Boyan who executed sales in favour of Chinna Mara Boyan had conveyed only an 1/20th share each. In paragraph 41 of his judgment, the learned Judge has himself referred to the fact that Sella Boyan sold only an 1/4th share and the three sons of N. Palani Boyan sold only an 1/20th share each to Chinna Mara Boyan. On the finding of the learned Judge that Raju Boyan (cousin of Petha Boyan) did not convey any title to Chinna Mara Boyan and on the facts found by himself in paragraph

41 referred above, Chinna Mara Boyan ought to have been held to have acquired title only to 4/10th share, as was the finding in the earlier suit namely O. S. No. 90 of 1943.

24. That the learned Judge (who decided O. S. No. 456 of 1950) had completely missed the controversy in the suit is evident from the curious finding that the first defendant herein (plaintiff in that suit) became entitled to a 4/5th share in the entire 14.47 acres. Needless to say that it is not the case of the first defendant that he was entitled to any such share. It is not even the case that he was entitled to what all Chinna Mara Boyan had become entitled to in the several purchases made by him. All that he claimed was only 3.68 acres which he purchased from out of the divided 4/10th of Chinna Mara Boyan. Different portions of the abovesaid divided 4/10th share of Chinna Mara Boyan had been sold to the first defendant herein and several other parties. While the first defendant purchased 3.68 acres, P. N. Ramaswami and Senga Goundar purchased 1 acre, V. Palaniswami purchased 50 cents and Senga Goundar purchased 41 cents, all out of the western 4/10th which fell towards Chinna Mara Boyan's share in the final decree in O. S. No. 90 of 1943, obtained by Sellamuthu Boyan standing in the shoes of Chinna Mara Boyan. Even though the abovesaid purchasers of different plots from Sellamuthu Boyan were also parties to the suit, the learned Judge did not allot anything to any of them.

25. Senga Goundar and V. Palaniswami had to file A. S. No. 98 of 1959 on the file of this court challenging the decree, and the first defendant herein entered into a compromise with them and got a release of their rights in respect of the plots claimed by them. One Venkatachala Goundar, a subsequent purchaser of a plot who was also a party to that suit filed an application for setting aside the ex parte decree against him in O. S. No. 456 of 1950. The second plaintiff in the present suit filed a similar application to set aside the ex parte decree against his vendor, namely, T. P. Palaniswami. Two other parties to that suit filed similar applications for setting aside the ex parte decree against them. On the application filed by Venkatachala Goundar, the Court set aside the decree in its entirety and all the four applications referred above had been allowed. Against that, there were four Civil Revision Peti-

tions to this Court and this court remitted the applications for fresh consideration. Then the first defendant herein (plaintiff in that suit) compromised the matter with Venkatachala Goundar by giving him 34 cents of land. The other applications to set aside the decree were not further prosecuted as in the meanwhile the plaintiffs filed the present suit.

26. There can be no doubt that the learned Judge who decided O. S. No. 456 of 1950 had not understood what the controversy was. The decree in O. S. No. 90 of 1943 was treated as infructuous on the ground that some of the sharers had not been made parties to that suit. But the learned Judge by the common judgment in O. S. No. 456 of 1950 and O. S. No. 418 of 1950 (O. S. No. 132 of 1947 on the file of the Court of the District Munsif, Tirupur) did not hold that any of them was entitled to any share. O. S. No. 418 of 1950 (O. S. No. 132 of 1947 on the file of the Court of the District Munsif, Tirupur) filed by some of the sons and a grand-son of N. Palani Boyan came to be dismissed. Peria Mara Boyan and Roya Boyan, the brothers of Chinna Mara Boyan who claimed that Chinna Mara Boyan's purchases were on behalf of their family, had given up such a case and had taken a sale from Sellamuthu Boyan (Successor-in-interest of Chinna Mara Boyan) of 3.68 acres. They conveyed the same to the first defendant herein, which alone the first defendant as the plaintiff in O. S. No. 456 of 1950 claimed. But the learned Judge had reallocated the shares as it were only amongst the persons who were parties to the earlier suit (O. S. No. 90 of 1943). While in the earlier suit T. P. Palaniswami (the predecessor-in-title of plaintiffs 1 and 2 herein) got 5/10th share, Venkatappa Goundar the second defendant herein (for himself and his brothers defendants 3 and 4 herein) got 1/10th share and Chinna Mara Boyan got 4/10th share, in O. S. No. 456 of 1950, the learned Judge held that T. P. Palaniswami was not entitled to any share at all, that defendants 2 to 4 herein were entitled to an 1/5th share and that Chinna Mara Boyan was entitled to a 4/5th share.

27. However, erroneous a decree might be, it cannot be set aside or treated as a nullity unless it is shown that the same had been obtained by fraud or that the Court had no jurisdiction to pass such a decree. As pointed out by the Privy Council in *Rajwant Prasad Pande v. Ram Ratan Gir*, 29 Mad LJ 165 = (AIR 1915 PC 99) the method of exercise of

the jurisdiction can never in law justify denial of the existence of such jurisdiction. I have already pointed out that the plaintiffs do not contend before me that the decree in O. S. No. 456 of 1950 is vitiated by fraud, their only case is that the court had no jurisdiction to pass such a decree. There can be no dispute that a Court would have jurisdiction only to hear matters in controversy. As pointed out by a Full Bench of the Calcutta High Court in *H. Nath Roy v. R. C. Barna Sarma*, (AIR 1921 Cal 34) (FB) jurisdiction of the court is the power to hear and determine a case, to agitate and exercise any judicial power in relation to it. In other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or it takes cognizance of matters presented in a formal way for its decision. If a controversy is presented before Court it has certainly authority to decide such controversy even wrongly. Therefore, the simple question is whether in this case, the court which decided O. S. No. 456 of 1950 decided only the controversy before it or something which was not in controversy. The learned Counsel for the first defendant contends that the issue before the court was as to what was the share to which the various parties before the court were entitled and that therefore it cannot be said that the court had acted without jurisdiction in allotting 4/5th share to the first defendant (plaintiff in that suit). This is not acceptable. It was already seen that the first defendant as plaintiff had conceded in that plaint that a half share belonged to Petha Boyan's branch though he stated that Raju Boyan's (cousin of Petha Boyan) had conveyed a 1/4th share to Chinna Mara Boyan. There can be no doubt whatsoever that at least in respect of a 1/4th share which was conceded to Petha Boyan as per the averments in the plaint in O. S. No. 456 of 1950, there was no controversy to be decided by the court. It is true that in a suit for partition, every defendant who claims a share is also in the position of a plaintiff and that therefore the plaint averments alone are not the criteria to decide what the controversy was. But significantly, none of the defendants to that suit had ever contended that Petha Boyan was not entitled to even that 1/4th share conceded in the plaint. Therefore, there is no escape from the position that in respect of 1/4th share there was no controversy at all. Under such circumstances, the court had no ju-

risdiction to decide even in respect of the said 1/4th share.

28. It is true, T. P. Palaniswami who claimed from Petha Boyan had remained ex parte in O. S. No. 456 of 1950, but when his right to at least 1/4th share had been conceded in the plaint, he could have appeared even at the final decree stage to work out his right in respect of such 1/4th share. Because the Court held in the preliminary decree that T. P. Palaniswami was not entitled to any share at all there was no further notice to him in the final decree proceedings. It cannot be disputed that even when a sharer is ex parte in the preliminary decree stage, he is entitled to notice in the final decree proceedings, so that he can safeguard his right in respect of his share. But because, in this case, the Court had exceeded its jurisdiction in deciding a matter which was not in controversy before it and held that T. P. Palaniswami was not entitled to any share at all, there was no further notice to him in the final decree proceedings.

29. *Navaneethammal v. Ammakannammal*, 1944-2 Mad LJ 67 = (AIR 1944 Mad 513) referred to by the learned counsel for the first defendant has no application here. What is pointed out there is that when the Court has jurisdiction over the subject-matter, but arrives at an erroneous decision it cannot be ignored as a nullity. There can be no dispute about the above proposition, but in the present case, the Court had purported to decide a matter which was not in controversy before it and therefore it had acted wholly without jurisdiction and it is not merely an erroneous exercise of jurisdiction. *Durga Prasad Sing v. Rajendra Narayan Bagchi*, (1914) ILR 41 Cal 493 (PC) referred to by the learned counsel for the first defendant is also of no help to him. That is a case of a suit for recovery of rent as per a kabuliyat. The defendants in that suit pleaded abatement of rent because of an injunction granted against them in an earlier suit, which injunction was wider in scope than the one asked for in the said earlier suit. The Privy Council held that the defendants were not entitled to abatement of rent as they have failed to prove any fact which would entitle them to any abatement of the rent fixed by the kabuliyat. The question whether the injunction granted in the earlier suit which was wider in scope than prayed for was without jurisdiction, did not fall for consideration.

30. The result is both the appeals fail and they are dismissed but under the circumstances of the case I make no order as to costs.

Appeals dismissed.

AIR 1976 MADRAS 318

RAMANUJAM, J.

K. S. Ardanareeswarar Gounder, Petitioner v. Tahsildar, Bhavani and another, Respondents.

W. P. 328 of 1972, D/- 3-1-1975.

(A) Tamil Nadu Panchayats Act (35 of 1958), Sections 115 (1), 116 — Madras Irrigation Cess Act (7 of 1865), Section 1 (2) (as amended by Act 3 of 1945) — Constitution of India, Sch. V, List II Entries 49 and 66 — Levy of local cess surcharge under Section 116 on the basis of land revenue due — Inclusion of water cess within the term 'Land Revenue' — Constitutional validity.

Inclusion of water cess in the definition of the term "land revenue" is not unconstitutional. The State Government is competent to define land revenue as it has done under the explanation to Section 115 (1) as including water cess. Though water cess is not treated as land tax proper for certain purposes under Section 1 (2) of Madras Act 7 of 1865 it is still a revenue due on the land in one's occupation and may clearly fall within the ambit of land revenue. (Paras 5, 10)

The word "revenue" is of wider connotation than the word "tax". The term "land revenue" has been defined under the explanation to Section 115 (1) to include water cess for purposes of Sections 115 and 116. Under Section 115 the levy is only on land but the measure of tax is based on the land revenue payable on it. Section 115 (1) enabled the levy of local cess at a particular rate on every rupee of land revenue payable to the Government in respect of any land for each Fasli, it is not therefore possible to limit the meaning of the term "land revenue" by restricting it to land tax. So long as the power to tax is there, then the Legislature is entitled to adopt any measure to effectuate the levy of tax. AIR 1965 SC 177 and AIR 1970 SC 169, Rel. on. (Paras 9, 10)

Cases Referred: Chronological Paras

AIR 1970 SC 169 = (1970) 1 SCR 268 9
AIR 1965 SC 177 = (1964) 6 SCR 666 9

BT/CT/A534/76/AS/MVJ

AIR 1942 Mad 719 = (1942) 2 Mad LJ 150 8

AIR 1917 PC 42 = ILR 40 Mad 886 8

S. Gopalaratnam, for Petitioner; The Govt. Pleader, for Respondents.

ORDER:— The petitioner owns lands in Singampatti village, Bhavani taluk, Coimbatore District, and the lands are comprised in patta Nos. 18, 30, 413 and 416. The land revenue payable for the lands comprised in the said patta numbers is Rs. 1.94, 2.93, 22.17 and 2.10 respectively and the water cess payable on them under the Madras Irrigation Cess Act, 1865 is Rs. 19.90 Rs. 32.10, 256.25 and Rs. 22.95 respectively.

2. By Government Order Ms. No. 1475, Rural Development and Local Administration dated 1-8-1970, the rate of levy of local cess surcharge under Section 116 of the Tamil Nadu Panchayats Act, 1958, was made subject to a maximum of Rs. 1.50 on every rupee of land revenue. On the basis of the said G. O., the respondent had claimed a sum of Rs. 702.77 from the petitioner under the provisions of Sections 115 and 116 of the said Act. The petitioner questions the validity of the said demand in the writ petition on the ground that the water cess collected under the Madras Irrigation Cess Act, 1865 will not come within the term of 'land revenue' used in Sections 115 and 116 of the Tamil Nadu Act 35 of 1958, that the explanation to Section 115 (1) which seeks to include water cess also within the term of land revenue is unconstitutional and as such invalid, and that the water cess which is only a fee payable to the Government for the water supplied cannot be taken to be a tax on land, leviable under Section 115 (1). The petitioner, therefore, seeks a writ of prohibition from this court to prohibit the respondent from enforcing the said demand.

3. According to the petitioner the water cess which is levied under the provisions of the Madras Irrigation Cess Act, 1865 is only a fee and that it is not within the competence of the State Legislature to levy any tax on the consumption of water in the irrigation of land by owners thereof. It is also stated that the explanation to Section 115 (1) of Madras Act 35 of 1958 which includes within the definition of 'land revenue' water cess payable to the Government for water supplied or used for the irrigation of land, which is not a tax, is beyond the legislative competence and is, therefore, invalid and unconstitutional.

4. The learned counsel for the petitioner refers to Entry 17 and Entry 66 of List II of the VII Schedule to the Constitution of India in support of his contention that no tax can be levied on the water supplied by the Government and that only a fee can be levied under Entry 66 of List II. Reference is also made to Section 1 (2) of Madras Irrigation Cess Act 1865 as amended by Madras Act 3 of 1945 which declares that water cess leviable under the said Act is not a tax on land but is only a fee for the water supplied or used for the irrigation of land. It is said that in view of the said section water cess can never be treated as a tax, and that land revenue which is a tax falling under Entry 49 of List II can never be taken to include water cess which is a fee, and, therefore, it is not open to the Legislature to include water cess within the definition of Land Revenue.

5. The respondents, however, counters the petitioner's contention that the said explanation is invalid and unconstitutional, by saying that the State Government is competent to define land revenue as it has done under the explanation to Section 115 (1) as including water cess, that though water cess is not treated as land tax proper for certain purposes under Section 1 (2) of Madras Act 7 of 1865 it is still a tax levied in respect of the land, and that water cess which is charged with reference to land in one's occupation may clearly fall within the ambit of land revenue.

6. For a proper appreciation of the rival contentions of the parties it is necessary to note briefly the statutory provisions. Section 115 (1) and the explanation thereto and Section 116 of the Madras Act 35 of 1958 are as follows:—

"There shall be levied in every Panchayat Development Block, a local cess at the rate of 45 naya paise on every rupee of land revenue payable to the Government in respect of any land for every fasli.

Explanation:— In this section and in Section 116 'land revenue' means public revenue dues on land and includes water cess payable to the Government for water supplied or used for the irrigation of land, royalty, lease amount or other sum payable to the Government in respect of land held direct from Government on lease or licence, but does not include any other cess or the surcharge payable under Section 116, provided that land revenue remitted shall not be deemed to be land re-

venue payable for the purpose of this section".

Section 116 provides—

"Every Panchayat Union Council may levy on every person liable to pay land revenue to the Government in respect of any land in the Panchayat union a local cess surcharge at such rate, as may be considered suitable as in addition to the local cess levied in the Panchayat Development block under Section 115 provided that the rate of local cess surcharge so levied shall be subject to such maximum as may be prescribed."

7. The maximum rate of local cess surcharge referred to in Section 116 has been fixed at Rs. 1.50 on every rupee of land revenue by G. O. Ms. No. 1475 Rural Development and Local Administration dated 1-8-1970. It is on the basis of the above provisions a demand has been made from the petitioner towards local cess surcharge as provided by Section 115 and 116 of Act 35 of 1958 read with Explanation to Section 115 (1). Entry 17 of List II of Schedule 7 of the Constitution runs as follows—

"Water that is to say water supplies, irrigation and canals, drainage and embankments subject to the provisions of Entry 56 of List I."

Entries 49 to 63 relate to imposition of various kinds of taxes. Entry 49 relates to taxes on lands and buildings. There is no entry enabling the State Government specifically to levy a tax on water supplied. Entry 66 of the same List reads thus:

"Fees in respect of any of the matters in this List, but not including fees taken in any court."

According to the petitioner water cess levied under Madras Act 7 of 1865 can be justified only as a fee falling under Entry 66 of List II read with Entry 17 which corresponded to Item 54 read with Item 19 of List II of the Government of India Act, 1935. It is said that the position will be clear by a look at Section 19 (2) of Madras Act 7 of 1865 which is as follows—

"For the avoidance of doubt it is hereby declared that water cess leviable under this Act is not a tax on land but is a fee for the water supplied or used for the irrigation of the land"

It is with reference to the above provisions the petitioner's constitutional attack against the explanation to Section 115 (1) has to be considered.

8. In *Madras Province v. Dolours Convent*, AIR 1942 Mad 719, a Division

Bench of this Court ruled that a cess levied in respect of water used for irrigating land is a land tax. In that case it was contended by the owner of the lands that as under an arrangement with the Government the lands are held free from land tax, a cess which is levied in respect of water used for irrigating the land being land tax it cannot, therefore, be levied on his land. The Court held, following the decision of the Privy Council in *Balasuryaprasada Rao v. Secy. of State*, ILR 40 Mad 886 = (AIR 1917 PC 42) that the cess payable under Madras Act 7 of 1865 is a form of land tax. In the said Privy Council case, Lord Parker has held that cess collected under the said Act is leviable on land which is irrigated and therefore is in the nature of a land tax. It is with a view to get over the said decisions, Section 1 (2) was introduced in Madras Act 7 of 1865 by Madras Act 3 of 1945. The Statement of Objects and Reasons for bringing in Section 1 (2) are given as follows—

"The Madras Irrigation Cess Act, 1865 (Madras Act VII of 1865) provides for the levy of water cess for the use of water supplied from a Government source for irrigation purposes in certain cases. In the case of lands granted tax free under inam title deeds and permanently settled estates granted under sanads, the practice has been to charge water cess in respect of all irrigation except to the extent to which the inamdar, zamindar or landholder in virtue of any engagement with the Crown is entitled to irrigation free of separate charges. That is to say, water cess was being levied in all cases which are not covered by the first proviso to Section 1 of the Act. In a recent case, the Madras High Court has held that the water cess under the Act is levied on land which is irrigated and it is therefore a form of land tax and that consequently the cess is not leviable in the case of lands held free of all land tax. The Government consider it necessary to amend the Act so as to make it clear that the water cess levied under the Act is not a tax on land, but is a fee levied for the water supplied or used for the irrigation of land. It is also considered desirable to make it quite clear that the persons referred to in the first proviso to Section 1 will be liable to pay the cess or fee for all irrigation in excess of that for which under their engagement with the Crown they are entitled to water free of charge. The Government further consider it necessary to validate the long-

standing practice referred to above and to indemnify the officers who have followed it hitherto."

The above extract from the Objects and Reasons make it clear that water cess was taken to be a fee and not a tax on land for a specific purpose i.e., with reference to the lands granted tax free under various inam title deeds and permanently settled estates granted under sanads, so as to see that the tax free grants cannot be relied on in the matter of levy of cess for water supplied as the decisions above referred to prevented them from collecting cess for the water supplied by the Government for irrigation on the ground that it is a tax on land. Section 1 (2) cannot, therefore, be taken as conclusive on the question as to whether the water cess collected is a tax on land for other purposes.

9. Even assuming that water cess collected under Madras Act 7 of 1865 is a fee, so long as Section 115 (1) enabled the levy of local cess at a particular rate on every rupee of land revenue payable to the Government in respect of any land for each fasli, it is not possible to limit the meaning of the term 'land revenue' by restricting it to land tax. The term 'land revenue' has been defined under the explanation to 'include water cess for purposes of Sections 115 and 116. Under Section 115 the levy is only on land, but the measure of tax is based on the land revenue payable on it. So long as the power to tax is there, then the Legislature is entitled to adopt any measure to effectuate the levy of tax. In *H. R. S. Murthi v. Collector of Chittoor*, AIR 1965 SC 177, the Supreme Court has held that land cess imposed under the provisions of Sections 78 and 79 of the Madras District Boards Act, is in truth a tax on lands within Entry 49 of the State List and not a tax on minerals within Entry 50 of the State List and that what a lessee or licensee actually pays for the land for working the minerals on the land can be used as a measure for collecting the land cess which is nothing else but a tax on land. In *Asst. Commr., Madras v. B. and C. Co. Ltd.*, AIR 1970 SC 169 the Supreme Court, while considering the validity of the provisions of the Madras Urban Land Tax Act of 1966, expressed the view that the mere fact that the Legislature while levying a tax under entry 49, List II has adopted, for determining the incidence of tax, the annual or capital value of the lands and buildings will not make the legislation as one under Entry

86 of List I, and that the capital value of the asset, has been taken only as a measure for imposing the tax on lands and buildings.

10. In this case also, while levying a tax on land the aggregate of the amounts paid in respect of the land by the owner has been taken as a measure for determining the tax liability. Reference may be made in this connection to the definition of 'public revenue' in the Revenue Recovery Act, 1864. Public revenue due on land has been taken for the purposes of that Act as including cesses or other dues to the State Government on account of water supplied for irrigation. Though that definition is only for the purpose of that Act, cesses or other dues payable to the Government on account of water supplied for irrigation is normally taken as a revenue due on the land. In the light of the above discussion it is not possible to accept the petitioner's contention that the cess for the use of water supplied for irrigation purposes by the Government cannot be taken to be land revenue. The petitioner's contention is that the words 'land revenue' should be equated to land tax. The word 'revenue' is in my view of a wider connotation than the word 'tax'. Even assuming that water cess is not land tax as alleged by the petitioner, it is still a revenue due on the land and, therefore, it has to be taken as land revenue. As already stated, land revenue has not been specifically defined in Madras Act 35 of 1958, except in the explanation to Section 115 (1), and it is open to the Legislature to give a special definition of land revenue for the purpose of determining the tax leviable on land under Section 115 (1). Hence there is no merit in the contention of the petitioner that the explanation to Section 115 (1) is unconstitutional and invalid. The writ petition is, therefore, dismissed. But in the circumstances of the case, there will be no order as to costs.

Petition dismissed.

AIR 1976 MADRAS 321

SPECIAL BENCH

**KAILASAM, Offg. C. J., RAMANUJAM
AND BALASUBRAMANYAN, JJ.**

The Chief Controlling Revenue Authority, Board of Revenue, Madras, Petitioner v. Jagadambal and another, Respondents.

R. C. No. 1 of 1975, D/- 1-4-1976.

GT/HT/C360/76/DHZ

1976 Mad./21 X G—32

(A) Stamp Act (1899), Sections 2 (15), 2 (24), Sch. I, Art. 45, Article 58-A — Partition or Settlement.

The document in question, after reciting the terms of the Will executed by one Z, which provided that A and B Schedule properties therein should be enjoyed by X for her lifetime and would vest with Y after her lifetime, recited that there being disputes between X and Y after the death of the testator Z the matter was settled by the well-wishers and A schedule properties were allotted to X to be enjoyed for her lifetime and would vest in Y after her lifetime and B Schedule properties were allotted absolutely to Y.

Held that the document could not be a settlement as the document was not executed for any of the purposes mentioned in Section 2 (24). The document in question was only a partition. It could not be held that Y was not entitled to any immediate right in the properties at the time when the document was executed and, therefore, he could not be classified as a co-owner. 'Property' includes a property in future i.e., the person with a vested interest is also owner of the property along with the limited owner, who will also be a owner however limited her rights may be as between these two persons. They need not be absolute owners of the entire or any portion of it. Partition is possible between two co-owners who may not have absolute or equal rights. (Para 2)

Cases Referred: Chronological Paras
(1971) W. P. No. 3254 of 1971 (Mad) 1

The Addl. Govt. Pleader No. 2, for Petitioner; K. Parasaran for R. Srinivasan, for Respondents.

KAILASAM, Offg. C. J.:— This case is referred under S. 57 (1) of the Indian Stamp Act by the Chief Controlling Revenue Authority, Board of Revenue, Madras. The first respondent Jagadambal is the first wife of Srinivasa Reddiar. The second respondent Chinmayananda Reddiar is the sister's son of Srinivasa Reddiar. Srinivasa Reddiar executed a will on 2-10-1941, bequeathing the properties mentioned in the Will to the first respondent — first wife and stating that she should administer them and pay the debts incurred by him by selling the properties and that out of what remained after liquidating the debts, the properties should be enjoyed by the second respondent after the death of the first respondent. Srinivasa Reddiar died, and there were disputes as to their rights under the Will.

There was a compromise, and the respondents executed a document on 5-12-1969, by which the properties described in Schedule A were allotted to the share of the first respondent and the properties described in Schedule B were allotted to the second respondent with a further stipulation that the second respondent would be entitled to absolute rights over the properties so allotted to him and the first respondent would be entitled only to a life estate in the properties allotted to her.

When the document was presented for registration before the Sub-Registrar, Mannargudi, as a partition deed chargeable to stamp duty under Article 45 of the I Schedule to the Indian Stamp Act, he impounded it and referred the matter to the District Registrar. The District Registrar construed the document as a settlement deed and not a partition deed and charged an additional stamp duty of Rs. 1,790/- and a penalty of Rs. 5/-. The respondents filed an appeal to the Board of Revenue and the Board of Revenue confirmed the view of the District Registrar holding that the document was a settlement deed. Aggrieved by the order of the Board of Revenue, the respondents filed a writ petition before this court, W. P. No. 3254 of 1971 (Mad) and this court directed the Board on 1-8-1972, to refer the matter to this court under Section 57 (1) of the Indian Stamp Act. Thus, the Board of Revenue has referred the following point to this court:—

"Whether the document No. 8/70 of the Sub-Registrar's Office Mannargudi, dated 5-12-1969 executed by the first and the second respondents by which the first and second respondents have agreed to take the properties recited in the said document, otherwise than with reference to the mode of devolution contemplated under the Will executed by Srinivasa Reddiar dated 2-10-1941, is a partition chargeable under Article 45 of Schedule I of Indian Stamp Act, or a deed of settlement chargeable under Article 58-A of the Indian Stamp Act or any other Article under the Act."

The document in question, after reciting the terms of the Will, which provides that A and B Schedule properties therein should be enjoyed by the first respondent for her lifetime and would vest with the second respondent after her lifetime, recites that there were disputes between the two respondents after the death of Srinivasa Reddiar and the matter was settled by the well-wishers

and that the A Schedule properties were allotted to the first respondent to be enjoyed for her lifetime and would vest in the second respondent after her lifetime and the B Schedule properties were allotted absolutely to the second respondent.

2. It was contended on behalf of the Revenue that by this document the second respondent became entitled to B Schedule properties immediately and thereby acquired more rights than otherwise given to him under the Will. According to the Revenue, this amounted only to a settlement. That it cannot be a settlement is very clear. 'Settlement' is defined under section 2 (24) of the Stamp Act as a non-testamentary disposition in writing of moveable or immovable property made (a) in consideration of marriage; (b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him; or (c) for any religious or charitable purpose. It is obvious that the document was not executed for any of the purposes mentioned in Section 2 (24) of the Act, and, therefore, cannot be a settlement. The question is whether it is an instrument of partition as defined under Section 2 (15) as meaning any instrument whereby co-owners of any property divide or agree to divide such property in severalty.

The argument advanced on behalf of the Revenue is that the second respondent was not entitled to any immediate right in the properties at the time when the document was executed and, therefore, he cannot be classified as a co-owner. We are unable to accept this contention, for, Section 5 of the Transfer of Property Act states that 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons. 'Property', therefore, includes a property in future i.e., the person with a vested interest is also owner of the property along with the limited owner, who will also be a owner however limited her rights may be as between these two persons. They need not be absolute owners of the entire property or any portion of it. Partition is possible between two co-owners who may not have absolute or equal rights. Though Section 5 of the Transfer of Property Act relates to transfer inter vivos of property, including the future interest, by a conveyance, it is

equally applicable to Wills also. In this case, it may be noted that the document in question was executed in settlement of disputes between the two parties. We do not see any difficulty in holding that this document was executed in settlement of the disputes between the two persons who are entitled to the same properties, who agreed to divide them amongst themselves in a particular manner. We are satisfied that the document in question, is only a partition and we answer the reference accordingly.

Answer accordingly.

AIR 1976 MADRAS 323

**RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.**

The Ramanathapuram Market Committee, Virudhunagar and others, Appellants v. East India Corporation Ltd., Madurai, Respondent.

Appeal No. 188 of 1970, D/- 24-1-1975.*

(A) Limitation Act (1963), Pre. — Statute of limitation — Object of — Rule of construction. (Interpretation of Statutes).

The object of the statute of limitation is preventive and not creative. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right. Such extinguishment of claims by statutory interference resulting in making certain demands stale should be construed strictly. No doubt, the provisions of the Limitation Act should be interpreted strictly in accordance with the language used, but it is always necessary that a litigant, who relies upon it, should bring his cause within the four corners of the terms of the statute. (Para 9)

(B) Limitation Act (1963), Section 17, Article 24 — Scope of Section 17 — phrase "with reasonable diligence" in Section 17 — Meaning — Suit, under circumstances held to be barred under Article 24. (Words and Phrases — Phrase "with reasonable diligence").

By the use of the phrase "with reasonable diligence" in Section 17, the Legislature has given scope to the defen-

dant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. It is open to the defendant to establish that "with reasonable diligence", the plaintiff could have discovered the fraud or the mistake earlier. The plaintiff, therefore, is not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action. (Para 14)

If the plaintiff's allegation as to the date of the knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. Reason varies according to times and circumstances in which the individual thinks. Thus, the word "reasonable" has always been understood in law as prima facie meaning, reasonable in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know. (Para 14)

When, in a suit against a statutory Market Committee for refund of cess paid under a mistake of law or of fact, it was found that the plaintiff knew about the cancellation of the earlier notification by a later notification, then it was normally and reasonably expected that it knew or with reasonable diligence ought to have discovered that the payments made by it under the earlier cancelled notification were irregular and improper and the payments were made under a mistake of law or of fact. The impact of such knowledge leads to the reasonable inference that the discovery of the mistake in the payment of the cess was contemporaneous with the publication of the second notification. The plaintiff in such a case ought to have, therefore, been diligent in instituting the action within three years from the date of the second notification. AIR 1925 Nag 398, Distinguished. (Suit having been filed beyond three years from the date of said notification under the circumstances was held to be barred under Article 24.)

(Paras 14, 15, 17)

(C) Contract Act (1872), Section 72 — "Mistake" — Meaning — Plea about discovering mistake on particular date — Burden of proof. (Evidence Act (1872), Section 101).

*(Against decree of Sub. J., Ramanathapuram at Madurai, in O. S. No. 90 of 1968.)

The word "mistake" appearing in Section 72 of the Contract Act takes into its fold mistake of fact as well as law and would entitle a litigant to recover even a tax, if it is established that such a payment has been made by the party labouring under a mistake of law. AIR 1959 SC 135, Followed. (Para 17)

When the plaintiff alleged a mistake in his case and particularly stated that it discovered such a mistake on a particular date, the initial burden would be on it to lead evidence, prima facie at any rate to establish the date of discovery of such a mistake. It is only in extra-ordinary cases where the plaintiffs are emphatic and the defendants avoid answering a specific claim as to date of discovery or knowledge, the courts in their discretion might dispense with the further proof of the date of acquisition of such knowledge or date of discovery. AIR 1929 All 721 (2) and AIR 1931 Bom 97 and AIR 1927 PC 230, Followed. (Para 17)

Cases Referred: Chronological Paras

AIR 1959 SC 135 = 1959 SCR 1350	17
AIR 1931 Bom 97 = 32 Bom LR 924	17
AIR 1929 All 721 (2) = 1929 All LJ 1153	17
AIR 1927 PC 230	17
AIR 1925 Nag 398 = 89 Ind Cas 625	16

K. Parasaran, for Appellants; K. K. Venugopal, for Respondent.

RAMAPRASADA RAO, J.:— The Ramanathapuram Market Committee, Virudhunagar, constituted or established by the Government of Tamil Nadu under Section 5 of the Madras Agricultural Produce Markets Act, 1959 (Act 23 of 1959), who is the defendant in O. S. 90 of 1968, on the file of the Subordinate Judge of Ramanathapuram at Madurai, is the appellant. The Tamil Nadu Act 23 of 1959 came into force on 22-10-1962. But by a notification in the Fort St. George Gazette on 18-4-1962, pursuant to the G. O. Ms. No. 1054 (Food and Agriculture) dated 30-3-1962, the State Government directed the constitution of a market committee at Virudhunagar and markets at Virudhunagar, Rajapalayam and Sattur, in Ramanathapuram District. These committees were no doubt regularly constituted and established under the provisions of the Madras Commercial Crops Markets Act (Act 20 of 1933). The main intentment of the Act is to provide for the better regulation of buying and selling of commercial produce in the State of Tamil Nadu and in order to achieve that object, a machinery is set up to control the trade

in commercial crops and impose restrictions on the carrying of such trade. Cotton is one of the commercial crops, which comes within the purview of Act 20 of 1933. Under the provisions of the Act, the State Government is entitled to exercise control over the purchase and sale of commercial crops including cotton, and declared certain areas to be specified areas within which such control could be exercised by the State.

In order to achieve the said purpose market committees are established by the State Government for every notified area. Once a market committee is set up, and a notified area is notified, then the sale and purchase of commercial crops could be carried on only in such places as are notified and in accordance with the condition of a licence issued by the appropriate authority. One of the provisions of the Act authorises the market committee to levy such fee on the notified commercial crops bought or sold in the notified area at such rates as it might prescribe. Act 20 of 1933 was repealed and practically re-enacted, though with slight modifications under the caption of the Madras Agricultural Produce Markets Act, 1959 (Act 23 of 1959). This Act came into force on 22-10-1962. There are provisions, which are very similar to the provisions of Act 20 of 1933, to which we have already made a reference. Under this Act also a market committee is established and an area is notified as the notified market area for the sale and purchase of agricultural produce and the market committee is enabled to impose a cess by way of sales tax on any notified agricultural produce bought or sold in the notified market area at the prescribed rate.

A saving provision is made under Section 38, which enabled the continuance of the notified area and the market committee under the provisions of Act 23 of 1959. What happened was that prior to the date when Act 23 of 1959 came into force, the State Government declared and published several notifications amongst which the notification published pursuant to G. O. Ms. No. 1054 dated 30-3-1962 is relevant. Under this, Virudhunagar, Rajapalayam and Sattur were notified as market areas under the latter Act. Realising the mistake, a notification under G. O. Ms. No. 1052 Food and Agriculture, dated 30-3-1964 was made and published in the Gazette on 27-5-1964, cancelling the 1962 notification and on the same date, a re-declaration was made declaring

certain areas in Virudhunagar, Rajapalayam and Sattur as notified market areas in respect of cotton, groundnut and chillies. In the present litigation, the cess collected for a period prior to 22-10-1962 is not in dispute, as obviously the said collection was made under Act 20 of 1933 and even otherwise such collections were validated by the passing of the Madras Commercial Crops Markets (Validation of Cess) Act, (Act 7 of 1963).

2. The bone of contention between the parties, however, is that all such levy and collection of cess by the defendant as a market committee under Act 23 of 1959 for a period commencing from 22-10-1962 till 26-5-1964 is illegal and that they have paid the cess under a mistake of law or of fact.

3. The plaintiff is a limited concern carrying on business in the purchase and sale of cotton. It has its head office at Madurai with branch offices in towns like Virudhunagar, Rajapalayam and Sattur. The complaint is that the defendant, as a market committee, did not have the jurisdiction to levy and collect cess under the Madras Agricultural Produce Markets Act, 1959 (Act 23 of 1959) prior to the date when it came into force and that, therefore, the collection of the cess made during the period commencing from 22-10-1962 to 27-5-1964 is invalid and that all such amounts which were paid under a mistake, are recoverable by the plaintiff. The plaintiff's case is that it was during the third week of September, 1965, it came to know about the unauthorised nature of the levy collected from it from 22-10-1962. In that situation, it laid the present suit on 28-3-1968 for the recovery of a sum of Rs. 19,731.32 made up of Rs. 2,932.92 collected by the defendant as cess from its Virudhunagar branch, Rs. 8,383.50 from its Rajapalayam branch and Rs. 8,364.90 from its Sattur branch. The defendant's case is that the levy was authorised, and that the defendant in exercise of its statutory functions, imposed the levy and collected the fee and that it cannot be challenged or declared to be unauthorised. The defendant also expressly pleaded that the suit is barred by reason of Article 78 of the Limitation Act. The other contention is that as the plaintiff did not exhaust the special remedies provided under the Act for setting aside the levy, the Civil Court cannot adjudicate on it and in that sense the suit is not maintainable. On these relevant pleadings, the following issues were framed—

1. Whether levy and collection of cess made from 18-4-1962 to 27-5-1964, from the plaintiff at Virudhunagar, Rajapalayam and Sattur by the defendant market committee are illegal and unauthorised?

2. Whether the said levy and collections made by the defendant market committee cannot be challenged as illegal or unauthorised or ineffective for any of the reasons stated in the written statement?

3. Whether the suit filed without impleading the State Government as a party is not maintainable?

4. Whether the plaintiff is estopped from claiming the refund of the amounts collected?

5. Whether the suit is out of time under Article 72 of the Limitation Act?

6. What is the correct amount to which the plaintiff is entitled to get by way of refund?

7. To what relief is the plaintiff entitled?

The learned Judge came to the conclusion that the levy and collection of cess made by the defendant from the plaintiff for a period of 22-10-1962 till 26-5-1964 is illegal and unauthorised, and found the issue in favour of the plaintiff. On issues 2 and 4, he found against the defendant and held on issue 3 that the State Government was not a necessary or proper party to the suit. On the main issue, which has been argued in full before us, he found that the suit having been filed on 28-8-1968 was within time and that the mistake in the matter of the payment of the cess, though voluntary, could have been discovered by the plaintiff only on 20-9-1965 and that, therefore, the suit was in time. In the result, he decreed the suit as prayed for. It is as against this, the present appeal has been filed.

4. It is unnecessary for us to go into the gamut of the case law regarding the validity of the levy.

5. We are not called upon in this case to consider whether the levy of the cess by the market committee is legal, as the finding of the court below that it was not so, has not been seriously challenged before us. Even otherwise, in the view that we intend taking on the issue on limitation, it is not necessary even for us to consider the hesitant argument addressed by the learned counsel for the appellants.

6. The material point, however, is whether the suit claim is barred by limitation. We have already referred to the

fact that the plaintiffs' case is that it paid the case for the period commencing from 22-10-1962 to 27-5-1964 under a mistake of law as well as fact. The plaint to recover such amounts paid by the plaintiff under mistake, was filed on 28-8-1968. Considerable reliance is placed on Ex. A-1, which is a letter written by the Ramanathapuram Market Committee, Virudhunagar, to East India Corporation Ltd., Virudhunagar. It runs as follows—

"In the notification, the previous order was cancelled and a new order was published. Nothing is said about the cess, whether the amount collected is to be refunded or collection is to be continued. For conducting normal work, the committee resolved to collect cess from 27-5-1964."

The argument is that the plaintiff's knowledge as to its quondam mistake in the matter of the payment of the cess during the relevant period should be taken to be the date of the above letter, when the market committee informed them that nothing is known about the cess already collected and whether the amount collected is to be refunded or collection is to be continued.

7. Mr. K. K. Venugopal, learned counsel for the respondent, strenuously contends that it is this letter which has given the cause of action for the plaintiff to file the action and as the suit has been laid within three years from the date of Ex. A-1, the claim is in time.

8. Mr. Parasaran, learned counsel for the appellants, however, would say that even on a reading of the letter it is clear that the plaintiff was making enquiries regarding the refund of cess and such enquiry was possible only when the plaintiff definitely entertained a doubt about the validity of the payments it made earlier during the suit period. The parties did not produce any earlier letter so as to bring the date of discovery of its knowledge as to such mistaken payments. Mr. Parasaran, therefore, rightly contends that the date in Ex. A-1 by itself cannot be the date, when such a discovery as to the mistake committed was found and that it was long prior to that date and if it was prior to 21-9-1965, then the presumption is that the plaintiff ought to have known about such mistaken payment, when the fresh notification was issued cancelling the earlier notification. If this date is taken as the date when the plaintiff could have reasonably discovered the mistake on its part, then the suit is barred by limitation.

9. The law as to limitation affords a guarantee to the litigant, public that after the lapse of a particular period of time prescribed under the Act, the cause of action rests. The object of the statute of limitation is preventive and not creative. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right. Such extinguishment of claims by statutory interference resulting in making certain demands stale should be construed strictly. No doubt, the provisions of the Limitation Act should be interpreted strictly in accordance with the language used, but it is always necessary that a litigant, who relies upon it, should bring his cause within the four corners of the terms of the statute. An attempt to deprive the party entitled to a right arising out of the existing benefit should not lightly be made by courts. But such a pleading as to the bar of the cause of action should flow from a permissible construction of the statutory provision.

10. We shall now refer to the pleadings as to how the plaintiff, who has come to court, could plead that its cause is in time. According to the plaintiff, during the third week of September, 1965, it came to know about the unauthorised and illegal levy and collections of the cess by way of sales tax from 18-4-1962 and thereupon it made enquiries and that the Ramanathapuram Market Committee, Virudhunagar, under Ex. A-1 held out that the previous notification was cancelled and a new order was published. The plaintiff desires to infer that it is only from Ex. A-1 the plaintiff came to know about the publication of a new order and that that date which Ex. A-1 bears, ought to be the date when the plaintiff discovered the mistake. In the cause of action paragraph, the plaintiff states that the cause of action for the suit arose when the illegal collections have been made during the period 22-10-1962 to 26-5-1964 and on 20-9-1965, when the mistake of collection and the payment was made known to the plaintiff by the defendant under Ex. A-1.

The defendants expressly plead that when a fresh notification dated 27-5-1964 was made cancelling the earlier notification dated 18-4-1962, that is the basis of the plaintiff's claim and it was futile for the plaintiff to state that he came to know of the unauthorised and illegal levy only during the third week of September, 1965. The appellants would add that such

a statement has been made only to escape the fact that the claim is out of time. They also referred to the fact that traders similarly placed like the plaintiff challenged the Tamil Nadu Act 20 of 1933 and Tamil Nadu Act 33 of 1959 and it is, therefore, futile for the plaintiff to say that it could discover the illegality of the levy only during the middle of September 1965. The defendants add that the suit is out of time under Article 72 of the Limitation Act.

11. It is interesting to note that the plaintiff did not even examine any witness on its side to pin-point the reasonable date when they had knowledge about the mistaken payment. On the other hand, the defendants examined two witnesses. The plaintiff's counsel in cross-examination specifically invited the attention of D. W. 1, to Ex. A-1. There was not even a suggestion in the cross-examination to this witness that the plaintiff began to enquire about the mistaken payments only in the third week of September, 1965. It is in this nebulous state of affairs the issue as to limitation has to be looked into. The learned trial Judge heard arguments of counsel, one relying upon Article 59 of the Limitation Act and the other Article 72 of the Act.

The learned Judge brushed aside the argument of the learned counsel for the plaintiff that Article 59 could be invoked in the instant case. He also rejected the argument of the counsel for the defendants who invoked Article 72 of the Act. The learned Judge for himself investigated—
(Contd. on Col. 2)

ed into the matter and was of the view that Article 24 read with Section 17 of the Limitation Act of 1963 would apply. He concluded by saying that the plaintiff has proved that under a mistake of law, the suit amount was paid and, therefore, the onus of proof is on the defendants to establish that the plaintiff had either discovered or could have discovered with reasonable diligence the mistake at a time beyond the period of limitation. He solely relied upon the pleading in the plaint wherein the plaintiff alleged that it came to know of the mistaken payment and the unauthorised levy only on 20-9-1965 and reading it in the light of Ex. A-1, found that there was no other document in the case to indicate that the plaintiff could have discovered the mistake prior to 20-9-1965. He held, therefore, that the suit was within time.

12. The earlier law on the aspect under consideration was covered by two articles under the Limitation Act, 1908. Article 95 dealt with a cause grounded on fraud. Article 96 dealt with the reliefs on the ground of mistake. In the former article a period of three years was provided to seek for a relief on the ground of fraud from the time when the fraud becomes known to the party wronged. Similarly, a period of three years was provided in cases wherein a relief on the ground of mistake is asked from the time when the mistake becomes known to the plaintiff. In the new Act, the appropriate Article, which could, if at all, be attracted is Article 24, which runs as follows—

Description of suit	Period of limitation	Time from which period begins to run
24. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use	Three years	When the money is received

But this has to be read in conjunction with Section 17 of the Limitation Act.

13. Section 17 of the Limitation Act deals with the effect of fraud or mistake in a particular suit or application for which a period of limitation is prescribed by the Act. Section 17 says that where the suit or application is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have dis-

covered it. We are not referring to the other limbs of Section 17, as they are not absolutely necessary for purposes of the present litigation.

14. The difference in the context and the language employed adopted by the old and the new Acts is rather significant. In the old Act, stress is laid on the knowledge of the person, who wants to take advantage of the enlarged period of limitation. In the new Act, emphasis is on the date when the plaintiff has dis-

covered the fraud or mistake or could, with reasonable diligence, have discovered it. By the use of the phrase 'with reasonable diligence' in Section 17 of the Act, the Legislature has given scope to the defendant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. It is open to the defendant to establish that 'with reasonable diligence' the plaintiff could have discovered the fraud or the mistake earlier. The plaintiff, therefore, is not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action. Where the legality of some proceeding is the matter in dispute between the two parties, he who maintains its legality and seeks to take advantage of it, cannot rely upon the proceeding itself as a bar to the adverse party.

To do so, would involve the logical fallacy of *Patitio-Principii* and would in many cases preclude redress to the aggrieved party. If the plaintiff's allegation as to the date of the knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake 'with reasonable diligence' on a date earlier than that on which the plaintiff bases his cause of action. As is said, it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies according to times and circumstances in which the individual thinks. Thus, the word 'reasonable' has always been understood in law as *prima facie* meaning, reasonable in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know.

It is also a fundamental maxim, 'Of things relating to each other, one being known, the other is also known'. In the instant case, when the plaintiff knew about the cancellation of the earlier notification by a later notification, then it is normally and reasonably expected that it knew or with reasonable diligence ought to have discovered that the payments made by it under the earlier cancelled notification were irregular and improper and the payments were made under a mistake of law or of fact. The cancellation of the earlier order is intimately connected with the mistake in the payments made by the plaintiff pursuant to the first withdrawn order. As it knew or ought to

have known and with reasonable diligence should have discovered that the earlier notification has become inoperative by its cancellation under the second notification, then that being known, then the other, namely, that it should seek for the refund of the said amounts on such discovery within the prescribed period of limitation, could have been known also. Such a discovery is possible because of the impact of one event as against the other.

15. The plaintiff in this case does not deny the knowledge of cancellation of the earlier order. He knew that G. O. Ms. No. 1054 dated 30-3-1962 was cancelled by G. O. Ms. No. 1052 dated 30-3-1964. The later was published in the Gazette on 27-5-1964. The payments, which are claimed to have been made under a mistake whether of fact or of law, were during the period commencing from 22-10-1962 till 26-5-1964. By the publication of the second notification on 27-5-1964, the plaintiff with reasonable diligence could have discovered the mistake committed by it. It ought to have, therefore, filed the suit for refund of the amounts paid as a consequence of such a mistake within three years from the date when the second notification became effective, that is, the suit ought to have been filed within three years from 27-5-1964. The plaintiff does not deny the knowledge of the cancellation of the earlier order, nor the publication of the second order cancelling the former. The impact of such knowledge leads to the reasonable inference that the discovery of the mistake in the payment of the cess was contemporaneous with the publication of the second notification. Having regard to the circumstances in which the plaintiff was called upon to act in law, knew or ought to have known about the mistake in the payments made by it and it ought to have, therefore, been diligent in instituting the action within three years from the date of the second notification.

16. The decision quoted by Mr. Venugopal in *Gunabai v. Motilal*, AIR 1925 Nag 398 has no application. The learned Judge was dealing with a case under the old Limitation Act where the accent was on knowledge. In that case the plaintiff specifically alleged that it was only at a certain time, he had knowledge of facts, which would entitle him to have the instrument cancelled or set aside. In those circumstances, the learned Judge held that it is incumbent on a

defendant who pleads that the suit is barred by time, to allege and prove a knowledge prior to the period from which time begins to run. On the facts, the learned Judge held that the defendant did not discharge his burden. In our case, the specific allegation of the defendants-appellants is that the plaintiff, by reason of the second notification, should be presumed to have discovered the mistake in the earlier payments on that very date. This contention is not an unreasonable contention, for it is always necessary for courts to be satisfied with the reasonableness within reach. It cannot be said that the contention of the appellants that on the date when the second notification became effective, the plaintiff should be deemed to have discovered the mistake, is an unreasonable contention or conclusion.

17. We have already seen Ex. A-1. The plaintiff was making enquiries and it was only pursuant to such enquiries and that the defendant wrote Ex. A-1 in reply. It cannot, therefore, be said that Ex. A-1 gave any cause of action at all to the plaintiff. On the other hand, it would be fair to assume that the enquiries which the plaintiff was making along prior to the date when Ex. A-1 was written by the defendants, was in relation to the refund of the cess paid by it under a mistake. The plaintiff avoids the box. It does not even explain as to what was the nature of the enquiries made. It is no doubt well established that the word 'mistake' appearing in Section 72 of the Indian Contract Act takes into its fold mistake of fact as well as law and would entitle a litigant to recover even a tax, if it is established that such a payment has been made by the party labouring under a mistake of law. (See Sales Tax Officer Benares v. Kanhaiya Lal Mukundlal Saraf, 1959 SCR 1350 = (AIR 1959 SC 135)). When the plaintiff alleged a mistake in this case and particularly stated that it discovered such a mistake on a particular date, the initial burden would be on it to lead evidence, prima facie at any rate to establish the date of discovery of such a mistake. It is only in extraordinary cases where the plaintiffs are emphatic and the defendants avoid answering a specific claim as to date of discovery or knowledge, the courts in their discretion might dispense with the further proof of the date of acquisition of such knowledge or date of discovery. See Sri Kishan v. Ghana Nand, AIR 1929 All 721 (2). We have already referred to the fact that the plain-

tiff has avoided the box. The Bombay High Court in Martand v. Radhabai, AIR 1931 Bom 97 relying upon Sardar Gurbaksh v. Gurdial Singh, AIR 1927 PC 230 observed, thus—

"It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

After giving our anxious consideration to this subject, we are of the view that the suit is out of time, since the plaintiff should be deemed to have, with reasonable diligence, discovered the mistake as to the mistaken payments on the date when the second notification was made and the suit having been filed beyond three years from the said date, it is barred under Article 24 of the Limitation Act. The learned Judge went wrong in having applied a wrong principle and ultimately decreeing the suit.

18. The result is that the appeal is allowed, but in the peculiar circumstances, there will be no order as to costs.

Appeal allowed.

AIR 1976 MADRAS 329

RAMAPRASADA RAO, J.

K. Sukumaran Nair and others, Petitioners v. S. Neelakantan Nair and others, Respondents.

Civil Revn. Petns. Nos. 3868 of 1974, 25, 414, 2332 and 2795 of 1975, D/- 27-2-1976.*

(A) Transfer of Property Act (1882), Section 106 — Notice of eviction under Section 106 not necessary before taking action under the provisions of Tamil Nadu Act (18 of 1960) — Special law excludes the general law. AIR 1976 Mad 149, Not followed. (Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), Section 10) — (Interpretation of Statutes).

The Madras Act and the Act of Parliament are mutually independent and not dependent for a landlord proceeding under the Madras Act to invoke any of the relevant provisions of the T. P. Act to enter

*(Against order of Rent Controller Appellate Authority (Sub. J.), Nagercoil, D/- 2-9-1974.)

FT/GT/B844/76/PNK

into the portals of the statutory authorities functioning under the Madras Act for relief. (Para 7)

Tamil Nadu Buildings (Lease and Rent Control) Act is an Act by itself and it operates in its own field without any dependency upon any other enactment including the Transfer of Property Act. (Para 6)

When a subject-matter is dealt with by a local legislature as well as by the Parliament and if the local legislature had the legislative power to enact a law on the subject under the relative entries in the VII Schedule to the Constitution of India, then that procedure which is special in the scope and application should prevail over the general principles which might govern normal situations by reason of the impact of the Central law on the same subject. AIR 1976 Mad 149. Not followed; AIR 1974 SC 818 and AIR 1967 Mad 57 (FB). Followed. (Para 6)

Cases Referred: Chronological Paras
 AIR 1976 Mad 149 = (1976) 1 Mad LJ 149 5
 AIR 1974 SC 818 = (1974) 2 SCR 629 4, 5, 6
 AIR 1974 SC 2331 5, 6
 (1969) 2 Mad LJ 585 = 82 Mad LW 636 6
 AIR 1967 SC 1419 = (1967) 1 Mad LJ (SC) 61 = 1967-1 SCR 475 3, 4, 6
 AIR 1967 Mad 57 = (1966) 2 Mad LJ 68 (FB) 2, 4, 5
 AIR 1965 SC 101 = 1964-5 SCR 239 4
 AIR 1964 SC 1341 = 1964-5 SCR 157 4
 AIR 1951 Mad 222 = (1952) 1 Mad LJ 317 2
 AIR 1949 Mad 780 = (1949) 1 Mad LJ 412 2, 3, 4, 6

P. Ramaswamy, K. Doraiswami, P. Ananthakrishnan Nair, B. Ananthakrishniah, for Petitioners; S. Padmanabhan, S. Jagadisan, T. R. Rajagopalan and K. Shanmugham, for Respondents.

ORDER:— The only question of law that has been argued in this batch of Civil Revision Petitions is whether a notice of termination of tenancy under Section 106 of the Transfer of Property Act is required before taking action under one or the other of the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The facts which are common and which are not agitated before me need not be adverted to. But the question has arisen in all these cases whether a notice of termination of tenancy under the Transfer of Property Act is required at all before a petition could be presented to the statutory authority

under the Buildings Act for obtaining relief under the various provisions of the Act.

2. There is abundance of case law on this subject and at one time they are perplexing and apparently contradictory as well. I shall now trace the various decided cases to find whether in the view of the Supreme Court as laid down by them and reiterated by them later the provisions of the Transfer of Property Act still would hold the field and should be looked into for purpose of observance of some of its prescriptions before an application under the Buildings Act could be filed. I may at once state that having regard to the declared law of the Supreme Court such an invocation of the provisions of the Transfer of Property Act including that prescription in Section 106 of it may not be necessary at all. The earliest ruling on the question is the decision of a Division Bench of our Court in Krishnamoorthy v. Parthasarathy, AIR 1949 Mad 780. There the learned Judges said that no notice determining the tenancy under Section 106 of the Transfer of Property Act (hereinafter for convenience called notice) was necessary before a landlord attempts to seek some relief under the special enactment, namely, the Tamil Nadu Buildings Act. This view was approved by another Division Bench of our Court in George Oakes Ltd. v. The Chief Judge, Small Cause Court, Madras, 1952-1 Mad LJ 317 = (AIR 1951 Mad 222) but a controversy arose in 1966. In that case the subject-matter was as to what ought to be the fair rent of the demised premises. But in view of the contentions of counsel therein a Full Bench was constituted and our Court in M/s. Royal and Co. v. Ramachandran, 1966-2 Mad LJ 68 = (AIR 1967 Mad 57) (FB), on the question whether a notice is required before action is taken under this Special Act, was considered alongside with the main dispute in that case which related to the fixation of fair rent. The Full Bench again approved the ratio in Krishnamoorthy v. Parthasarathy, AIR 1949 Mad 780 and held that no such notice was necessary.

3. Whilst this was ruling the field, a decision of the Supreme Court reported in Manujendra Dutt v. P. P. Roy Chowdhury, 1967-1 Mad LJ (SC) 61 = (AIR 1967 SC 1419) made certain observations touching upon the matter in issue before me namely, whether a notice was necessary at all before taking action under the Rent Act. That was a case which arose under

the Calcutta Thika Tenancy Act, 1949. While considering the provisions of that Act in juxtaposition to the provisions of the Transfer of Property Act, the Supreme Court would not agree with the decision of our Court which held the field till 1966, the basis of all which was the ruling in *R. Krishnamoorthy v. Parthasarathy*, AIR 1949 Mad 780. There is undoubtedly an observation in *Manujendra Dutt v. P. P. Roy Chowdhury*, 1967-1 Mad LJ (SC) 61 = (AIR 1967 SC 1419) to the effect that the decision in *R. Krishnamoorthy v. Parthasarathy*, AIR 1949 Mad 780 cannot be said to be correctly laying down the principle in so far as the issuance of a notice under Section 106 of the Transfer of Property Act is concerned. Naturally, therefore, a Division Bench of our Court which decided cases under the Tamil Nadu Buildings (Lease and Rent Control) Act followed the above decision of the Supreme Court in *Manujendra Dutt v. P. P. Roy Chowdhury*, 1967-1 Mad LJ (SC) 61 = (AIR 1967 SC 1419) and held that notice of termination of tenancy under the Transfer of Property Act was necessary before action could be taken.

4. Whilst this was the position, the decision of the Full Bench reported in *Raval & Co. v. Ramachandran*, 1966-2 Mad LJ 68 = (AIR 1967 Mad 57) (FB) (hereinafter to be referred to as *Raval's case*) came up in appeal before the Supreme Court in *Raval and Co. v. K. G. Ramachandran*, AIR 1974 SC 818. The observations of Alagiriswami, J., who spoke for the majority of the Bench are very apposite and it would be convenient to excerpt them instead of summarising.

"We are not called upon in this case to consider whether those two cases were correctly decided. But we must point out that the general observations therein should be confined to the facts of those cases.

"The decision of the Madras High Court in *R. Krishnamoorthy v. Parthasarathy*, AIR 1949 Mad 780 = (1949-1 Mad LJ 412) where it was held that Section 7 of the Madras Buildings (Lease and Rent Control) Act of 1948 had its own scheme of procedure and therefore there was no question of an attempt to reconcile that Act with the Transfer of Property Act and that an application for eviction could be made to the Rent Controller even before the contractual tenancy was terminated by a notice to quit, should not have been summarily dismissed on the grounds

that it was contrary to the decisions of this Court, (1964) 5 SCR 157 = (AIR 1964 SC 1341) and *Mangilal's case*, (1964) 5 SCR 239 = (AIR 1965 SC 101) and therefore was not a correct law, without examining the provisions of that Act.

Be that as it may, we are now concerned with the question of fixation of fair rent.

"The Madras High Court reviewed all the decisions of this Court except the latest one in (1967) 1 SCR 475 = (AIR 1967 SC 1419). We have already pointed out that the criticism made in that decision regarding *Krishnamoorthy's case* AIR 1949 Mad 780 = (1949-1 Mad LJ 412) was not justified. We are in agreement with the view of the Full Bench of the Madras High Court that the various decisions of this Court were based upon particular provisions of the Acts which were under consideration mainly the Bombay Act which is vitally different from the Madras Act. A close analysis of the Madras Act shows that it has a scheme of its own and it is intended to provide a complete code in respect of both contractual tenancies as well as what are popularly called statutory tenancies."

5. This view of the Supreme Court is again reiterated in *P. J. Gupta and Co. v. K. Venkatesan*, AIR 1974 SC 2331. There *Beg. J.*, speaking for the Bench said:

"It is clear from the majority view of this Court in *M/s. Raval and Co. v. K. G. Ramachandran*, AIR 1974 SC 818 at p. 823, dismissing an appeal from a judgment of the Full Bench of Madras High Court reported in AIR 1967 Mad 57 (FB) that the Act "has a scheme of its own and it is intended to provide a complete code in respect of both contractual tenancies as well as what are popularly called statutory tenancies." In other words, the special procedure provided by the Act displaces the requirements of the procedure for eviction under the Transfer of Property Act and by an ordinary civil suit. Therefore we need not concern ourselves with the provisions of Transfer of Property Act."

It is however brought to my notice that my learned brother *Gokulakrishnan, J.*, in *Nagalingam v. Ramaswami*, 1976-1 Mad LJ 149 = (AIR 1976 Mad 149) following once again the ruling of our Court has said that it was necessary for the landlord to issue the usual statutory notice of determination of tenancy under Section 106 of the Transfer of Property

Act. But, it is unfortunate that the decisions of the Supreme Court referred to by me above were not brought to his notice.

6. The net analysis of the position appears to be this: At one time, till 1966, the law as declared by our Courts was to the effect that no notice of determination of tenancy under Section 106 of the Transfer of Property Act was necessary before the special statutory benefits could be availed of by the landlord under the provisions of the Buildings Act. The ratio is founded on the well-known principle that "the special excludes the general". When a subject-matter is dealt with by a local Legislature as well as by the Parliament and if the local Legislature had the legislative power to enact a law on the subject under the relative entries in the VII Schedule to the Constitution of India, then that procedure which is special in scope and application should prevail over the general principles which might govern normal situations by reason of the impact of the Central Law on the same subject. The Full Bench of our Court in Raval's case accept this well-known application of the maxim as above. But reference was made in a case decided by a Division Bench of this Court in Kalyansundaram v. Natarajan, 1969-2 Mad LJ 585, to a decision of the Supreme Court reported in Manujendra Dutt v. P. P. Roy Chowdhury, 1967-1 Mad LJ (SC) 61 = (AIR 1967 SC 1419) which in turn commented upon the applicability of the rule in Krishnamoorthy v. Parthasarathy, AIR 1949 Mad 780. The Supreme Court in Raval and Co. v. K. G. Ramachandran, AIR 1974 SC 818 pointedly referred to the fact that such a summary disposal of the rule in Krishnamoorthy v. Parthasarathy, AIR 1949 Mad 780 ought not to have been done. Alagiriswami, J.'s observations made in Raval and Co. v. K. G. Ramachandran, AIR 1974 SC 818 have already been excerpted by me and the underlining in the passages is mine. Sufficient and significant accent is made on the self-sufficiency of the Madras Act. It is in that light the latter decision of the Supreme Court in Raval and Co. v. K. G. Ramachandran, AIR 1974 SC 818 and P. J. Gupta and Co. v. Venkatesan, AIR 1974 SC 2331 have to be understood. They have laid particular emphasis upon the fact that the Tamil Nadu Buildings (Lease and Rent Control) Act is an Act by itself and it operates in its own field without any dependency upon any other

enactment including the Transfer of Property Act. Such an emphatic pronouncement leads me to the conclusion that the rule in Kalyanasundaram v. Natarajan, 1969-2 Mad LJ 585 is not applicable and it is only the rule in the other Division Bench case as well as in the Raval's case which ought to be the law which has been accepted to be the correct law by the Supreme Court.

7. As the Supreme Court has said that "we need not concern ourselves with the provisions of the Transfer of Property Act" when we are confronted with the application of a special enactment, it follows that a notice of determination of tenancy under Section 106 of the Transfer of Property Act is not necessary and the Madras Act and the Act of Parliament are mutually independent and not dependent for a landlord proceeding under the Madras Act to invoke any of the relevant provisions of the Transfer of Property Act to enter into the portals of the statutory authorities functioning under the Madras Act for relief. In view of my above decision and as notice is not necessary, no other point survives Civil Revision Petition 25 of 1975 fails and it is dismissed. No costs.

8. In C. R. P. No. 2332 of 1975 notice has been given and the lower Court has rightly held that the notice is valid and that the petition for eviction was maintainable. The Civil Revision Petition is therefore dismissed. No costs. If there are no arrears of rent, the petitioner is granted three months' time to vacate.

9. In C. R. P. No. 3868 of 1974, a notice of determination of tenancy was given. Its support was questioned at some stage before the lower Court. But as in my view no such notice of termination of tenancy is required, the argument does not survive. No other question of jurisdiction arises in this petition. The Civil Revision Petition is therefore dismissed. The petitioner-tenant is given three months' time from this date to vacate since he is continuing in a portion of the demised premises. No costs.

10. In C. R. P. No. 414 of 1975 the propriety of a notice of determination of tenancy was gone into. As in my view it is not necessary, the question need not be gone into again. The petitioner is the tenant. The Civil Revision Petition is dismissed as there is no other error of jurisdiction. The petitioner is granted four months' time to vacate. No costs.

11. In C. R. P. No. 2795 of 1975 again the question is whether the notice of termination of tenancy was valid. But as such a notice is not necessary, no more investigation into it is called for. The petition itself was filed under Section 14 (i) (b) of the Buildings Act. No error of jurisdiction arises. The Civil Revision Petition is dismissed. No costs.

Revision dismissed.

AIR 1976 MADRAS 333

RAMAPRASADA RAO AND
RATNAVEL PANDIAN, JJ.

P. Ram Mohan, Appellant v. Lalitha Raghuraman and others, Respondents.

Appeal No. 380 of 1971, D/- 2-5-1975.*

(A) Transfer of Property Act (1882), Section 8 — Deed — Construction — Settlement deed — Life estate followed by absolute estate created by the deed — Settlee acquires vested interest on the date of the deed.

There cannot be a vacuum or interregnum, where there is a life estate followed by an absolute estate because the residue must rest some where and that what is deferred is only the possession of the properties in favour of the settlees and not the vesting of interest. In other words, only the possession of the properties would be postponed but not the vested interest created under the document. (1976) 89 Mad LW 151, Foll. (Case law discussed). (Para 15)

Where a settlor by a deed of settlement created a life interest in favour of himself, his wife, his foster son and his wife and the remainder to the two sons of the foster son of the settlor, it was held that the two sons of the settlor acquired a vested interest in the property on the date of execution of the deed.

(Para 16)

Cases Referred: Chronological Paras
1975 TNLJ 9 = 89 Mad LW 151 15, 16
AIR 1960 Punj 257 = ILR (1958) Punj 1852 16
AIR 1939 PC 78 = 181 Ind Cas 355 16
AIR 1933 Mad 885 = 66 Mad LJ 170 16
AIR 1919 Mad 768 = 8 Mad LW 140 16
(1911) ILR 33 All 558 = 8 All LJ 577 16
(1911) ILR 38 Cal 468 = 38 Ind App 54 (PC) 16

* (Against decree of 2nd Asst. J., City Civil Court, Madras in O. S. No. 5718 of 1968).

DT/FT/B127/76/ABR/LGC

RATNAVEL PANDIAN, J.:— The first defendant in O. S. No. 5718 of 1968 on the file of the City Civil Court, Madras is the appellant herein. Respondents 1 and 2 herein filed the said suit for partition of the plaint schedule properties by metes and bounds and for allotment of a half share after allotting premises No. 48-A Gengu Reddi Street, to the defendants, for recovery of a half share in the plaint B Schedule moveable properties or their value of Rs. 250/-, for recovery of rental collections till date of suit after taking of accounts, for directing the defendants to pay half the rental collections at Rs. 350/- per mensem till delivery of possession of the plaintiffs' share and for costs.

2. Briefly the plaint allegations were as follows: Late Rao Bahadur P. Akilandam Naidu was the absolute owner of four house properties viz., Nos. 47, 48, 48-A and 48-B Gengu Reddi Street with garages, outhouses etc. By a settlement deed Ex. A-1 dated 17-2-1929, he gave the properties to himself and his wife Ranganayaki Ammal for life, to his foster son P. Parthasarathi Naidu and his wife Narayaniammal for life, and the remainder to Ram Mohan, the appellant herein (first defendant), and Raghuraman, the husband of the first plaintiff (first respondent herein) and other sons to be born to the said Parthasarathi Naidu and Narayani Ammal. Parthasarathi Naidu died on 4-8-1967 at Madras. Narayaniammal had predeceased him. Raghuraman also predeceased him. Parthasarathi Naidu had only two sons, the appellant and the said Raghuraman, husband of the first respondent and father of the second respondent. Parthasarathi Naidu died leaving him surviving the appellant and respondents 1 and 2. The plaintiffs (respondents 1 and 2) are residing in a portion of No. 48 Gengu Reddi Street, Egmore, Madras. They are entitled to a half share in the plaint schedule properties and also in all the moveables left by Parthasarathi Naidu worth about Rs. 20,000/-. The plaintiffs are not able to lay hands on the said moveables excepting the items set out in the plaint B Schedule valued at Rs. 500/- and their share therein is about Rs. 250/-. The defendants are collecting the rentals of Rs. 700/- a month from the properties and the plaintiffs are entitled to a moiety of the same after meeting the expenses such as taxes, repairs etc., and an account of the same has to be taken from the date of death of Parthasarathi Naidu and the amount ascertained has to be paid over to the plaintiffs. While so,

the plaintiffs understood that the first defendant (appellant) and his father had settled 48-A, Gengu Reddy Street in favour of one Vasanthammal and Anusuya (defendants 2 and 3—respondents 3 and 4 herein), who are sisters of the first defendant. According to the plaintiffs, this is not binding on them and in the partition the said property should be allotted to the share of the defendants so that the plaintiffs may get a half share in the estate of Akilandam Naidu. The plaintiffs sent a lawyer's notice dated 16-9-1967, calling upon the defendants to effect a peaceful partition in respect of the plaintiff schedule properties; but the defendants did not comply with the requests and hence the suit.

3. The appellant (first defendant) filed a written statement contending as follows — by the settlement deed Ex. A-1, dated 17-2-1929, it was provided that after the lifetime of Akilandam Naidu and his wife Ranganayaki Ammal, their foster son Parthasarathi Naidu and his wife Narayaniammal, were to take the properties and enjoy the same during their lifetime without power of alienation and after the death of the four members of the house, viz., Akilandam Naidu, Ranganayaki Ammal, the foster-son Parthasarathi Naidu and his wife Narayaniammal, the said properties should go to his sons Ram Mohan (first defendant-appellant) and Raghuraman (both of them being living then) and also to the other sons to be born thereafter. The said Raghuraman died on 2-4-1954. On his death, the only person who became entitled to the property was Parthasarathi Naidu and after his lifetime, this defendant (appellant), according to the provisions of Ex. A-1. On 16-5-1966, Parthasarathi Naidu and this defendant executed a settlement deed, whereby they transferred one of the houses, viz., the house and ground No. 48-A, Gengu Reddi Street, to defendants 2 and 3, to be taken by them in accordance with the terms contained therein. Parthasarathi Naidu died on 4-8-1967. After his death, except the house No. 48-A, Gengu Reddi Street, mentioned above, this defendant (appellant) became absolutely entitled to the other properties and he is in possession and enjoyment of the same. This defendant is in possession of No. 48-A Gengu Reddi Street, and collecting the rents from the tenants of the said house as per the terms of the abovesaid settlement deed. This defendant submits that as per Ex. A-1, the properties were given to

a class viz., the sons living at the time of the death of Parthasarathi Naidu, and this defendant is the only son of Parthasarathi Naidu, living at the time of his death, and as such there has been no vesting of the property in Raghuraman who died before the death of Parthasarathi Naidu and therefore Raghuraman had no right or share or claim in any of the properties left by Akilandam Naidu or Parthasarathi Naidu. The plaintiffs are therefore not entitled to a half share in any of the plaintiff schedule properties. This defendant has denied the allegations about Parthasarathi Naidu having left jewels, silverware etc., worth Rs. 20,000/-. In any event, the plaintiffs have no right or claim to any such properties. The plaintiffs are not entitled to the rentals or income derived from the properties. The settlement deed dated 16-5-1966 executed by this defendant in favour of defendants 2 and 3 is valid and binding on the plaintiffs and they are not entitled to claim partition of the said properties. Inasmuch as the plaintiffs have not sought to set aside the said settlement deed or paid court-fee therefor, they cannot question the validity of the said settlement deed. To the plaintiffs' notice dated 16-9-1967, this defendant has sent a suitable reply dated 20-10-1967, denying the rights of the plaintiffs in any share of the properties. The suit is bad for misjoinder of causes of action as the plaintiffs claim for partition of the immovable properties belonging to Akilandam Naidu and moveable properties belonging to Parthasarathi Naidu.

4. The second defendant filed a written statement contending that the properties bearing Nos. 47, 48, 48-A and 48-B Gengu Reddi Street, were originally the absolute properties of Akilandam Naidu. This defendant also denies the allegation that deceased Parthasarathi Naidu had left moveables worth Rupees 20,000/- and in any event, he states that he is not in possession of any of them. He states that he is in possession of house No. 48-A, Gengu Reddi Street, from November 1967, and is receiving a rent of Rs. 115/- per month from November 1967, out of which the 3rd defendant is entitled to a half share in the net income therefrom as per the terms of the settlement deed. The other contentions of this defendant are similar to those in the first defendant's written statement.

5. The 3rd defendant filed a written statement contending that Parthasa-

rathi Naidu died leaving the defendants and the plaintiffs as the heirs, that the plaintiffs the first defendant, the second defendant and the third defendant are each entitled to a 1/4th share in the plaint B Schedule properties and other moveables not mentioned in the plaint specifically, that he is getting a half share of the rental collections made by the 2nd defendant, who has paid only for a period of six months and that the settlement deed executed by the 1st defendant and Parthasarathi Naidu (their father) was valid since it was executed to discharge the obligations under the original will and settlement.

6. The following issues were framed for trial—

1. Whether the plaintiffs are entitled to half or any share in the suit properties as heir of Raghuraman by virtue of the settlement deed dated 27-2-1929?

2. Whether the plaintiffs are entitled to claim any share in the properties of Parthasarathi Naidu?

3. Whether the settlement deed dated 16-5-1966 is valid and binding on the plaintiffs?

4. Whether the 2nd defendant is a necessary party to the suit?

5. Whether the plaintiffs are entitled to mesne profits and of what amount?

6. Whether the court-fee paid is correct?

7. It appears that in the trial court, the plaintiffs had given up their claim for the moveables mentioned in the plaint B Schedule. In other respects, the trial court, on a consideration of the entire evidence, both oral and documentary, found all the issues in favour of the plaintiffs and passed a decree directing partition of the entire suit properties and allotment of a half share to the plaintiffs and allotment of No. 48-A Gengu Reddi Street, to the share of the first defendant. From the judgment, it is seen that the trial court held that the plaintiffs are entitled to mesne profits and decided that the quantum of mesne profits would be relegated in separate proceedings. However, it has not mentioned the same in the result paragraph. Aggrieved by the above judgment, the first defendant has preferred the present appeal.

8. Both the parties in the case have not let in any oral evidence on their respective sides; but both of them have relied on Exs. A-1 to A-7, marked on the side of the plaintiffs and based their arguments on the interpretation of the said documents.

9. The admitted facts are as follows — One Akilandam Naidu was the absolute owner of the four suits houses, viz., Nos. 47, 48, 48-A and 48-B Gengu Reddi Street, Egmore, Madras. One Ranganayaki Ammal was his wife. They had no issue and therefore they adopted one Parthasarathi Naidu, father of defendants 1 to 3 and one Raghuraman (husband of the first plaintiff and father of the second plaintiff). Parthasarathi Naidu's wife was one Narayaniammal, who predeceased Parthasarathi. The said Raghuraman died on 2-5-1954, predeceasing his father Parthasarathi who died much later on 4-8-1967.

10. Akilandam Naidu, the foster-father of Parthasarathi, executed the settlement deed Ex. A-1 dated 17-2-1929 in and by which he gave life estate to himself, his wife Ranganayaki Ammal, his foster-son Parthasarathi and Parthasarathi's wife Narayaniammal, and then the remainder to the first defendant, and Raghuraman, the two sons of Parthasarathi who were then in existence, and to all the sons to be born to Parthasarathi. Inter alia, the document provided, by a separate clause, that these persons i.e., the sons then in existence and the sons to be born to Parthasarathi Naidu, should divide the properties equally among themselves according to Hindu law, treating the properties as the self-acquired properties of Parthasarathi Naidu and that the said sons should not either sell or in any other way alienate the properties till the last son of Parthasarathi would attain the age of 21 years and that on the attainment of the age of 21 years by the last son of Parthasarathi, all the sons of Parthasarathi must get absolute title to the properties.

11. It is found from the settlement deed Ex. A-1 that on the date of its execution, defendants 1 to 3 and Raghuraman (husband of the first plaintiff) were alive. By this settlement deed, the settlor has created a life interest in favour of himself, his wife, his foster-son Parthasarathi Naidu and Parthasarathi's wife Narayaniammal, and the remainder to the sons of Parthasarathi Naidu. While so, Parthasarathi Naidu and the first defendant (appellant herein) have settled premises No. 48-A, Gengu Reddi Street, in favour of defendants 2 and 3, by the deed Ex. A-2 dated 16-5-1966.

12. The question that arises for consideration is whether under Ex. A-1, Raghuraman derived any vested interest

in the properties on the date of the execution of the said document, thereby enabling his legal heirs (plaintiffs herein) to automatically acquire vested interest to Raghuraman's share in the properties on his death, and possession on the death of all the four life estate holders, or whether the rights of the settlees were subject to the condition that they should be alive till after the death of all the said four life estate holders. The contention of the plaintiffs in this suit is that the first defendant and Raghuraman had a vested interest even on the date of Ex. A-1 and therefore though Raghuraman predeceased his father, the plaintiffs are entitled to claim Raghuraman's share in the properties on the demise of Parthasarathi Naidu, who died as the last life estate holder. The defendants resisted the claim of the plaintiffs, contending that Ex. A-1 is a gift to a class and nothing vested on Raghuraman on the date of Ex. A-1 and the vesting of the property would take place only on the death of Parthasarathi Naidu and that as Raghuraman died on 2-5-1954, before Parthasarathi Naidu who died on 4-8-1967, the first defendant alone was the person entitled to succeed to the properties after the death of Parthasarathi Naidu and that therefore the plaintiffs have no right to any share in the properties.

13. Before proceeding to a further discussion on the above question we may point out that the words in Ex. A-1 to the effect that the sons (then existing and to be born) of Parthasarathi, while dividing the properties equally among themselves, should treat the properties as the self-acquired properties of Parthasarathi Naidu, whether appropriate or inappropriate, were quite unnecessary, but were added as addenda and depended on the attitude of the writer of the deed. On a careful perusal of the document, we feel that the settlor could not have intended that Parthasarathi Naidu could exclude any of his sons from acquiring the properties. Moreover, in Ex. A-1, only the sons of Parthasarathi are mentioned as the persons entitled to the vested remainder, which recital is conclusive. Therefore, the recital about treating the properties as the self-acquired properties of Parthasarathi, is nothing but otiose.

14. Now, coming to the main question, a plain reading of Ex. A-1 makes it crystal clear to our mind that the settlor, after providing for the life estates in favour of four persons including himself, had created vested interests in favour

of both Ram Mohan and Raghuraman and also in favour of the sons to be born to Parthasarathi Naidu. As we have already mentioned, no son was born to Parthasarathi after these two and as such the latter clause has no relevance in this case and we have to take it that on the date of Ex. A-1, the vested interests were created in favour of Ram Mohan and Raghuraman.

15. In a recent judgment rendered by both of us on 29-11-1974 in *Somasundaram v. Rajammal*, A. S. 522 of 1970 — summary of the judgment reported in 1975 TNLJ 9 — we have held that there cannot be a vacuum or interregnum where there is a life estate followed by an absolute estate, because the residue must rest somewhere and that what is deferred is only the possession of the properties in favour of the settlees and not the vesting of interest. In other words, only the possession of the properties would be postponed but not the vested interest created under the document. In the instant case, Ram Mohan and Raghuraman had both acquired a vested interest in the properties immediately on the date of execution of Ex. A-1, but only their right to possession of the properties had been postponed by the intervention of the life estates.

16. In *Bhagabati Barmani v. Kalicharan Singh*, (1911) ILR 38 Cal 468 (PC) a Hindu testator left a will, giving possession of the properties, moveable and immovable, to his wife and mother for their lives and on their death to the sons of his sisters who were in existence and also those who might be born thereafter who should hold the properties in equal shares. The testator died the day following the execution of the will. It was held that the will gave the sons of the sisters a vested interest in their respective shares at the testator's death, though it postponed their possession and enjoyment until the deaths of the mother and widow. In *Bilaso v. Munnial*, (1911) ILR 33 All 558, *Phillip Graham Greenwood v. Phillip Graham Greenwood*, AIR 1939 PC 78, *Hazara Singh v. Bantasing*, AIR 1960 Punj 257, *Sreechand Sowcar v. Kasi Chetti*, AIR 1933 Mad 885, and *Somasundaram v. Rajammal*, (decided by us A. S. 522 of 1970) = (reported in 1975 TNLJ 9), a similar view about the nature of vested interests has been taken. All the above cases related to wills. In *Krishna Aiyar v. Saminatha Iyer*, 8 Mad LW 140 = (AIR 1919 Mad 768), a Bench of this court, has

party thereto and to defend the action on any of the following grounds, namely:—

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability, and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provision of Section 105; or

(b) that there has been a breach of a specified condition of the Policy, being one of the following conditions namely:—

"(i) a condition excluding the use of vehicle:—

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

The statutory provision is clear that an insurer who has been made a party to a proceeding for recovery of compensation can resist the claim only on those grounds mentioned in sub-section (2) and it is not open to it to raise any other plea. The consensus of judicial opinion is to the same effect. See *Vanguard F. & G. I. Co. v. Sarla Devi*, AIR 1959 Punj 297; *I. M. G. Ins. Society v. Helen*, AIR 1971 Mys 207;

H. G. I. Society v. S. C. Paul, AIR 1972 Tripura 9; *Vangaurd Insurance Co. Ltd. v. Shafali Mukherji*, 1970 ACJ 245 (All); *Kesavan Nair v. State Insurance Officer*, 1971 ACJ 219 (Ker) and *B. I. G. Insurance Co. v. Itbar Singh*, AIR 1959 SC 1331. Reliance has been placed on the decision of the Supreme Court in the case of *B. I. G. Insurance Co. v. Itbar Singh* (Supra) in support of the contention that under the terms of the policy the right to defend the claim proceeding has been reserved to the insurer. Ext. A-II is the Policy bond. One of the express conditions being condition No. 2 therein runs thus:—

"No admission, offer, promise, payment or indemnity shall be made or given by or on behalf of the insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim or to prosecute in the name of the Insured for its own benefit any claim for indemnity or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured shall give all such information and assistance as the Company may require."

A Bench of the Bombay High Court in the case of *Royal Insurance Co. v. Abdul Mahomed*, AIR 1955 Bom 39, was called upon to deal with the situation where the owner of the vehicle did not resist the claim and the insurer wanted to step in to dispute the claim but there was no term in the policy bond as referred to above. Chagla, C. J. spoke for the Court thus:—

"Therefore, clearly implicit in this decision (AIR 1953 Bom 109) is the principle that in the interests of justice the insurance company may be allowed to defend the action in the name of the defendant although the insurance company was not entitled to defend it in its own name and in its own right under S. 96 (2). We have also pointed out at pp. 110, 111 that the object of giving the notice to the insurance company was obviously to enable it to defend the action through the defendant, but that no right had been given to the insurance company to defend the action in all cases in its own right or in its own name. Therefore, the object of providing for a notice to the insurance company is really two-fold. One is to enable it to defend the action in its own right and in its own name if it is challenging the claim on any of the

grounds mentioned in Section 96 (2). But the other purpose and object of the notice, which is equally important, is to give intimation to the insurance company that an action has been started against the defendant so as to enable the insurance company to see that that action is properly defended and that the decree does not go against the defendant by default or that a decree is not passed collusively against the defendant. Therefore, when in this case a notice was served upon the insurance company and when the insurance company found that the defendant had left India and was not likely to defend the action, it was open to the insurance company to come to Court and apply that it should be permitted to defend the suit in the name of the defendant."

Repelling the contention against the insurer, the learned Chief Justice further observed:—

"We are also unable to accept the view of the learned Judge that, in the absence of any specific clause in the insurance policy entitling the Insurance Company to defend the action in the name of the defendant, the Court would not be entitled under its inherent powers to allow the insurance company to defend in the name of the defendant."

We may now refer to the decision of the Supreme Court in the case of *B. I. G. Insurance Co. v. Itbar Singh*, (AIR 1959 SC 1331) (Supra). This was a case where in the policy bond there was a condition as in this case. First dealing with the provision of Section 96 of the Act, the Court observed:—

"To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that sub-section (2) makes available to an insurer? That clearly is a question of interpretation of the sub-section.

Now the language of sub-s. (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given 'shall be entitled to be made a party thereto and to defend the

action on any of the following grounds, namely', after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute." Coming to deal with the terms of the policy bond, the Court further observed:—

"We think that this contention is without foundation. Sub-section (2) in fact deals with defences other than those based on the conditions of a policy. Thus clause (a) of that sub-section permits an insurer to defend an action on the ground that the policy has been duly cancelled provided the conditions set out in that clause have been satisfied. Clause (c) gives him the right to defend the action on the ground that the policy is void as having been obtained by non-disclosure of a material fact or a material false representation of fact. Therefore, it cannot be said that in enacting sub-section (2) the legislature was contemplating only those defences which were based on the conditions of the policy.

It also seems to us that even if, sub-section (2) and sub-section (3) were confined only to defences based on the conditions of the policy that would not have led to the conclusion that the legislature thought that other defences not based on such conditions, would be open to an insurer. If that was what the legislature intended, then there was nothing to prevent it from expressing its intention. What the legislature has done is to enumerate in sub-section (2) the defences available to an insurer and to provide by sub-sec. (6) that he cannot avoid his liability excepting by means of such defences. In order that sub-section (2) may be interpreted in the way the learned Solicitor-General suggests we have to add words to it. The learned Solicitor-General concedes this and says that the only word that has to be added is the word 'also' after the word 'grounds'. But even this the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning, neither of which we think it is. The addition suggested will, in our view, make the language used unhappy and further effect a complete change in the meaning of the words used in the sub-section."

Next comes the observation on which full reliance has been placed by the insurer.

"..... The Statute has no doubt created a liability in the insurer to the injured person but the statute has also expressly confined the right to avoid that liability to certain grounds specified in it. It is not for us to add to those grounds and therefore to the statute for reasons of hardship. We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship, if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do....."

From this decision of the Supreme Court, three propositions seem to have become settled; (i) an insurer is not entitled to resist a claim on a ground not enumerated under Section 96(2) of the Act, (ii) Section 96 (2) of the Act deals with defences other than those based on conditions of a policy, and (iii) where conditions of the policy so provide, an insurer has the right to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by the insurer. There seems to have been some dispute as to what exactly was meant by the Supreme Court when it observed:—

"....., the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the assured and if he does so, all defences open to the assured can then be urged by him....."

On a plain reading of the lines quoted above from the judgment of the Supreme Court, it appears to us that the Court has said that the insurer must have reserved to it by the policy the right to defend the action in the name of the assured and the insurer must defend in the name of the assured in order that the restriction put under Section 96 (2) of the Act goes and all the defences available to the assured are available to the insurer. The phrase 'if he does so' does not have the narrow interpretation, as given to it by Counsel in support of the appeal, namely, that the insurer has reserved to it the right to defend in the name of the assured. If that was the real meaning intended to be given to the phrase, after it has already been said that 'the insurer has the right, provided he has reserved it by the policy,

to defend the action in the name of the assured' there was no necessity to add. What was really intended to be said was that such a condition was there under the terms of the policy and the insurer was out to raise the defence in exercise of the right. Most of the cases cited to us have followed the dictum of the Supreme Court in this sense though in one or two Courts a different view has been taken. Each of the cases that was cited to us at the Bar, however, seems to be one where the insured had not entered contest, i.e. both the insurer and the insured were not contesting simultaneously. It is unnecessary to give a catalogue of such cases. Where the insured appears and defends the claim and the insurer intends to defend in his own name, the condition in the policy bond does not provide shelter to the insurer.

3. The Supreme Court has dealt with an appeal arising out of the suit. By then the Motor Accidents Claims Tribunal had not been constituted under Section 110 (1) of the Act, and, therefore, a suit had been instituted. We have been shown the decision of the Madras High Court in the case of *Gopala Krishnan v. Sankara Narayanan*, AIR 1968 Mad 436, wherein in paragraph 25 of the decision at page 446 of the Reporter, Sadasivam, J. speaking for the Court has observed:—

"..... Thus the insurer is an important party in the claim before the Tribunal as the amount payable by it should be clearly specified in the award. The Claims Tribunal has restricted the rights of the insurance company to cross-examine the claimant and his witnesses on its construction of Section 96 of the Act. It should be noted that Section 96 of the act was introduced several years before the constitution of the Claims Tribunal by the present Section 110 of the Act. At the time when Section 96 of the Act first came into force there was no claims tribunal. Section 96 was introduced in order to enforce the duty of insurers to satisfy judgments against persons insured in respect of third party risk by giving them notice after judgment obtained by third party against persons insured in respect of third party risk. It is only in such cases the defences open to the insurer are restricted to the grounds mentioned in Section 96 (2) of the Act. A reading of Section 96 would clearly show that it was not intended to govern enquiry before a claims tribunal. Sec-

tion 96 contemplates proceedings in a Court and not a proceeding before a Tribunal. It contemplates notice being given to the insurer which may be before or after judgment is obtained against the person who had effected insurance for third party risk. The insurer is no doubt entitled to be made a party and defend the action on the grounds mentioned in that section. But in the proceedings before a Claims Tribunal the insurer is a party. The decisions in *Vanguard Fire and General Insurance Co. v. Sarla Devi*, AIR 1959 Punj 297 and *B. I. G. Insurance Co. Ltd. v. Itbar Singh*, AIR 1959 SC 1331 holding that an insurer is not entitled to take any defence which is not mentioned in sub-section (2) of Section 96 of the Act are all decisions in which the insurers were given notice in proceedings by way of suit as contemplated under the provisions of Section 96 of the Act. It has been rightly pointed out in those decisions that apart from the statute, an insurer has no right to be made a party to the action by the injured person against the insured causing the injury and that the rights open to the insurer are therefore governed by those provided in the section. The decisions do not relate to proceedings before a Claims Tribunal where the insurers are made parties and the scope of the defences which they were to put forward has not in any way been restricted. The contention of Sri C. R. Krishna Rao is that if Section 96 could have no application to proceedings before the Claims Tribunal, it would have been deleted after S. 110 was introduced in the Act. But the obvious answer is that it is only after a Claims Tribunal is constituted by the State Government by a notification in the Official Gazette, the Civil Court's jurisdiction would be barred. There may be States where a Claims Tribunal may not have been constituted and in those States Section 96 of the Act could be invoked and the insurance company could be permitted to take only the defences allowed under Section 96 of the Act in respect of the judgment obtained by a third party. In our opinion, the insurance companies who are mainly responsible to satisfy the claims of third parties and who are parties to the proceedings before the Claims Tribunal (sic and who?) are entitled to cross-examine cannot be restricted to the defences specified in Section 96 (2) of the Act."

With due respect to the learned Judges in the Division Bench, we are afraid that the conclusion is not correct. It is true

that when the decision of the Supreme Court was given the Claims Tribunal had not been constituted under Section 110 of the Act. The Act has undergone in recent years copious amendments and if the view indicated by the Madras High Court was in accord with the intention of Parliament, we think, Parliament would have taken steps to delete Section 96 (2) of the Act. In a series of cases coming from different High Courts and arising out of proceedings before the Claims Tribunal, Section 96 (2) has been applied and in fact the Madras decision, more or less a solitary one, has taken the view indicated above. There may be some force in saying that Section 96 (2) of the Act should have been adapted after the Claims Tribunals came into existence and the reference to 'court' appearing therein should have been substituted by 'Tribunal'. We do not think Section 96 (2) of the Act was intended to apply to claims proceedings before the Court and not the Tribunal.

4. On behalf of the respondents it has been claimed that Parliament took notice of the judicial opinion expressed by different Courts and while amending the Motor Vehicles Act by Central Act 56 of 1969 incorporated into Sec. 110-C, a sub-section, numbered as (2-A), running thus:—

"Where in the course of any inquiry, the Claims Tribunal is satisfied that—

(i) there is collusion between the person making the claim and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded by it in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made." Undoubtedly there have been many amendments to the Statute to bring the law in accord with the judicial opinion. We are, however, not prepared to accept Mr. Patnaik's contention that sub-section (2-A) is a statutory incorporation of the judicial opinion. On the other hand, sub-section (2-A) appears to be a provision in the background of Section 96 (2) of the Act. In the eventuality indicated in Section 110-C (2-A) and in the absence of a provision in the policy bond in the line indicated above, it is open to the Court

to permit the Insurance Company to step in to defend. Sub-section (2-A) is more in accord with the view indicated by Chagla, C. J. in the decision dealt with earlier in our judgment. The power under Section 110-C (2-A) of the Act can be exercised even when the insured has entered contest and, while giving an appearance of contest, is actually colluding with the claimant. The insurer is not required to defend with the leave of the Court in the name of the insured. It can enter contest in its own right once permitted by the Tribunal. Thus the contractual right under the policy bond may well be exercised in addition to the enabling provision under sub-section (2-A) of Section 110-C of the Act.

5. In the order of reference, the learned Single Judge observed that the view of the Division Bench was contradictory to what was expressed by a learned Single Judge in the case of Orissa Co-operative Insurance Society Ltd. v. Ranian Kumar Garabaru, 1976 ACJ 21. In the Bench decision of this Court, the question now posed did not arise for consideration and all that was taken note of was the restriction imposed under S. 96 (2) of the Act. The learned Single Judge in the subsequent decision (1976 ACJ 21) (Orissa) was indeed not dealing with the term of the policy bond reserving the right to defend to the insurer in the name of the insured, but was considering the scope and ambit of Section 110-C (2-A) of the Act.

6. As the facts of this case show, the insured had entered contest and there is no reason to hold in the absence of any allegation, and something more, that the insured has been colluding with the claimant. Leave of the Tribunal had admittedly not been taken under S. 110-C (2-A) of the Act. There exists a clause in the policy bond authorising the insurer to defend in the name of the insured. As we have already noted, the insured and the insurer simultaneously wanted to defend, the insured defending in his own name and the insurer in its own name. The term in the policy bond did not authorise such defence by the insurer. In the instant case, therefore, to the insurer the restriction under Section 96 (2) of the Act applies and he could not travel beyond the restriction imposed by the Statute either before the Tribunal or in appeal before this Court. None of the Grounds in the memorandum of appeal appertains to a defence raised within Section 96 (2) of the Act and what is being

mainly challenged is the quantum and liability on a ground not covered by Section 96 (2) of the Act. On these grounds the insurer was not entitled to contest the claim nor the award. The appeal filed on its behalf, therefore, is not maintainable.

7. We accordingly dismiss the appeal. The interests of justice, in our view, would be adequately satisfied if parties are directed to bear their own costs.

B. K. RAY, J.:— I agree.

N. K. DAS, J.:— I agree.

Appeal dismissed.

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S. N. SHANKAR, C. J. AND

P. K. MOHANTIL, J.

Gunanidhi Mohapatra, Petitioner v. The Chairman, N. A. C., Bhubaneswar and others, Opposite Parties.

O. J. C. No. 1678 of 1975, D/- 2-3-1976.

(A) Constitution of India, Art. 226 — Mandamus, Certiorari and Quo warranto — Who can apply — Councillor of Notified Area Council has no locus standi to challenge appointment to a public office by seeking writ of Mandamus or Certiorari. (Municipalities — Orissa Municipal Act (23 of 1950), Sections 382 and 94 (2)).

If a writ asked for is a writ of quo warranto in respect of a public office the petitioner need have no personal interest. But if the writ asked for is a writ of mandamus or certiorari, the petitioner has to establish that he has some personal interest in the matter which the law recognises as sufficient. AIR 1962 SC 1044 and AIR 1966 SC 828 and (1916) 1 KB 595, Ref. (Para 10)

A councillor of the Notified Area Council under the Orissa Municipal Act has no locus standi to file a petition for a writ of mandamus or a certiorari challenging the appointment of a Medical Officer, a public office under Notified Area Council. The interest envisaged under Section 382 of the Orissa Municipal Act dealing with personal liability of councillors for any expenditure made from the Municipal fund contrary to law or under S. 94 (2) requiring a councillor to claim attention of the chairman to any waste of Council's property is not sufficient to entitle such Councillor to invoke the jurisdiction under Article 226 for issue of

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a writ of mandamus or certiorari.

(Para 11)

(B) Constitution of India, Article 226 — Quo warranto — Holder of public office not qualified to hold office on date of appointment but subsequently acquiring necessary qualification during pendency of writ petition — Writ cannot issue. AIR 1975 Delhi 66 (FB); AIR 1954 All 227 (FB) and AIR 1965 SC 491, Rel. on.

(Paras 13 and 14)

(C) Constitution of India, Articles 16 and 226 — Person challenging an appointment to public office as contravening Article 16 ought to be an aspirant himself. AIR 1960 SC 384, Rel. on.

(Para 15)

Cases Referred: Chronological Paras

AIR 1975 Delhi 66 = (1975) 77 Pun LR

(D) 17 (FB) 13

AIR 1966 SC 828 = (1966) 2 SCR 172 9

AIR 1965 SC 491 = (1964) 4 SCR 576 12

AIR 1962 SC 1044 = 1962 Supp (3) SCR

1 9

AIR 1960 SC 384 = (1960) 2 SCR 311 15

AIR 1954 All 227 = 1953 All LJ 678 (FB)

13

AIR 1952 SC 12 = 1952 SCR 28 9

AIR 1951 SC 41 = 1950 SCR 869 9

(1916) 1 KB 595 = 85 LJ KB 630 8

Asok Das, S. N. Satpathy, M. S. Panda and D. S. Misra, for Petitioner; Standing Counsel and S. Mohanty and G. A. Rao Dora, B. B. Ratho, A. K. Misra and S. D. Das, for Opposite Parties.

MOHANTI, J.:— In this writ petition under Article 226 of the Constitution the validity of the appointment of Dr. Srikrushna Sahu (opposite party No. 3) as the Second Medical Officer of the Bhubaneswar Notified Area Council is under challenge.

2. The relevant facts are these:

The Notified Area Council by its Resolution No. 29 dated 31-10-1964 (Annexure A/1) decided to create the post of a Second Medical Officer and advertised the same on 1-8-1965 (Annexure A/3). Opposite Party No. 3 was temporarily appointed to the post and he joined on 31-8-1965. On 23-7-1971 he applied to the Notified Area Council for study leave to undergo the condensed M. B. B. S. course (vide Annexure E/3). On 24-7-1971 the N. A. C. moved the State Government for necessary instructions regarding the nature and period of leave to be admissible to opposite party No. 3 and for posting of a substitute in his place (vide Annexure H/3). On 31-7-1971 the N. A. C. by its Resolution No. 6 decided to relieve the opposite party No. 3

and to settle the nature of leave and the terms and conditions thereof later according to the directions of Government (vide Annexure G/3). On 12-8-1971 Government by their letter in Annexure F/3 directed the N. A. C. to relieve opposite party No. 3 to join the training course. On 13-8-1971 opposite party No. 3 was relieved of his duties. On 25-2-1972 the N. A. C. issued an order cancelling allotment of a residential quarter in favour of opposite party No. 3. A copy of this order was forwarded to the State Government. Thereupon the State Government by their letter in Annexure 2 intimated that the N. A. C. had no obligation for opposite party No. 3 since he was appointed as a Medical Officer without having a post created with the approval of the Government. On 9-12-1972 the N. A. C. terminated the services of the opposite party No. 3 with retrospective effect from 13-8-1971, that is, the date on which he was relieved (vide Annexure K/3). Opposite party No. 3 preferred an appeal under S. 77 of the Orissa Municipal Act which was rejected by the State Government on the ground of limitation (vide Annexure 3). But on a subsequent representation to the Chief Minister, Government directed the N. A. C. to take back opposite party No. 3 and to regularise the period of his absence from duty (vide Annexure 5). On 11-6-1975 the N. A. C. passed a Resolution (Annexure 7) accepting the Government order in Annexure 5. The petitioner challenges the legality of the appointment of the opposite party No. 3 on the following grounds:

(i) At the time of his appointment on 31-8-1965, he had not passed the M. B. B. S. examination prescribed for the post of an Assistant Surgeon. He was not registered as a Medical practitioner as required under Section 15 of the Indian Medical Councils Act.

(ii) No prior sanction of the State Government had been obtained for creating the post of Second Medical Officer as required under Section 73 of the Orissa Municipal Act.

(iii) The order of appointment in Annexure 7 is in contravention of Art. 16 of the Constitution.

3. Opposite party No. 3 filed counter contending that there was ex post facto sanction of the State Government for the post during the relevant period; that he passed the condensed course from the Gopabandhu Ayurveda Institute and held the D. M. S. M. diploma

as required by the advertisement in Annexure A/3; that the Government of Orissa recognised D. M. S. M. as equivalent to M. B. B. S. for service; that he was duly registered in the State Medical Register on 14-2-1966; that he was relieved of his duties on 13-8-1971 on study leave terms to join the training course and that in the meantime he has passed the M. B. B. S. examination. He also contended that after the State Government directed the N. A. C. to take him back, the petitioner brought a proposal to abolish the post of Second Medical Officer but the Council by majority decided to continue the post. The petitioner is bound by the majority decision of the N. A. C. and has no locus standi to maintain the writ petition.

4. The State Government (opposite party No. 4) while supporting the above contentions maintained that merely because opposite party No. 3 was relieved to undergo higher studies it does not mean that he ceased to be an employee of the N. A. C. The appeal filed by him under Section 77 of the Orissa Municipal Act was dismissed on the ground of limitation, but on a further representation Government reviewed the case and felt that their previous letter dated 14-8-1972 (Annexure 2) had been issued without appreciation of the correct position. Accordingly, Government directed the N. A. C. to take back opposite party No. 3 in the post of Second Medical Officer and to regularise the period of his absence.

5. The Chairman and the Executive Officer of the N. A. C. (opposite parties 1 and 2) filed a joint counter supporting the case of opposite party No. 3.

6. Smt. Binapani Dash who has been serving as an Honorary Lady Doctor in the N. A. C. Hospital was impleaded as opposite party No. 5 on her own application dated 1st December, 1975. She filed a counter supporting the allegations made in the writ petition. Her contention is that if there had been a selection for the post of Second Medical Officer after due advertisement, she ran the best chance of being selected for the post. She further contended that the Government order directing the N. A. C. to take back opposite party No. 3 in the post of Second Medical Officer amounts to a fresh appointment and it violates the provisions of Article 16 of the Constitution of India.

7. Acute controversy has centred round the question about the petitioner's locus standi to maintain the writ peti-

tion. It is contended on behalf of the opposite parties 1 to 4 that the writs sought are those in the nature of quo warranto, mandamus or certiorari and that in the circumstances of the case, none of these writs could lie or could issue at the instance of the petitioner. The argument is that the power of jurisdiction to issue any such writ could be invoked by a petitioner who is prejudicially affected by the order challenged in the writ petition and who seeks protection of a legal right vested in him.

8. The question whether the petitioner has any locus standi to invoke the extraordinary jurisdiction under Art. 226 of the Constitution is necessarily related to the nature of the relief asked for. For the issue of a writ of mandamus the petitioner has to make out that he has a legal right by virtue of which he is entitled to a particular act being done by the opposite parties or to require that they shall not do a thing which may prejudicially affect his right. For the issue of a writ of certiorari, the petitioner should be a person who is adversely affected by the order sought to be quashed. But in the case of a writ of quo warranto the petitioner is in the nature of an informer. In England the petitioner in such circumstances is not called a petitioner at all but only a relator i.e. one who relates facts on the basis of which the Court itself takes action in the name of the King. The peculiar characteristics of the writ of quo warranto and the history of its development in England would appear from the leading case of *The King v. Speyer*, (1916) 1 KB 595. Lord Reading C. J. pointed out that originally a writ of quo warranto was available only for use by the King against encroachment of Royal prerogative or of the rights, franchise or liberties of the Crown but that later it gave place to the practice of filing informations by the Attorney General on the strength of which the Court enquired into the authority whereby the respondent held any public office. Later still, the King's coroner commenced the practice of exhibiting the information of quo warranto at the instance of even private persons. To prevent malicious information at the instance of private persons, statutes were subsequently passed after which the practice of coroner filing information was stopped. Another statute was passed during the reign of Queen Anne making the issue of a writ of quo warranto subject to the discretion of the Court to grant or refuse the same upon

the informations exhibited by private persons.

9. In the case of Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal, AIR 1962 SC 1044 the Supreme Court while dealing with the question of locus standi to file a petition under Article 226 of the Constitution held as follows:

"..... The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *State of Orissa v. Madan Gopal*, 1952 SCR 28 = (AIR 1952 SC 12) this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Article 226 of the Constitution. In *Charanjit Lal Chowdhuri v. Union of India*, 1950 SCR 869 = (AIR 1951 SC 41). It has been held by this Court that the legal right that can be enforced under Article 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. We do not see any reason why a different principle should apply in the case of a petitioner under Article 226 of the Constitution. The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified."

(The underlining is ours.)

This view was reiterated in AIR 1966 SC 828, (*Gadde Venkateswara Rao v. Government of Andhra Pradesh*).

10. In view of the authorities cited, we can take it as well established proposition that if the writ asked for is a writ of quo warranto in respect of a public office the petitioner need have no personal interest. But if the writ asked for is a writ of mandamus or certiorari the petitioner has to establish that he has some personal interest in the matter which the law recognises as sufficient.

11. Now, in the case before us, the petitioner who is a Councillor of the N. A. C. questions the legality of the appointment of opposite party No. 3 on the ground that he did not possess the requisite qualifications and that no prior sanction of the Government had been obtained for creation of the post. He has no

personal interest in the matter of appointment of opposite party No. 3. He is neither an aspirant for the post nor is he prejudicially affected in any manner by the impugned orders in Annexures 5 and 7. The learned counsel appearing on behalf of the petitioner invited our attention to Section 382 of the Orissa Municipal Act which deals with personal liability of Councillors for any expenditure made from the Municipal Fund contrary to law where such illegal payment has been authorised by him while acting as a Councillor. He also invited our attention to sub-section (2) of Section 94 of the Act which requires any Councillor to call the attention of the Chairman to any waste of Council's property. This interest of the petitioner, in our opinion, is not sufficient to entitle him to invoke the jurisdiction under Article 226 of the Constitution for issue of a writ of mandamus or certiorari.

12. The scope and ambit of a writ of quo warranto came up for consideration in the case of *University of Mysore v. Govinda Rao*, AIR 1965 SC 491. The Court indicated that before a citizen can claim a writ of quo warranto, he must satisfy the Court, inter alia, that the office in question is a public office and is held by a usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not. That the office held by opposite party No. 3 is a public office is not disputed by the opposite parties. It is however contended that he has no legal authority to hold the office. By the time of his initial appointment, opposite party No. 3 was holder of D. M. S. M. diploma which had been recognised by Government as equivalent to M. B. B. S. degree. The qualification prescribed in the advertisement (Annexure A/3) was either a M. B. B. S. degree or a D. M. S. M. diploma. Thus the requirement of the advertisement was satisfied. It appears from the letter dated 13-11-1965 (Annexure T/3) from the Chairman of the N. A. C. to the Director of Health Services that the post of Medical Officer under the State Government had been offered to opposite party No. 3. It is not disputed that subsequently opposite party No. 3 passed the M. B. B. S. examination and was duly registered in the State Medical Register. He was, therefore, qualified to hold the post of a Medical Officer by the time Annexures 5 and 7 were issued. Ex post facto sanction for creation of the post was ac-

corded by Government for the period from 31-8-1965 to 28-2-1971, and the term of the post was extended from time to time. It was last extended upto 29-2-1976 by G. O. No. 29600/UD, dated 31-10-1975. Thus it is clear that even if it be assumed that the requirements of Section 73 of the Orissa Municipal Act and Section 15 of the Indian Medical Councils Act were not fulfilled at the time of initial appointment the irregularity if any, was completely cured by the time Annexures 5 and 7 were issued.

13. In AIR 1954 All 227 (FB), (Hari Shankar Prasad Gupta v. Sukhdeo Prasad) the writ of quo warranto was refused as the holder of the office though not qualified on the date of his appointment thereto acquired the necessary qualification during the pendency of the writ petition. In AIR 1975 Delhi 66 (FB), (P. L. Lakhanpal v. Ajit Nath Ray, Chief Justice of India, New Delhi) the petitioner prayed for a writ of quo warranto against the present Chief Justice of India on the ground that his Lordship's appointment was in violation of the provisions of Article 124 (2) of the Constitution as the mandatory consultation was not made and as the rule of seniority which inheres in that Article was not followed. After the appointment was made, Justices J. M. Shelat, K. S. Hegde and A. N. Grover who were senior to the present Chief Justice resigned their office as Judges of the Supreme Court, and by the time the writ petition was filed, Justice A. N. Ray became the seniormost puisne Judge. In the circumstances, the Full Bench held that the issue of a writ of quo warranto would be futile because as a result of the resignations of the Judges who were senior to him, Justice A. N. Ray became the seniormost puisne Judge and he was not only eligible for reappointment as Chief Justice of India but was entitled to be so reappointed and hence a writ of quo warranto ousting his Lordship from the office of the Chief Justice of India would be futile and such a writ could not be issued. We are in respectful agreement with the views expressed in these decisions.

14. The alleged invalidity of the appointment of opposite party No. 3 in the year 1965 is not the subject-matter of this writ petition. We are only concerned with the legality of his appointment under Municipal Resolution dated 11-6-1975 (Annexure 7). As mentioned earlier, the post of Second Medical Officer did exist on that date and the opposite

party No. 3 had the requisite qualification for the same. It cannot, therefore, be said that there was any illegality in the appointment of opposite party No. 3 as per Annexure 7.

15. The next contention is that the order in Annexure 7 amounts to a fresh appointment and the Notified Area Council was bound to observe the principles of Article 16 of the Constitution and advertise an invitation for applications thereto, which has not been done in the present case and, therefore, the appointment of opposite party No. 3 is illegal. In our opinion, a challenge to a particular appointment as contravening Article 16 of the Constitution cannot be urged by one who was not and is not an aspirant to the post. Referring to Article 16, in AIR 1960 SC 384, (All India Station Masters' and Assistant Station Masters' Association v. General Manager, Central Railway), the Court said:

"Equality of opportunity in matters of employment can be predicated only as between persons, who are either seeking the same employment, or have obtained the same employment."

16. Opposite party No. 5 has been appointed as an Honorary Lady Assistant Surgeon under the Notified Area Council. She was never an applicant for the post of the Second Medical Officer held by opposite party No. 3. She is over-aged and in her letter dated 21-7-1972 (Annexure Z/3) she offered to serve as a Lady Assistant Surgeon in the N. A. C. without any remuneration towards her service. She has therefore no locus standi to challenge the appointment of opposite party No. 3. Admittedly, applications from eligible persons were invited when opposite party No. 3 was appointed to the post on 31-8-1965 and he was selected on merit. No doubt, his services were terminated on 9-12-1972 as per Annexure K/3 but subsequently the order of termination was cancelled by the N. A. C. — vide Resolutions in Annexures L/3 and M/3. In Annexure 7 the N. A. C. accepted the Government decision in Annexure 5 for taking back opposite party No. 3 and for regularising the period of his absence. In these circumstances, the contention that there was fresh appointment of opposite party No. 3 in violation of the provisions of Article 16 of the Constitution is not acceptable.

17. Considering all the circumstances of the case, we are not satisfied that this is a fit case for interference with the appointment of opposite party

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No. 3. The writ petition is accordingly dismissed with costs and hearing fee of Rs. 100/- (one hundred) payable to opposite party No. 3.

SHANKAR, C. J.:— I agree.

Petition dismissed.

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**S. N. SHANKAR, C. J. AND
P. K. MOHANTI, J.**

Mathuri Sahu and others, Petitioners
v. Secretary, Prajatantra Prachar Samity,
Cuttack, Opposite Party.

Original Jurisdiction Case No. 2332 of
1975, D/- 9-2-1976.

(A) Constitution of India, Art. 226 —
Certiorari — Alternative remedy — Petitioners challenging order of retirement made after attainment of 58 years — Allegation that practice was to continue workers till they became ill or they voluntarily abandoned service — No breach of any standing order pointed out — Matter, held, could be decided in an Industrial Dispute which could be raised by petitioners — Petitioners, held, had, no locus standi. (Para 17)

(B) Constitution of India, Art. 226 —
Against whom writ can issue — Registered Trust employing certain persons — Retirement ordered after workers attained age of 58 years — No breach of any statutory rule — Being a private institution petitioners, held, could not invoke the jurisdiction under Article 226. (Para 8)

Cases Referred: Chronological Paras

AIR 1972 SC 843 = 1972 Lab IC 431 6

AIR 1972 SC 1201 = 1972 Lab IC 644 14

AIR 1970 Orissa 9 = 1970 Lab IC 49 16

AIR 1970 Orissa 126 = 1970 Lab IC 1000 16

AIR 1969 SC 1306 = (1969) 3 SCR 773 7

1969 Lab IC 1282 = 35 Cut LT 614 16

AIR 1964 Guj 265 = (1964) 5 Guj LR 649 3, 9

P. Palit, S. Das and R. Mohapatra,
for Petitioners; J. Das and G. Rath, for
Opposite Party.

SHANKAR, C. J.:— Petitioners, nine
in number, are employees of Prajatantra
Prachar Samity (hereafter called the
'Samity'). Opposite Party in the petition
is the Secretary of the Samity. The
prayer of the petitioners is that the orders
dated November 15, 1975 and December
26, 1975 (Annexures 1 and 2 respectively)

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be quashed. The former is a letter issued
to one of the petitioners Raghunath Patra
by the Secretary of the Samity informing
him that as he had already reached the age
of 58 years he was being superannuated
and retired. The latter is a letter to the
President of Cuttack Press Workers'
Union issued by the Secretary in reply to
a communication sent by the said Union
stating in substance that the decision
taken by the Samity that its employees
would retire on attaining the age of fifty-
eight years was justified.

2. The petition is contested on
several grounds. It is urged that the
Samity is a private institution and a re-
gistered trust created to undertake literary
and cultural activities by publishing news-
papers and periodicals and to encourage
other activities of like nature and has no
statutory duty or obligation violation of
which can be remedied under the writ
jurisdiction; that the averments in para-
graph 9 of the petition that the employ-
ees of the Samity "usually and ordinarily
retire from their employment either on
the event of their death or on the event
of perpetual illness or on the event of
their voluntary abandonment of the em-
ployment" is not correct and that in al-
most all industries in the country "the
present trend and normal practice as to
the age of retirement is 58 years." The
petitioners, it is maintained, are not en-
titled to any relief from this Court.

3. The objection pressed on behalf
of the opposite party in forefront is that
no writ could be issued by the Court
against the Samity as it was a private
body. In reply it is contended that a writ
under Article 226 could go to any person
or authority if any statutory right of the
petitioners was infringed and that in the
instant case as there was a breach of
Standing Orders certified under the Indus-
trial Employment (Standing Orders) Act,
1946 relating to service conditions of the
employees of the Samity the rights of the
petitioners were infringed and the writ
was competent. Strong reliance in sup-
port of this submission is placed on Tata
Chemicals v. Kailash, (AIR 1964 Guj 265).

4. No copy of the certified Stand-
ing Orders was filed with the petition nor
has any reference been made in the peti-
tion to the particular Standing Order the
infringement of which is claimed. Learned
counsel for the petitioner however pro-
duced a copy of the Standing Orders at
the time of hearing but was unable to
point to any clause of the Order the
breach of which can be invoked by the

petitioners in support of the relief. The Standing Orders do not at all specify the age of superannuation. Question of a breach of any Standing Order by the Samity to entitle the petitioners to invoke Article 226 does not, therefore, arise.

5. In fact, in paragraph 9 of the petition the claim has been laid by the petitioners on the ground that the employees of the Samity "usually and ordinarily retire from their employment either on the event of their death or on the event of perpetual illness or on the event of their voluntary abandonment of the employment". This is the only ground for the relief. In the counter affidavit this averment is controverted. As it is not denied that the Samity is a private institution and a registered trust, the question that arises for consideration is whether the petitioners are entitled to invoke writ jurisdiction on the ground urged in the petition.

6. In *Banchhanidhi v. State of Orissa*, (AIR 1972 SC 843) the appellant was appointed a Headmaster of Sadhu Charan Bidyapitha in the year 1949. In the year 1951 the Government of Orissa recognised this Bidyapitha as an institution in accordance with the terms of Education Code. By letter dated 19th May, 1969 the appellant was retired from service. He challenged the order of retirement in a writ under Article 226 of the Constitution. Amongst others the contention raised by him was that it had been the uniform usage and implied term of office of all teachers in private schools in Orissa that irrespective of age limit they would continue to be in service as long as they were physically fit and mentally alert. The writ petition was dismissed. In dealing with the appeal by the petitioner against the order of dismissal at page 845 of the report the Supreme Court said:—

"It is manifest that the appellant could not enforce a contract of employment in an application under Art. 226 of the Constitution. The appellant did not rely on any rule of the management of the institution that the appellant would continue in service as long as the appellant was physically fit and mentally alert. The appellant alleged a custom to that effect in the petition. Custom of such a nature cannot be enforced in an application under Article 226."

7. In *Praga Tools Corporation v. C. V. Imanuel*, (AIR 1969 SC 1306) the question of locus standi of a petitioner

to invoke Article 226 came up before the Supreme Court. In this case writ was filed by the workmen challenging the validity of an agreement entered into between the Company and the Corporation Employees Union the effect of which was that in spite of an earlier settlement the company could carry out retrenchment of 92 workmen. The objection was that the writ petition was not maintainable. Dealing with the contention Mr. Justice Shelat speaking for the Court at page 1309 of the report said:—

"No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute."

8. There is, therefore, no escape from the conclusion that the petitioners have no locus standi to invoke Art. 226 of the Constitution and the ground on which they base their claim is not sustainable in the writ Court.

9. In the Gujarat case relied upon by the learned counsel, (AIR 1964 Guj 265) there was a Standing Order provisions of which were not complied with and therefore it was held that the suit for declaration that dismissal was illegal was not barred by Section 21 (b) of the old Specific Relief Act. This case does not help the petitioners.

10. It was then argued that the petitioners had in any case been retrenched within the meaning of S. 2 (oo) of the Industrial Disputes Act, 1947 in violation of the mandatory provision of Section 25-F of the Act and this furnishes a good cause of action to the petitioners to invoke Article 226.

11. This case was not pleaded in the petition. The plea has for the first time been taken in the rejoinder.

12. The first question that falls for determination in the context of this plea is whether the impugned order is

an order of retrenchment. On the face of it the order states that the petitioners having reached the age of superannuation i.e. 58 years are retired. As stated earlier there is no provision in the Standing Orders as to the age of superannuation. So what has happened in this case is that in spite of the absence of such a provision the Samity has taken a decision to retire its employees at the age of 58 years. If this decision is legal and sustainable the impugned order is purely an order of retirement and not retrenchment.

13. Retrenchment is defined in Section 2 (oo) of the Industrial Disputes Act, 1947 in the following terms:—

"(oo) 'retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include—

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of the employment between the employer and the workmen concerned contains a stipulation in that behalf; or

(c) termination of the service of a workman on the ground of continued ill-health."

Clause (b) in terms excludes retirement on reaching the age of superannuation from the purview of retrenchment. True that retirement has the effect of "termination" of service but all termination of service is not retrenchment. The impugned order, therefore, *prima facie* is not an order of retrenchment unless it is shown that either the Samity was not competent to take the decision to retire its employees at the age of 58 years or that the decision is otherwise unreasonable and unwarranted. This is not the scope of the present writ petition. The petitioners have not raised any such plea and the consideration of this aspect apart from anything else is not warranted in this petition as framed.

14. The case of the Samity, in answer to the petitioners' contention that the employees of the Samity could retire only in the circumstances mentioned in para. 9 of the petition, is that the stand taken by the petitioners is "astounding, unusual and contrary to the normal practice in this country". It is further averred "the present trend and normal practice as to the age of retirement is 58 years in almost all industries". We have no

material before us to decide the controversy raised by these pleas, nor would it be proper to embark on such a venture within the limited scope of this petition. If further appears that at one stage the case of the petitioners was taken up by the Union and the Union sent a communication to the Samity. But after the reply of the Samity to the Union vide Annexure 2 the Union apparently took no interest in the matter. In *United Provinces Electric Supply Co. Ltd. v. T. N. Chatterjee*, (AIR 1972 SC 1201) the fixation of 58 years as the age of superannuation was approved by the Supreme Court. The decision of the Union cannot, therefore, on the face of it be called unreasonable. The Supreme Court in this case endorsed the age of superannuation after the various aspects of the question had been considered at length by the appropriate Tribunals and the entire matter including the views of the Tribunal was before the Court. No decision in the absence of such relevant material would be justified. To take into account only the abstract principles would be to bypass the real question in controversy between the parties which will lead to complications and further unrest in the Industry resulting in multiplicity of proceedings. We are, therefore, not inclined to go into this aspect of this case in the present proceedings.

15. It was not disputed before us that the petitioners can raise an Industrial Dispute. All pleas available to the petitioners in law can be raised in this dispute. After taking into consideration all the relevant facts and circumstances of the case, we are of the view that the matter can more appropriately be decided in that dispute and the petitioners should not be allowed to side-track the real issue by invoking Article 226.

16. Learned counsel for the petitioners urged that the existence of alternative remedy is no bar to the invocation of writ jurisdiction. In support of the contention he relied on *Saroj Kumar v. Chairman, Orissa State Electricity Board*, (AIR 1970 Ori 126), *Beni Bhuj Sahu v. Chief Engineer, Hirakud Dam Project*, (AIR 1970 Ori 9) and *Duryodhan Naik v. Union of India*, (1969 Lab IC 1282) (Orissa). In *Saroj Kumar's* case the petitioner was retired by the Orissa State Electricity Board on attaining the age of 55 years in pursuance of a clause relating to superannuation in the Standing Orders. The factum of superannuation was thus not in dispute and the contention raised

was that the Standing Orders could not contain a clause fixing the age of superannuation and, therefore, the petitioner could not be superannuated. No enquiry on the factual aspect being called for, the Court entertained the writ and found that the superannuation clause was beyond the ambit of the Schedule to the Act and as such unenforceable and so the petitioner could not be retired. In Beni Sahu's case also there was no dispute as to "Retrenchment Notice". With this admitted fact the Court found that provisions of Section 25-F having not been complied with, the order of retrenchment was vitiated. In Duryodhan Naik's case the Court found on the facts before it that one set of employees consisting of eleven petitioners had been retrenched and it was conceded that second and third categories of the petitioners were admittedly cases of retrenchment without recourse to the provisions of Section 25-F of the Industrial Disputes Act, 1947. The relief was, therefore, granted in the writ petition. The facts of all these cases were wholly different from the present one and no question as to the competency and validity of the decision as to fixing the age of superannuation was involved. They are, therefore, of no assistance to the petitioners.

17. For reasons aforesaid, we are of the view that the petitioners in the facts of this case are not entitled to invoke the writ jurisdiction of this Court and therefore, dismiss this petition; but having regard to the circumstances of the case leave the parties to bear their own costs.

MOHANTI, J.:— I agree.

Petition, dismissed.

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R. N. MISRA AND N. K. DAS, JJ.

Binod Bihari Rout, Petitioner v. The Member, Board of Revenue and another, Opposite Parties.

Original Jur. Case No. 421 of 1974, D/- 21-1-1976.

(A) Orissa Public Demands Recovery Act (1 of 1963), Section 9 — Certificate proceeding — Disciplinary action on charge of misappropriation of Government money — No clear finding of misappropriation — Certificate proceeding should not have been initiated — Civil suit was proper remedy. (Para 2)

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(B) Public Accountants' Default Act (12 of 1850), Preamble — Applicability of the Act to areas covered by ex-State of Keonjhar after 26th Jan. 1950.

In view of the terms of Article 372 (2) of the Constitution and the provision made in Clause 8 of the Adaptation of Laws Order, 1950, it is manifest that it was not the intention of the Order of 1950 to extend the application of any Central Law to new areas. In view of the admitted position that the Laws Local Extent Act (15 of 1874) was not in force in the areas covered by the ex-State of Keonjhar and Section 3 of that Act makes provision to indicate the extent of the Central Law, it must follow that by adaptation made to Section 3 of that Central Act, it was not the intention to extend its jurisdiction to new areas. On this analysis, the medium through which the Public Accountants' Default Act (12 of 1850) was sought to have been extended to the areas covered by the ex-State of Keonjhar is not available to be relied upon and the only conclusion is that the Central Act (12 of 1850) was not in force in the areas covered by the ex-State of Keonjhar after the State of Orissa came into existence with effect from 26th Jan. 1950.

(Para 3)

L. Rath, for Petitioner; Addl. Govt. Advocate, for Opposite Parties.

MISRA, J.:— Petitioner was Nazir of the office of the Subdivisional Officer at Anandpur. He was accused of misappropriation of money entrusted to him in a criminal case and when it ended in acquittal, he was subjected to disciplinary action and found guilty for misappropriation. In respect of the money alleged to have been misappropriated steps were taken for recovery in a proceeding under the Public Demands Recovery Act. The Certificate Officer overruled the objections raised on behalf of the petitioner and directed execution of the certificate. An appeal carried to the District Collector failed, but on petitioner's revision, the Revenue Divisional Commissioner, Northern Division, by his order dated 7-1-1969, under Annexure 1, quashed the proceeding holding:— (i) there was no clear finding against the petitioner regarding misappropriating Government money entrusted to him and (ii) the Public Accountants' Default Act on the basis of the provisions of which the certificate proceeding was held to be tenable was not in force in the ex-State of Keonjhar at the material time and, therefore, even if the money had been entrusted to the peti-

tioner qua a Public Accountant and there had been misappropriation, recovery proceeding under the Public Demands Recovery Act was not tenable. The State of Orissa carried a further revision to the Board of Revenue and the Member, Board of Revenue, by his order dated 31st December, 1973 Annexure 2, reversed the order and held that the certificate debt was recoverable under the Act. The order of the Member, Board of Revenue is assailed before us and petitioner asks for a writ of certiorari for its quashing.

2. The same two questions which had been canvassed before the Revenue Divisional Commissioner are re-agitated before us in support of the petitioner's case. Mr. Rath for the petitioner relies upon an extract from the enquiry report which was quoted by the Revenue Divisional Commissioner in his order in support of his contention that there was no finding in relation to misappropriation by petitioner of State's funds entrusted to him qua a Public Accountant. It is useful to extract that part of the enquiry report:

"It is seen from the Nazir's cash book that the entries in respect of these amounts have been mostly written by the delinquent. The receipt and repayment register also must have been written by him. So, his plea that he is quite unaware of these transactions is untenable. In view of the conduct of the delinquent in similar cases, there is strong suspicion against the accused officer that these might be wrong-doings of his."

The State of Orissa has not chosen to place the enquiry report or the final finding of the disciplinary authority before us to negative petitioner's contention that he had not been adjudged to be liable in the disciplinary proceeding on the footing that there was any misappropriation by him. In that view of the matter, particularly in the absence of a contrary finding by the Board of Revenue on this score, we are prepared to agree with Mr. Rath's contention that without a clear finding of misappropriation, the certificate proceeding should not have been initiated. The direction of the Revenue Divisional Commissioner that this was a fit case where a civil suit should have been filed in which the extent of the petitioner's liability had first to be gone into was, therefore, appropriate.

3. The next issue which is contentious is in regard to the applicability of Public Accountants' Default Act to the ex-State of Keonjhar or to the district of Keonjhar after the State of Orissa came

into existence, with effect from 26th of January, 1950 or on the date when the proceeding was instituted. There is no dispute that the said Act was not in force in the ex-State of Keonjhar. Under the Merger Agreement, the said ex-State was taken over with effect from 1st January, 1948 and its administration was being looked after by the Province of Orissa as a delegate of the Central Government until August, 1949 when its administration was taken over by the Province of Orissa in view of the provisions of Section 290-A of the Government of India Act of 1935 (as amended). Several statutes of the Central Legislature as also of the Provincial Legislature were extended to areas covered by the merged States, but no provision has been placed before us extending the Central Act 12 of 1850 to the areas covered by the ex-State of Keonjhar. Reliance has been placed on the Laws Local Extent Act (15 of 1874) for the contention that with the adaptation made by the President in 1950, the provisions of Central Act (12 of 1850) got extended to the entire State of Orissa and, therefore, it must be construed that to the district of Keonjhar which came into existence after 1950, this Act was applicable. Section 3 of Central Act 15 of 1874 before the adaptation made in 1950 reads thus:

"The Acts mentioned in the first schedule hereto annexed are now in force throughout all the Provinces of India, except the Scheduled Districts."

On adaptation, the provision reads thus:

"The Acts mentioned in the first schedule hereto annexed are now in force in the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States and the Scheduled Districts."

Undoubtedly the language of Section 3 after adaptation would prima facie support the contention advanced on behalf of the State, but as Mr. Rath for the petitioner rightly indicates adaptation being on the terms indicated in the order itself would not permit the interpretation placed on Section 3 by learned Additional Government Advocate. Article 372 (2) of the Constitution which is the provision authorising adaptation reads thus:

"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be

necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

Clause 8 of the Adaptation of Laws Order, 1950 provides:

"Notwithstanding any amendment made by this Order in the extent clause of an existing Central law, that law shall not be deemed to have been extended to any area to which it did not extend immediately before the appointed day; and a reference in that law to any State or class of States shall not, unless the context otherwise requires be deemed to include a reference to any part of that State or class of States to which that law did not extend immediately before the appointed day."

In view of the terms of Article 372 (2) of the Constitution and the provision made in Clause 8 of the Adaptation of Laws Order, 1950, it is manifest that it was not the intention of the Adaptation of Laws Order to extend the application of any Central Law to new areas. In view of the admitted position that the Laws Local Extent Act (15 of 1874) was not in force in the areas covered by the ex-State of Keonjhar and Section 3 of that Act makes provision to indicate the extent of the Central law, it must follow that by adaptation made to Section 3 of that Central Act, it was not the intention to extend its jurisdiction to new areas. On this analysis, the medium through which the Public Accountants' Default Act was sought to have been extended to the areas covered by the ex-State of Keonjhar is not available to be relied upon and once that sole process fails the only conclusion which emerges is that the Central Act (12 of 1850) was not in force in the areas covered by the ex-State of Keonjhar. On this analysis, we would hold that petitioner's contention that the certificate proceeding is not maintainable, must also be accepted.

4. The writ application accordingly succeeds. The certificate proceeding and the adverse orders passed against the petitioner therein stand quashed. Petitioner shall have his costs of this proceeding. Hearing fee is assessed at rupees one hundred.

DAS, J.:— I agree.

Petition allowed.

AIR 1976 ORISSA 191

S. K. RAY AND N. K. DAS, JJ.

Kasinath Tripathy and another, Petitioners v. State of Orissa and others, Opposite Parties.

O. J. C. No. 469 of 1974, D/- 7-1-1976.

(A) Constitution of India, Art. 226 —
— Writ of certiorari and mandamus —
— Maintainable only when some personal right is affected.

Except in cases of writs like Habeas Corpus or Quo Warranto, the only right that can be enforced under Article 226 is the personal or individual rights of the petitioner. Existence of right is the foundation of the exercise of this jurisdiction of the Court under this article.

(Para 6)

Even in case of issue of writ of mandamus there should be a legal or personal right of individual which is infringed and thereby prejudicially affects him.

(Para 7)

Where Government had ordered to reinstate a head clerk in appeal against the order of dismissal by a Notified Area Committee and two of the members of the Committee filed a writ petition as Tax payer of the Notified Area Committee under Article 226 against the order of Government to reinstate the head clerk, it was held that neither a writ of certiorari nor mandamus was maintainable.

(Para 7)

(B) Constitution of India, Art. 226 —
Corporation or Statutory body acting in excess of its statutory powers — Misapplication of Funds — Writ by a shareholder or a tax payer is maintainable. (Case law discussed).

(Para 5)

Cases Referred: Chronological Paras

1973 (1) Cut WR 595 = 1973 All Serv LJ 665 6

AIR 1972 Andh Pra 1 = (1971) 2 Andh WR 363 (FB) 6

AIR 1966 SC 828 = (1966) 2 SCR 172 5, 6

AIR 1962 SC 1044 = (1963) 1 SCJ 106 6

AIR 1960 Cal 102 = 64 Cal WN 134 5

AIR 1953 SC 384 = 1953 SCR 1184 6

AIR 1952 SC 12 = 1952 SCR 28 6

AIR 1951 SC 41 = 1950 SCR 869 6

AIR 1949 Bom 229 = 51 Bom LR 190 5
(1898) ILR 22 Bom 646 5

S. Misra (1), S. C. Misra, S. K. Nayak and Miss Nita, for Petitioners; R. N. Das, P. K. Das, J. Swain, K. M. Das and Addl. Government Advocate, for Opposite Parties.

DT/ET/B104/76/LGC

DAS, J.:— The two petitioners who are residents within the area of the Rambha Notified Area Council have filed this petition under Article 226 of the Constitution of India for issue of a writ of certiorari or any other suitable writ quashing the order of the Government allowing the appeal of the Head Clerk of the Rambha N. A. C. in a disciplinary proceeding against the Head Clerk.

2. The petitioners contend that opposite party No. 3 was appointed as Head Clerk of the Rambha N. A. C. Several charges were framed against him and after enquiry he was discharged from service. As against the said order opposite party No. 3 preferred appeal as provided under Section 77 of the Orissa Municipal Act to the State Government. The State Government allowed the appeal of opposite party No. 3 and directed to reinstate him. During the pendency of the appeal the post of Head Clerk was abolished by the N. A. C. After receipt of the Government order the Executive Officer wanted clarification from the Government and he has been informed that the order of the Government is to be complied with. The petitioners challenge the Government order on the ground that the order of reinstatement is illegal as there was no post of Head Clerk in the N. A. C. while the Government order was passed. The petitioners contend that as they are tax-payers their interest is vitally affected if the order of the Government is implemented. It is further contended that opposite party No. 3 was not qualified and also was not otherwise eligible for the post of Head Clerk as provided under the Orissa Municipal Rules.

3. A preliminary objection was raised by the opposite parties that the petitioners had no locus standi to challenge the order of the Government as they have no right either legal or personal or proprietary to give rise to a cause of action for this petition. It is contended that the petitioners being merely tax-payers and the N. A. C. having not launched any new scheme financially affecting the funds of the N. A. C. the petitioners can have no grievance in such a matter and they have no right to invoke the extraordinary jurisdiction of this Court. On the other hand, it is contended by the petitioners that as the Government order for reinstatement of opposite party No. 3 affects the financial position of the N. A. C., they as tax-payers, are vitally interested and as such can enforce their right.

4. It has been repeatedly held by the Supreme Court that a person having no legal or personal right or any property right cannot invoke the writ jurisdiction of the High Court. Indisputably no fundamental right of the petitioners has been affected in any way. The contention of the petitioners is that as they are tax-payers they are interested in the expenditure to be made by the N. A. C. for payment of the back dues of opposite party No. 3 when his appeal was allowed by the State Government and the N. A. C. was directed to reinstate opposite party No. 3.

It appears from the petition filed by the petitioners that they were Councillors of the N. A. C. while opposite party No. 3 was discharged from service. They passed a resolution abolishing the post on the day following the day when opposite party No. 3 preferred appeal before the State Government under Section 77 of the Orissa Municipal Act. It is thus clear that the intention of the petitioners was to see that some how or other opposite party No. 3 is not retained in service. Ultimately the appeal filed by opposite party No. 3 was allowed and he was directed to be reinstated. In ordinary course opposite party No. 3 has a right to be reinstated when his appeal is allowed. The post was in existence at the time when the punishment of discharge from service was imposed on opposite party No. 3. Only during the pendency of the appeal before the State Government the N. A. C. passed a resolution abolishing the post. After the appeal has been allowed and opposite party No. 3 has been directed to be reinstated, it is the duty of the N. A. C. to reinstate opposite party No. 3 in a suitable post. The N. A. C. has not come with any grievance against the order of the Government. The two petitioners who were parties to the subterfuge played by the N. A. C. for abolition of the post during the pendency of the appeal by opposite party No. 3, have come up with the present writ petition objecting to the order of the State Government. The dispute, if any at present, is between the N. A. C. on the one hand and opposite party No. 3 on the other. But none of them have filed the application objecting to the order of the Government and asking for any relief. This is not a case where the N. A. C. has taken recourse to launching a new adventure which was not in existence beforehand and such an adventure vitally affects the finance of the N. A. C.

Until they adopted the *lex loci* the old law would govern them. The decision, therefore, does not help us in deciding the question raised in the present appeal. It has not been suggested that in this case at any earlier stage that the parties although residents of Bihar were governed by Dayabhaga School of Hindu Law. I, therefore, reject this contention and hold that the parties are governed by the Mitakshara School of Hindu Law.

9. Mr. Chatterjee next contended that even assuming that Mitakshara School of Hindu Law applies to the parties, the plaintiffs must be held not to be the heirs at law of Mukund. It is said that having regard to the relationship the plaintiffs cannot be described as sapindas of Mukund. Mr. Chatterjee took us to the discussion in the Book on Hindu Law by Mulla. Mulla in Section 80, which deals with the doctrine of spiritual benefit under Dayabhag school. Reliance was placed on the statement that pinda is offered to the three immediate paternal ancestors and the three immediate maternal ancestors. The conclusion which the Chatterjee wants to draw from this that only those relatives can be called Sapindas is an impossible one. It is too late in the day to suggest that an "uncle's son's son" is not an heir in Hindu Law. Mulla himself has mentioned him in Section 43 as Item No. 23. The doctrine of religious efficacy is not the guiding principle in Mitakshara system.

10. It is true that for purposes of succession also originally Sapindaship was confined to three degrees of agnatic kindred in ascent and in descent (Mayne Section 475), but this was in remote past. There was a lot of development made in the law by other Rishis and ultimately it crystallised in the following form: The Mitakshara recognised three classes of heirs, namely, (a) Gotraja Sapindas, (b) Samanodaks, and (c) Bandhus. The first class succeeds before the second and the second succeeds before the third. The Sapindas of a person include besides his six male descendants in the male line and six ascendants in the male line, the six male descendants in the collateral male line of each of his six male ascendants. (See Mulla Section 39 and Mayne Section 513). I accordingly hold that Sukha's sons who are the uncle's son's son's sons of Mukund were the nearest reversioners and inherited the properties on the death of Mossamat Jago in 1951.

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11. The next point urged on behalf of the appellants is that the finding recorded by the lower appellate Court reversing that of the trial court on the question of the disputed relationship of the plaintiffs with Mukund is illegal and not adequate in eye of law for sustaining a decree in favour of the plaintiffs. The trial court considered the evidence of all the witnesses relevant on the point examined on behalf of the plaintiffs and rejected their evidence. The lower appellate Court referred to the evidence of the plaintiffs' witnesses in paragraph 7 and held in paragraph 14 of the judgment that the plaintiffs are nearest agnatic relations of Mukund. Continuing further in the same paragraph the learned Additional District Judge held as follows:—

"It is to be noted that the genealogy as given in the plaint extends to several degrees upwards and it cannot be expected that direct evidence in support of the plaintiffs case regarding Kali and Ramlal being brothers will be available. But the material and evidence on record inclined me to the view that these defendants first party or second party never came in possession of any land of Jago and Mukund and that defendant second party are no heirs of Mukund."

Before a finding in favour of the plaintiffs could be given, the court ought to have given a clear finding on the question of relationship between the plaintiffs and Mukund which has been strongly denied by the defendants. The court is not right in saying that there is no direct evidence in support of the plaintiffs' case. We have not examined all the evidence on the record, but the judgment of the trial Court itself indicates that there is at least some direct evidence which includes the deposition of P. W. 13. The finding in the general terms that the plaintiffs are the nearest agnatic relations of Mukund is vague specially when all the plaintiffs are not related to Mukund in the same way. Some of the plaintiffs are remoter in degree. The discussion in paragraph 7 of the judgment also indicates that excepting three witnesses the others have spoken about the possession of the parties. No finding was recorded in paragraph 7. The question of relationship is a vital one for the success of the plaintiffs, inasmuch as, their locus standi depends on it. The final court of fact ought to consider the entire evidence on the records of the case before disposing of the appeal, and specially so, if the appeal is going to be allowed. It has been

pointed out by Mr. Chatterjee that many of the considerations which weighed with the trial Court have not been taken into account by the lower appellate Court. For example, the trial court drew adverse inference from the non-filing of the written genealogy of the family which has been accepted by the plaintiffs as existing. For all these reasons, I am of the view that the finding recorded by the lower appellate Court must be set aside and the matter should be sent down for a reconsideration of the entire evidence on the record.

12. In the result, this appeal succeeds and is allowed and the decision of the lower appellate Court is set aside. The case is sent back to the lower appellate Court for disposal in accordance with law. The Court will hear fresh arguments on the questions of fact and thereafter deliver judgment in the light of the observations made above. The costs in this appeal will abide the final result in the litigation.

BIRENDRA PRASAD SINHA, J.:—
I agree.

Appeal allowed.

AIR 1976 PATNA 290

B. D. SINGH J.

The State of Bihar Appellant v. Rajendra Prasad Baid and others Respondents.

A. F. A. D. No. 309 of 1973, D/- 23-1-1976*.

(A) Bihar Tenancy Act (8 of 1885), Section 158 (1) (d) — Assessment of rent — Lands given as Birt Brahmottar are rent free lands — Only Kabil Lagan lands are liable to assessment of rent.

Where lands are given as Birt Brahmottar they are not liable to assessment of rent as they are rent free lands. Because in the deed it was mentioned that the grantee will cultivate the lands and appropriate its produce, it cannot be interpreted that the grantee intended that those lands were Kabil Lagan, i. e. liable to assessment with fair and equitable rent. (Para 8)

It is well known that if lands are given as Birt Bishunpriti for worship of God Vishnu, it is expected that the grantor would not give barren lands. Similarly in Birt Brahmottar, one does not expect that the grantor would

*(From decision of Uma Kant Jha, Addl. Dist. J. 2nd Court, Gaya, D/- 22-3-1973).

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pass on his waste or barren lands to Brahmins. The "Birt" is religious oriented. On religious grounds such grants were made, so that the lands transferred to the grantees yielded benefit to the grantees. (Para 8)

Cases Referred: Chronological Paras

AIR 1934 PC 5 = 61 Ind App 93 8

AIR 1927 Cal 210 = 31 Cal WN 135 7, 8

Khaleel Ahmad, Govt. Pleader No. III, and Prabhunath Roy Jr. Counsel to the Govt. Pleader, for Appellant; J. C. Sinha, Arjun Prasad, K. B. Sinha, and Braj Kishore and Mr. Janardan Singh, (for No. 3), for Respondents.

JUDGMENT:— This appeal by the State of Bihar, which was defendant first party in the trial Court, is directed against the judgment and decree of the lower appellate Court, affirming those of the trial Court.

2. In order to appreciate the point involved in this appeal, it will be necessary to state some material facts. Rajendra Prasad Baid (respondent No. 1) had instituted a title suit for a declaration that the lands described in Schedule A of the plaint were rent free, were not liable to assessment of any rent and were not kabil lagan and that the order passed by the Block Development Officer, Khizar-sarai, on the 10th of January, 1966 fixing rent in respect of those lands was illegal, void, ultra vires and without jurisdiction.

3. The suit was contested by the State of Bihar only. The parties adduced evidence and also filed documentary evidence in support of their respective claims, as according to the State of Bihar, its officer had right to fix fair and equitable rent as the lands in dispute were not rent free lands. On behalf of the plaintiff the survey Khatian (Ext. 6) as well as the three grants made in favour of his ancestor Pandit Horil Baid by three different persons were filed to show that the lands which were given to the ancestor of the plaintiff under those documents were rent free. Those documents were exhibited as Exts. 10, 10 (a) and 10 (b). Ext. 10 is dated the 4th Bhado, 1274 Fasli, corresponding to 1867, Ext. 10 (a) is dated the 13th Baisakh 1261 Fasli, corresponding to 1854 and Ext. 10 (b) is dated the 19th Asarh, 1301 Fasli, corresponding to 1894.

4. The trial Court, on a consideration of the evidence on the record, came to the conclusion that the suit lands were rent free and the defendant No. 1 or its officers were not entitled to assess or fix rent of the lands in suit in view of the nature of the grants under Exts. 10 to 10 (b), on the basis of which the survey khatian entries were made. The suit was, accordingly, decreed. Being aggrieved by the judgment and decree of the trial Court, the State of Bihar preferred an appeal. Affirming the finding of the trial Court the lower

appellate Court held that "the plaintiff being just a raiyat, his interest did not vest in the State and no rent can be fixed for his lands under Section 6 of the Land Reforms Act". It will be useful to refer to a portion of paragraph 8 of the judgment of the lower appellate Court which reads thus:

"I have not found any provision in the B. T. Act which gave a right to the landlord to fix rent for rent-free lands. I gave sufficient time to the learned Government Pleader to show me any provision which could enable the B. D. O. to fix rent for rent-free Brahmotar land, but he could not show any. According to the provisions of the B. T. Act, rent can be fixed only for Kabil Lagan lands and not for rent-free lands."

The appeal was, accordingly, dismissed by the lower appellate Court.

5. Mr. Khaleel Ahmad, Government Pleader No. III, has assailed the judgment and decree of the Courts below and contended that they have erred in holding that the lands were rent free. He referred to Ext. 10 series which simply mention that the lands were given to the ancestor of the plaintiff as Bishunuprit. In the survey Khatian (Ext. 6), against the lands in dispute is simply mentioned "Brahmottar" in the remarks column. He has submitted that the lands which were given to the ancestor of the plaintiff were only for the sake of cultivation and, therefore, it must be presumed that they were Kabil Lagan lands. He also urged that the onus was on the plaintiff to establish that the lands in suit were rent free. In order to find support to his contention, he has drawn my attention to the definition of word "tenant" in Section 3 (3) of the Bihar Tenancy Act, 1885, which is as follows:

"Tenant" means a person who holds land under another person, and is, or but for a special contract would be liable to pay rent for that land to that person."

Learned counsel submitted that according to the above definition of the word "tenant", it is clear that a tenant has to pay rent to the landlord unless the tenant produces a special contract to show that he was not liable to pay rent. The plaintiff, according to him, being a tenant, the onus was upon him to show that by a special contract he was exempted from paying rent. He also referred to Section 24 of the Bihar Tenancy Act which provides as follows:

"An occupancy raiyat shall pay rent for his holding at fair and equitable rates."

Lastly, learned counsel has drawn my attention to the provision contained under Section 158 (1) (d) of the Act which provides for determination of incidents of tenancy. Section 158 (1) (d) reads thus:

"The Collector or any revenue officer specially empowered by the State Government in this behalf may, on application of either the landlord or the tenant of the land, determine in the prescribed manner all or any of the following matters, namely:—

xx xx xx xx
(d) the rent payable for the land and other incidents of the tenancy:
xx xx xx"

On the basis of the aforesaid provisions, learned counsel for the State submitted that in the instant case, the Block Development Officer was justified in getting the rent fixed for the disputed lands.

6. In my opinion, the submission of the learned Counsel for the State is not acceptable. In order to show that the lands in suit were rent free, the plaintiff produced Exts. 10 series to show special contract. No doubt, those documents do not show in clear words that the lands given under those grants were rent free. They simply say that the lands were given for "Bishunuprit". Exts. 10 series, however, do not say that the lands granted to the ancestor of the plaintiff were Kabil Lagan. As mentioned earlier, in the survey Khatian (Ext. 6) in the remarks column against those lands is mentioned "Brahmottar". In this connection reference may also be made to Guide And Glossary to the Survey and Settlement Operations under the Bihar Tenancy Act, 1938 Edition, edited by the Board of Revenue, Bihar. At pages 22 and 23 of the Book, for the vernacular word "Birt", the English translation is "Rent-free grant in consideration of religious services, past, present or future, generally defined by the addition of Brahmotar, etc." In the remarks column, it is mentioned that "such grants are almost invariably heritable and transferable even to persons who cannot be expected to keep up the particular observances for which they were originally made. The expression "Birt Brahmotar" has been defined as "Rent-free grant to Brahmin." The expression "Birt Bishunuprit" has been translated as "Rent free grant for worship of God Bishun." Therefore, by reference to the expression "Birt Brahmotar" or "Birt Bishunuprit", it has to be presumed that the lands given to the plaintiff's ancestor were rent free. If the donors intended that the lands given by the grants would also carry rent, they could have very well said so in Exts. 10 series. But as mentioned earlier, they do not contain the words "Kabil Lagan". In that view of the matter, I am unable to interpret those words contained in Exts. 10 series as implying the words "Kabil Lagan".

7. The provisions contained under Section 158 (1) (d) of the Bihar Tenancy Act would apply only when the lands were held

to be Kabil Lagan. But since in the instant case I am unable to hold that the lands granted under Exts. 10 series were Kabil Lagan, the provisions contained under Section 158 (1) (d) of the Act are not attracted. In this connection reference may also be made to the case of Kiran Chandra Roy v. Srinath Chakravarti (AIR 1927 Cal 210 which corresponds to 31 Cal WN 135), on which reliance was placed on behalf of the appellant. Learned counsel drew my attention to a portion of the judgment at page 212 of the report wherein it was observed that strong reliance was placed by the learned Vakil for the appellant on the presumption as to the correctness of the entry in the record-of rights in favour of the plaintiffs. Their Lordships observed that there could not be any doubt that the entry must be presumed to be correct unless the contrary was proved but when the matter was investigated by the Civil Court and the parties adduced their evidence on the point in controversy, the entry lost its weight when the evidence disclosed no foundation for it. In my opinion, the above observations do not lend any support to the submission of the learned counsel for the appellant in the present case, rather the other observations of their Lordships support the case of the plaintiff respondent. In this connection it will be necessary to reproduce the finding of the trial Court in this regard which reads thus:

"Therefore, from the aforesaid three documents, Ext. 10 series, read with the khatian entries, Ext. 6, I am satisfied to conclude that the said lands were rent free and also that those lands were never tenure grants, rather for agricultural purposes purely."

It is, therefore, evident that in the present case, the trial Court has drawn inference from the entries in the Khatian (Ext. 6).

8. In Anup Mahto v. Mita Dusadh, (AIR 1934 PC 5), it was observed that inferences drawn from statements in the Khatian are inferences of fact with which a High Court could not interfere in second appeal. In that view of the matter also, I do not find any ground to interfere with the inference drawn by the trial Court by reference to the entries in the Khatian (Ext. 6). It may be noticed that in AIR 1927 Cal 210 (supra), on which reliance was placed on behalf of the appellant, the appellants in that case brought a suit under Section 158 of the Bengal Tenancy Act for the assessment of fair and equitable rent for certain lands appertaining to their Zemindari, Touzi No. 5557 of the Faridpur Collectorate in the possession of the defendants of that case and also for arrears of rent for the years 1326 to 1329. In the course of a record-of-rights, the lands in suit

were recovered as Brahmottar Prankrishna Bhattacharji liable to assessment with fair and equitable rent. The claim of the plaintiff in that case was based on the said entry in the record-of-rights. The defence of the defendants was that the lands in suit appertained to Brahmottar Prankrishna Bhattacharji, that those lands were enjoyed as such by the grantee and his successors from before the permanent settlement and that in execution of a decree, dated 1879, against a successor of the original grantee, the lands in suit were sold as rent-free brahmottar in 1882 and were purchased by defendants Nos. 6, 7, 8 and 9. The defendants alleged that the purchasers were all along in possession of the lands as rent-free brahmottar without any payment of rent to the plaintiffs. Their Lordships on the facts and circumstances of that case observed as follows at page 212:

"In the present case the learned Subordinate Judge has found possession for 62 years under a claim of a rent-free grant by the original grantee and his successors and then, after the property was sold by the purchasers, defendants. During this long period of time the Zamindar did not receive any rent for these lands.

I am, therefore, of opinion that the learned Subordinate Judge was right in holding that from the circumstances of the present case the presumption of a lost grant arose."

In that case, it may be seen, in the record-of-rights it was mentioned that the lands were liable to assessment with fair and equitable rent. Even then their Lordships held that rent could not have been charged. In the present case, there is no such entry in Ext. 6. Therefore, in my view, the submission of the learned counsel for the appellant is not tenable. Simply because in Ext. 10 series it was mentioned that the grantee will cultivate the lands and appropriate its produce, it cannot be interpreted that the grantee intended that those lands were Kabil Lagan, i. e. liable to assessment with fair and equitable rent. It is well known that if lands are given as Birt Bishunpuri for worship of God Vishnu, it is expected that the grantor would not give barren lands. Similarly in Birt Brahmottar, one does not expect that the grantor would pass on his waste or barren lands to Brahmins. The "Birt" is religious oriented. On religious grounds such grants were made, so that the lands transferred to the grantees yielded benefit to the grantees. In that view of the matter, in my view, there is no merit in the submissions of the learned counsel for the appellant.

9. In the result, the appeal is dismissed with costs, and the judgment and decree of the Courts below are affirmed.

Appeal dismissed.

AIR 1976 PATNA 293

LALIT MOHAN SHARMA AND BIRENDRA PRASAD SINHA, JJ.

Jadubir Chaudhary and others, Appellants v. Smt. Sumangali Devi and others, Respondents.

A. F. O. D. No. 151 of 1965, D/- 9-3-1976.*

(A) Civil P. C. (1908), Section 36 and Order 26 Rule 15 — Failure to pay Commissioner's fee — Effect — Order directing payment of Commissioner's fee is executable — Striking off defence for non-payment — Illegal.

The only provision in the Civil P. C. which is relevant in regard to the payment of Commissioner's fee is in Rule 15 of Order 26 which does not authorise the court to pass an order striking off the defence for failure to deposit the Commissioner's fee. The Civil Court Rules of the Patna High Court also do not suggest otherwise. The direction of the Court in regard to the deposit of the Commissioner's fee is executable in view of Section 36. (1881) ILR 3 Mad 259 and AIR 1947 Sind 1 (FB), Rel. on. (Paras 5 and 6)

Cases Referred: Chronological Paras
AIR 1947 Sind 1 = ILR (1946) Kar 349 7
(FB) 7
(1881) ILR 3 Mad 259 7

Swaraj Prasad, for Appellants; Sidheshwar Prasad Singh, for Respondents; Rajanikant Chaudhary, for Minor Respondent No. 4.

LALIT MOHAN SHARMA, J.:— This appeal by the defendants is directed against the decision of the court below decreeing the suit in part. The plaintiff filed the suit for partition of the properties described in the plaint claiming 1/8th share on the allegation that she is the widow of Sibani Chaudhary, a member of the family of the defendants. The genealogical table of the family is given at page 11 of the paperbook. In Schedule 1, the immovable properties belonging to the family are included and in Schedule 2 certain movables are mentioned.

2. Two written statements were filed by the major defendants, one by defendants

*(From original decrees of Sub J. Bihar Sharif D/- 21-4-1965).

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1 to 5 and 8 and the other by defendants 9, 10 and 12. It was pleaded that the plaintiff is an imposter and not the widow of Sibani Chaudhary who died bachelor. It was also stated that a partition had been effected in 1927 between the branches of the two brothers Hansraj Chaudhary and Uttam Chaudhary and in 1951 there was a further partition amongst the defendants 9, 10 and 11.

3. A Commissioner was appointed by the trial Court on the prayer of defendant No. 1 who submitted a bill after completing his work. In spite of a direction by the court, the remuneration of the Commissioner was not paid by the parties and the court, therefore, passed an order striking off the defence. The result was that the suit was heard ex parte. The defendants were, accordingly, not permitted to lead evidence and the plaintiff examined only one witness, that is, herself, in support of her case on 21-4-1965. The court below on that very day, decreed the suit in respect of Schedule 1 properties by a very perfunctory judgment.

4. In support of this appeal, Mr. Swaraj Prasad, learned Advocate for the appellants, has contended that the order of the court below striking off the defence was illegal which must be set aside and a fresh opportunity must be given to the parties to lead evidence in support of their respective cases. The order sheet of the court below has been included in the paperbook and the order dated 20th July, 1964 indicates that an application for appointment of a Commissioner had been made by defendants 1, 2 and 4. The court allowed the prayer and directed the appointment of a survey knowing pleader Commissioner for inspecting the house and the lands and for noting the configuration and existing condition. The court further ordered:

"Let the parties concerned make a deposit of Rupees hundred for the present to defray the cost."

The order dated 20-7-1964 indicates that defendant No. 1 deposited a sum of Rs. 100/- as ordered. The order dated 27-11-1964 states that the Commissioner submitted his report on 14-12-1964. The plaintiff and defendant No. 11 filed objections thereto. On 18-12-1964, the bill of the Commissioner for Rs. 517 was passed. The defendant was directed to deposit further sum of Rs. 417/- and his lawyer was accordingly informed. The parties raised some dispute regarding payment of this amount and by order dated 2-3-1965 the court directed the payment in the following terms:

"Plaintiff to pay 32/- at once. Defendant to pay the balance by 3-3-1965 or the defence will be struck off."

On the next day, that is, 3-3-1965, the plaintiff and defendant No. 9 appeared. The other defendants did not take any step. The court directed the defence to be struck off and granted time till 24-3-1965 to the plaintiff for depositing Rs. 32/-. The order sheet of the next date shows that neither the plaintiff nor the defendants made the deposits. The plaintiff was given further time till 7th April, 1965 to deposit Rs. 32/-. It was further said that the case would be heard ex parte on that date, that is, 7th April, 1965. The plaintiff deposited the amount on 7-4-1965. The defendants appeared on this date, but the court observed in its order that the suit had already been fixed for ex parte hearing. The 21st April, 1965 was fixed as the next date when the suit was heard and decreed in part as stated above.

5. The main question in this appeal is whether the trial Court could have directed for striking off the defence on the ground of non-payment of the Commissioner's fee. The appointment of the Commissioner was made under the provisions of Order 26 of the Code of Civil Procedure and Rule 15 thereof is in the following terms:

"R. 15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

Although the rule enjoins that the order in regard to payment of expenses of the commission should be made before issuing the commission, it must be held that on a final accounting, the court has authority to direct the party concerned to deposit additional costs. But the question is as to whether the court can strike off the defence on the failure of such deposit. There has been some controversy on the question whether the order for deposit of the commissioner's fee is executable. It is true that the Commissioner, in whose favour such an order is passed, is not a party to the suit and, therefore, cannot be a party to the decree in the suit and, for that reason, it has to be held that the order does not amount to a decree. But Section 36 of the Code of Civil Procedure states that the provisions of the Code relating to the execution of a decree shall, so far they are applicable, be deemed to apply to the execution of orders. I am, therefore, of the view that the direction of the court in regard to the deposit of the Commissioner's fee is executable. The remedy of the Commissioner was, therefore, by way of execution.

6. The striking off the defence and holding an ex parte trial are serious matters which prejudice the defendants adversely, affecting the results of the litigation and are clearly penal in nature. The court is basically interested in finding the truth in a case and giving its judgment, as far as it may be possible, in accordance with merits, and for that end, a certain procedure has to be followed for holding the trial. The Code of Civil Procedure has been enacted for that purpose laying down rules, inter alia, for production of evidence. Certain duties have been cast on the parties in this regard and if a party does not discharge his responsibility in regard to a particular piece of evidence, ordinarily the consequence should be the exclusion of such evidence, if it is in favour of that party, or drawing of an appropriate adverse inference against him. It would not be fair to decide the case itself against the defaulting party. Unless, therefore, the law expressly provides, the court should not pass a more rigorous and far reaching order than necessary in the situation. In the matter of appointment of a Commissioner, it is true that the Commissioner's fee ought to be paid by the party at whose instance the appointment is made, but as I have indicated above, the amount can be realised by execution. Besides, the court is entitled to exclude the Commissioner's report from consideration, although it would not be bound to do so. But no provision of the Code has been placed before us authorising the court to pass an order more severe in nature. The provisions regarding ex parte hearing are included in R. 6 of O. 9 of the Code of Civil Procedure but only if the defendant does not appear in spite of service of summons when the suit is called on for hearing. In such a situation, no alternative is left but to proceed with the trial ex parte. Order 9 also provides for dismissal of the suit in certain conditions which fully justify such a course. The only provision in the Code which appears to be relevant in regard to the payment of Commissioner's fee is in Rule 15 of Order 26 which does not authorise the court to pass an order similar to the one passed in the present case. The Civil Court Rules of the Patna High Court also do not suggest otherwise. Rules 422 and 425 in Chapter I of Part V, which are relevant, read as follows:

"422. Judicial Officers should bear in mind that a commissioner would be justified in refusing to execute a commission if the party has not deposited cash sufficient to pay his fee as well as all his necessary incidental expenses. A Commissioner's remuneration should be paid in cash, unless he is a Judicial Officer or a Civil Court Amin."

"425. In any case in which the sum fixed for the expenses of the commission and paid into Court shall have been calculated with regard to the time likely to be occupied in the execution of such commission, the Commissioner shall, in the event of his finding that the time is insufficient, give timely notice to the party at whose instance the commission was issued, and report the fact to the Court. The sum necessary to cover the expenses for such further period as may be required to complete the execution of the commission should then be deposited in Court by the party, and the Commissioner, unless certified of such deposit, should suspend the investigation at the close of the period originally fixed, pending the further instructions of the Court. If the additional deposit required be not made within a reasonable time, the trial should proceed."

7. No direct decision covering the point has been placed before us at the bar, but the decisions in *Ragava Chariar v. Vedanta Chariar*, ((1881) ILR 3 Mad 259) and *Valji Harji v. Ravishankar Chhaganlal* (AIR 1947 Sind 1 FB) may be referred to. The Madras case had been decided under the old Code. There the District Judge dismissed the suit, because the plaintiff had declined to pay the remuneration of the Commissioner as fixed by the court. In the Sind case, it was held that if the plaintiff at whose instance a commission is issued declines to pay the fees, the court would not be justified in passing an order whereby it purports to terminate the proceeding before it not by passing a final order but by ordering the record to be assigned to the Record Room. The proper course indicated is to proceed with the case on the materials available. The ratio of these cases, to my mind, support in principle, the view I am taking. I, accordingly, hold that the court below was not justified in striking off the defence and directing for an ex parte trial.

8. I have already pointed out above that the Commissioner was appointed at the instance of defendants 1, 2 and 4 and other defendants do not appear to be party to the application. For that reason also, the court was not justified in shutting out the defence of the defendants. The result of the aforesaid erroneous order of the court has been the exclusion of the defence and evidence in support of the same from consideration. The error has to be corrected by an order of retrial from that stage.

9. For the reasons stated above, this appeal is allowed and the decree of the court below is set aside. The order of the trial court striking off the defence and directing for

ex parte trial is also set aside and the case is remanded back. Both sides will be given opportunity for leading evidence. The evidence of the plaintiff already recorded will form part of the records of the case, but she will be entitled to make any further statement she desires to. The defendants will be entitled to cross-examine her. However, in the circumstances of the case, there will be no order as to costs of this appeal.

BIRENDRA PRASAD SINHA, J.:— I agree.

Appeal allowed.

AIR 1976 PATNA 295

B. D. SINGH J.

The State of Bihar, Petitioner v. Bhagwati Singh, Opposite Party.

Civil Revn. No. 514 of 1975, D/- 26-3-1976°.

(A) Civil P. C. (1908), Section 115 (c) — Material irregularity — Interference by High Court.

The position is firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally or with material irregularity" occurring in clause (c) of Section 115 do not cover either errors of fact or of law. They do not refer to the decision arrived at, but merely to the manner in which it is reached. The errors contemplated by that clause relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. AIR 1971 SC 2324 Foll.

(Para 5)

Held, in the circumstances of the case the order was passed by the Subordinate Judge ignoring the previous order and he committed material irregularity in exercising jurisdiction and the order could be set aside under Section 115 (c).

(Para 5)

Cases Referred: Chronological Paras
AIR 1971 SC 2324 = (1970) 2 SCR 368 5

T. K. Jha, G. A. with Jagannath Jha, J. C. to G. A. for Petitioner.

ORDER:— This application by the State of Bihar under Section 115 of the Civil Pro-

°(Against order of C. N. Singh, Sub J. Hazaribagh, D/- 7-4-1975).

GT/GT/C41/76/MVJ

cedure Code (hereinafter referred to as 'the Code') is directed against the order dated 7th April, 1975, passed by the learned Subordinate Judge, Hazaribagh, directing the State of Bihar, namely, the Receiver to make payment of Rs. 16,330.38 paise to Bhagwati Singh, the opposite party, a Government Contractor and to report its compliance within fifteen days of the date of order.

2. In order to appreciate the point involved in this application, it will be necessary to state briefly the facts obtained from the application filed by the petitioner. The State of Bihar, namely, the petitioner instituted a Title Suit bearing No. 16 of 1961 in the Court of learned Subordinate Judge, Hazaribagh, regarding mining properties of late Raja of Ramgarh. An application was also filed in the said suit by the petitioner for the appointment of a Receiver under Order 41 Rule 1 of the Code, to manage the suit properties as detailed in the said petition. On 6th of October, 1969, the then learned Subordinate Judge, ordered for the appointment of a Receiver and by his order dated the 7th of October, 1969 Sri P. K. Mishra, Deputy Commissioner, Hazaribagh, was appointed as an ad interim Receiver who took over charge of the properties on 10th October, 1969. By order dated 14th March, 1970, the State of Bihar was appointed the Receiver with all the powers as detailed in the writ of appointment. The different areas of Kedla Jharkhand Colliery were put in the charge of the Receiver. For the purpose of efficient functioning of different contracts and despatch of coal from the different collieries the road connecting the different areas had to be repaired and maintained by the Receiver. The then nominee of the State of Bihar who was the Receiver on behalf of the State got a tender notice issued through the Superintendent of collieries under reference dated 24th of May, 1972, inviting sealed tenders for supplying 40 trucks first class morrum for road repairs and maintenance work. The specific condition in the tender notice was that the morrum was to be dumped along the road 100 Ft. apart and the rate was to be quoted for 100 cft. The tender notice is marked as Annexure '1' to the application filed in this Court. Bhagwati Singh, the sole opposite party, submitted his tender for the supply of stone boulders and morrum. Under letter dated 29th July, 1972, Shri B. Roy, Superintendent, under the Receiver gave a work order to the opposite party to supply stone boulders and morrum of such quantity as inducted at road side and the ad hoc rates were fixed till the tenders were finalised. The

supply order given to the opposite party is marked as Annexure '2' to the application. Thereafter, the tender of opposite party was accepted, being the lowest rate offered. The work order dated the 8th August, 1972, is marked as Annexure '3' to the application. The opposite party began to supply morrum and boulders from time to time after receipt of the work order. The materials supplied by him were duly measured by the Surveyor and the measurements were noted in the Measurement Book on 15th October, 1972 and 18th December, 1972. The measurement was done in presence of the representative of opposite party and the Measurement Book was duly signed by the Surveyor, the Superintendent of collieries and the representative of the opposite party. It was further stated in the application filed by the petitioner that the payments as per the Measurement Book, were made by the opposite party except some matters of dispute raised by another contractor, namely Mr. D. P. Jaiswal. The dispute was also decided by the superintendent of the Colliery and payments were made accordingly to the opposite party. On 3rd February, 1973, the opposite party filed a petition before the then learned Subordinate Judge praying for directing the authorities concerned to make payment to him at an early date. The opposite party's total claim mentioned in the petition was of Rupees 18,226.00. On receipt of the said petition of opposite party, the court directed the Receiver to file rejoinder by 19th February, 1973. The court also directed the Receiver to submit his report against the allegations made by the opposite party in his petition. On 19th February, 1973, the rejoinder and the report were filed, after obtaining the report of the Superintendent of collieries concerned. The Superintendent concerned had reported to the Receiver that there was no dues outstanding in the name of opposite party. However the Receiver prayed for directing the opposite party to appear before the agents for settlement of his dues. The opposite party prayed for sending all papers, i. e. the Chalan to the agent for verification and report. The court, by its order dated 19th February, 1973, directed the opposite party to appear before the Receiver for settlement of his dues. On 17th May, 1974, the opposite party again filed a petition stating therein that he had not received the payment and prayed the court to get the payment of Rs. 18,226/- made to him altogether with interest thereon. Thereupon, the court directed the Receiver on 18th of May, 1974 to report. The Receiver submitted his rejoinder on 17th June, 1974, in which it was asserted that there was no outstanding

dues of the opposite party as the Superintendent had reported that the payment for supply, as claimed by the opposite party, had already been made to him on the basis of measurement, and the Receiver prayed for rejecting the petition of the opposite party. At that point of time, the matter was heard by Shri J. P. Singh, the then learned Subordinate Judge, who was pleased to pass an order dated 16th July, 1974. A true copy of the said order is marked as Annexure '4' to the application. It will be relevant to quote in extenso paragraph 13 of his order which reads thus:—

"It has been contended on behalf of the contractor that as soon as he unloaded the morrum and stone boulders, they were without being measured on the road as the work was going on. In none of these chalans, there is any measurement of the materials supplied by this contractor. It was the duty of the contractor to get the quantity of the materials mentioned on these chalans measured and when it was not so done, he should have made a protest. So, it is difficult to say that quantity of the materials was supplied by this contractor at the site. In absence of the evidence regarding the quantity of the materials supplied by this contractor, I cannot hold that materials worth Rupees 18,226/- were supplied by this contractor. So the matter has to be sent back to the Receiver. The Receiver will decide as to what was the quantity of the materials supplied by this contractor on these 165 chalans for which this petitioner will appear before him and then the Receiver will make payment to the petitioner and report."

It is clear from the above that the learned Subordinate Judge had directed the Receiver to thoroughly verify before making the payment, as the learned Subordinate Judge has observed that, in the absence of evidence regarding the quantity of the materials supplied by the contractor, it could not be held that the material worth Rs. 18,226/- were supplied by the contractor. In that view of the matter, the learned Subordinate Judge sent back the matter to the Receiver and directed him to decide as to what was the quantity of materials supplied by the opposite party. Thereafter, the Receiver examined the matter again and found that the different chalans were defective and were not genuine and, therefore, he found inability to act upon those chalans. A petition to that effect was filed in the court by the Receiver. Subsequently, it appears that the colliery mines were nationalised and were taken over under the provisions of Colliery Mines Nationalisation Act, 1973, Under this Act, the

coal mines authorities were appointed and various relevant papers came in possession of the coal mines authorities regarding the collieries. Thereafter, on hearing the parties, the court directed the coal mines authority by its order dated 2nd of December, 1974, to produce the measurement book and a letter was sent to the said authority to produce the same by 11th of December, 1974.

3. The coal mines authority, after receipt of the court's direction, wrote letters to the Receiver for certain clarifications, but the court, however, by order dated 21st of December, 1974, directed the Receiver to pay the amount immediately without examining the correctness of the accounts and to report by 23rd December, 1974. Thereafter, the petitioner filed a petition on 23rd of December, 1974 before the court praying therein that direction for the payment within the specified time should be stayed, as the petitioner wanted to move the High Court in revision. On the application of the petitioner, time till 16th of January, 1975 was granted. However, against the said order, the petitioner did not move the High Court. Subsequently, the Receiver could get the measurement book from the coal mining authority and reports of the Superintendent, Surveyor and Road Supervisor in respect of the supply of raw materials by the opposite party. The Receiver then filed a petition on 2nd January, 1975, before the court annexing the copies of measurement book, report of the Superintendent, Surveyors and others. In the said petition, it was prayed for recalling the order dated 21st of December, 1974 passed by the court. The court was, however, pleased to recall the said order dated the 21st of December, 1974, but instead of giving opportunity to the Receiver to verify and to make payment after the receipt of the measurement book from the coal mining authority, the impugned order dated 7th of April, 1975, was passed.

4. Learned Government Advocate appearing on behalf of the petitioner has assailed the impugned order on the ground that the learned Subordinate Judge, on the facts and circumstances of the instant case, particularly in view of the order passed under Annexure '4' referred to above, should not have directed the Receiver to make payment of the said amount to the opposite party without making proper verification within a specified time.

5. The question arises as to whether it will be a jurisdictional point justifying interference by this Court under Section 115 of the Code. None has appeared on behalf of the opposite party in this Court. In D. L.

F. Housing etc. Co. v. Sarup Singh (AIR 1971 SC 2324) the provisions contained under Section 115 of the Civil Procedure Code and its scope and the powers of the High Court under the same was considered. Section 115 of the Code confers on High Court revisional jurisdiction in these terms:—

"115. The High Court may call for the record of any case which has been decided by any Court Subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law or

(b) to have failed to exercise a jurisdiction so vested or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

The High Court may make such order in the case as it thinks fit."

It was observed by the Supreme Court in that case at Page 2327 that the position seemed to be firmly established that while exercising the jurisdiction under Sec. 115, it was not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors had relation to the jurisdiction of the Court to try the dispute itself. The words "illegally or with material irregularity" occurring in clause (c) of Section 115 did not cover either errors of fact or of law. They did not refer to the decision arrived at, but merely to the manner in which it was reached. The errors contemplated by that clause related either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities had been complied with. Learned Government Advocate applying the above principles of law enunciated by the Supreme Court with regard to the provisions contained under Section 115 of the Code, submitted that the learned Subordinate Judge in the instant case has committed a material irregularity in the impugned order ignoring the previous order as contained in Annexure '4'. The order passed by the then Subordinate Judge under Annexure '4' contained a specific direction that the Receiver must verify before making the payment. If the records were not available, there could have been no verification and it was on account that the payment was delayed. Now, since the record and other materials have been received by the Receiver on 2nd of January, 1975, as stated by the Receiver in the petition filed before the Court, the learned Subordinate Judge ought to have granted some reasonable time to verify and report but,

instead, the impugned order was passed for compliance within fifteen days of the receipt of the order dated 7th of April, 1975.

6. In my opinion, on the facts of the instant case, there is merit in the contention of the learned counsel for the petitioner. At present, Mr. Patankar, Commissioner, North Chotanagpur Division, is the nominee of the petitioner. From the facts stated above, it is clear that the payment to the opposite party has been much delayed. In that view of the matter now I direct Mr. Patankar to make payment to the opposite party of his entire dues with regard to 165 Chalans, after verification within two months from to-day.

7. In the result, the application is allowed and the impugned order of the learned Subordinate Judge is quashed with the direction indicated above. In the circumstances, however, there will be no order as to costs.

Application allowed.

AIR 1976-PATNA 298

H. L. AGRAWAL, J.

Dr. Anant Prasad Singh Petitioner v. Devendra Kumar Sinha Opposite Party.

Civil Revn. No. 120 of 1976, D/- 5-3-1976*.

(A) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11-A — Default — Deposit of Rs. 4592/- instead of Rs. 4623/- on account of mistake in calculation — Held, there being substantial compliance of order written statement should not be struck off. (Para 5)

Kailash Roy and Naresh Kumar Sinha, for Petitioner; Lala Deoki Nandan Prasad, for Opposite Party.

ORDER:— In this application by the defendant the only question is as to whether he committed any default in carrying out the peremptory order of this Court dated 9-7-1975 passed in Civil Revision No. 377 of 1975 granting him some time to deposit the arrears of rent and thereby incurring the liability of his written statement being struck off.

2. The facts are these. The petitioner had come earlier to this Court in the aforesaid revisional application against the order of the trial Court passed against him under Section 11A of the Bihar Buildings (Lease, Rent

* (Against order of Rameshwar Prasad Sub J. 1st Court, Patna, D/- 27-1-1976.)

ET/FT/B413/76/JHS

and Eviction) Control Act, 1947 (hereinafter called 'the Act'). While refusing to interfere with the order of the trial court I had directed to deposit arrears of rent from 28th May to July, 1974 at the rate of Rs. 325/- per month by 9th August, 1975 in the trial court and then to go on depositing future rents within fifteen days of the each succeeding month.

3. In pursuance of the aforesaid order the petitioner made deposit of a sum of Rs. 4,592/- within the time granted by this Court but unfortunately for him, the amount on proper calculation was short by about Rs. 31. An application was accordingly filed by the landlord for striking out his defence and the learned Subordinate Judge by the impugned order has struck out his defence.

4. Mr. Kailash Roy, Learned counsel, appearing for the petitioner has submitted that on the facts of the present case there was no non-compliance of the order of this Court and virtually it amounted to its substantial compliance. Learned counsel submitted that the penalty contemplated under Section 11A of the Act was intended for defaulting tenants and not to the case of the like where the tenant had all intentions to carry out the order and the direction, but by some error there was a slight mistake in making the calculation. This proposition was seriously controverted by Mr. Lala Deoki Nandan Prasad, learned counsel appearing for the landlord. According to him, the default having once been incurred it was absolute and no power lay in the court to condone any laches either it may be with respect to the amount or with respect to the period.

5. I for myself, on examining the facts and circumstances of the case, could not feel persuaded to agree with the contention of the learned counsel for the landlord and would hold that the deposit made by the petitioner which was although short by about Rs. 31/- was a sufficient compliance of the orders of this Court and did not render the written statement to be struck off on the application of the theory of default in carrying out the order passed under Section 11A of the Act.

6. I would accordingly allow this application and direct that the defence of the petitioner against ejectment be restored to its file. This order will however be subject to the condition that the petitioner must pay a sum of Rs. 200/- to the landlord within a period of three weeks from today either in this Court or in the trial Court. There shall be no order as to costs in this case.

Application allowed.

AIR 1976 PATNA 299

B. D. SINGH J.

M/s. Chaurasia Brothers and another, Petitioners v. The State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 1358 of 1975, D/- 25-2-1976.

(A) Bihar Panchayat Raj Act (7 of 1948), Section 47 (1) (c) and (d) — Bihar Gram Panchayat Account Rules (1949), Rule 54 — Levy on goods brought into Panchayat area for sale to be in accordance with the above provisions — Auction settlement of the right to collect the fees to the highest bidder held illegal. (Constitution of India, Article 265). (Paras 4 and 5)

G. C. Bharuka, V. P. Singh and Gyanchand Prasad, for Petitioners; S. N. Jha, Standing Counsel No. 2 and Chandra Mohan Jha, J. C. Standing Counsel No. 2, for Respondents.

ORDER:— This is an application by Messrs Chaurasia Brothers and another, filed under Articles 226 and 227 of the Constitution of India for directing the respondents not to collect supplementary taxes under Section 47 of the Bihar Panchayat Raj Act, 1947 (hereinafter referred to as the 'Act').

2. In order to appreciate the points involved in this application, it would be necessary to state briefly the facts. The petitioner No. 1 is a dealer in foodgrains and oil-seeds and several other commodities, carrying in its business in village Dhandiha, whereas petitioner No. 2 is a petty dealer dealing in oil-seeds and different varieties of pulses. Petitioner No. 2 purchases oil-seeds and pulses from cultivators by moving from place to place and thereafter supplies the same to petitioner No. 1 at its business premises at Dhandiha by bringing the said goods either on horse or on bullock-carts. Petitioner No. 1 mostly makes purchases of foodgrains, oil-seeds and other foodgrains from different dealers, like petitioner No. 2, who bring their goods on different types of vehicles and animals to its business premises for sale. On the 18th April, 1975, the Mukhiya of Dhandiha Gram Panchayat issued a notice, purporting to act under the powers conferred under Section 47 (c) of the Act, informing the villagers of the Panchayat area that the right to collect taxes on ferry (ferrywalla) shall be settled with the highest bidder. A true copy of the said notice is marked as annexure 'I' to the petition. In accordance with the said notice, the said right of collecting tax from persons bringing their

goods in the Dhandiha Gram Panchayat area was settled with Sri Jairam Singh (respondent No. 3), and since then the respondent No. 3, according to the petitioners, was illegally, forcibly and arbitrarily collecting taxes from the persons who come to sell their goods at the business premises of petitioner No. 1. The petitioners further submitted in their application that the imposition and collection of fee by respondent No. 3 depends on his sweet will and the tax so collected varies between 25 paise to Rs. 4/- for a bullock-cart containing goods for sale. As an illustration, petitioner No. 2 has annexed various receipts of payment of such taxes by him. Those receipts are annexed as annexures 2, 2/1, 2/2 and 2/3 on different dates. They also submitted that no guideline having been provided for, in Section 47 of the Act as to the rate of tax and fees, which could be levied under the said provision, it leads to vesting of an arbitrary power in the Gram Panchayat, and as such the said provisions are bad also for excessive delegation and, in that view of the matter, the said provisions are unenforceable. Due to compulsory imposition and realisation of taxes from petty dealers, most of the petty dealers, who used to bring their goods for sale to petitioner No. 1, have stopped coming to his business premises, thus adversely affecting the business of petitioner No. 1 and, therefore, the action of the respondents amounts to infringement of the petitioners' right.

3. A counter-affidavit has been filed on behalf of respondent No. 1, namely, the State of Bihar on the 14th January, 1976, wherein, inter alia, it is stated that the Bihar Panchayat Account Rules 1949 (hereinafter referred to as the 'Rules') has come into force from 2nd May, 1949, and Section 47 (1) (d) read with rule 54 empowers the Gram Panchayat to levy and collect such taxes.

4. Learned Counsel appearing on behalf of the petitioners submitted that neither the said provision contained in the said section nor the rule authorises the Gram Panchayat to delegate its power to a third person and to auction and settle their right to the highest bidder, as in the instant case they have done so with respondent No. 3. He has also drawn my attention to the provision contained under Article 265 of the Constitution of India, which reads thus—

"No tax shall be levied or collected except by authority of law."

He also referred to Section 47 (1) (c) of the Act, which provides.

"Subject to the prescribed rules and any general or special orders of the Govern-

ment in this behalf 'a Gram Panchayat' may levy—

(a) xx xx xx

(b) xx xx xx

(c) a tax on vehicles, pack animals and porters bringing goods for sale into the village."

A reference was also made to Rule 54 of the Rules, which reads thus—

"The Executive Committee at a meeting may, by resolution levy a tax on vehicles, pack animals and porters carrying goods for sale to any market or place belonging to or under the control of the Panchayat or on goods exposed for sale in such market or place at such rate or rates as it may determine.

Provided that the Executive Committee shall while levying such tax take into consideration the nature of vehicles and pack animals carrying the goods and the nature and value of goods carried by such vehicles and pack animals or exposed for sale." Learned Counsel for the petitioners emphasised that none of the provisions, referred to above, have empowered the Gram Panchayat to sub-delegate their power to a third person on the basis of auction.

5. In my opinion, the submission of the learned Counsel for the petitioners is well founded. The provisions of the Rules, referred to above, no doubt, authorises the Gram Panchayat to levy and collect tax, but it is to be done in accordance with the provisions contained under Section 47 (1) (c) and (d) of the Act read with Rule 54 of the Rules. In that view of the matter, issuance of notice contained in annexure 'I' cannot be sustained. In the result, the notice contained in annexure 'I' is quashed and respondent No. 3 is restrained from collecting tax on the basis of the said notice or on the basis of the auction settlement in his favour. Respondents Nos. 1 and 2 are directed to proceed with regard to collection of levy or tax in the light of the discussion, made above, in accordance with law.

6. The application is, accordingly, allowed, In the circumstances, however, there will be no order as to costs.

Petition allowed.

AIR 1976 PATNA 301**MADAN MOHAN PRASAD J.**

Jai Prakash Sinha Petitioner v. The Chairman, Bihar School Examination Board, Respondent.

Civil Writ Jurisdiction Case No. 1658 of 1975, D/- 26-11-1975.

(A) Constitution of India, Article 226 — Certiorari — Natural justice — Use of unfair means at examination — Expulsion — Such expulsion is an administrative act — Application of principles of natural justice — (Bihar School Examination Board Regulations, Regns. 10 and 18), C. W. J. C. No. 1192 of 1975 D/- 12-9-1975 (Pat) Dissented from.

For the purpose of finding out whether the principle of natural justice applies, it has to be found out as to how the rule and regulations are framed in the particular case. The act of expelling a candidate from an examination is neither a judicial nor a quasi judicial act. Reading the two regulations, Regulations 10 and 18, of the Bihar School Examination Board Regulations it becomes obvious that regulation 10 is a remedy to be resorted to immediately when the examinee is found to be using unfair means. On the other hand Regulation 18 applies to a case where no action is taken immediately by way of expelling the candidate but after the examination is held. It is detected that the examination was violated by any of the reasons mentioned in the regulation. In the latter case, of course, the determination of the question or of the allegation is done at a date subsequent to the examination and this order has got to be passed after considering materials. In such a case, it would be fair to hear the examinee in defence. Thus regulation 10 does not permit by its very nature application of the principle of natural justice whereas a case covered by regulation 18 may admit the application of the principle. AIR 1962 SC 1110; AIR 1970 SC 1269, Dist. C. W. J. C. No. 1192 of 1975, D/- 12-9-1975 (Pat), Dissented from. (Para 13)

(B) Evidence Act (1872), Section 115 — Estoppel — Representation made in mistaken view of the fact — There is no estoppel — Person knowing true facts cannot take advantage of principle of estoppel. (Para 15)

(C) Constitution of India, Article 226 — Natural justice — Principles — Application to administrative orders — Application depends upon the facts of the case, constitution of Tribunal before which enquiry is being held.

It cannot be stated as a wide proposition that the principles of natural justice would

apply to all cases of administrative orders. Whether a particular rule of natural justice applies to a given case must depend to a great extent upon the facts and circumstances of the case, the frame work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Further when violation of principle of natural justice is alleged the court has to decide whether the observance of that rule was possible for the just decision on the fact of that case. AIR 1975 Pat 12; AIR 1967 SC 1269 and AIR 1970 SC 150, Rel. on. (Para 8)

(D) Constitution of India, Article 226 — Certiorari — Suppression of fact — Petitioner is not entitled to relief. (Para 6)

Cases Referred:	Chronological	Paras
AIR 1975 Pat 12 = 1974 BLJR 739		8
(1975) C. W. J. C. No. 1192 of 1975 D/- 12-9-1975 (Pat)		12
AIR 1970 SC 150 = (1970) 1 SCR 457		8
AIR 1970 SC 1269 = (1970) 3 SCR 963		11
AIR 1967 SC 1269 = (1967) 2 SCR 625		8
AIR 1965 SC 1812 = (1965) 3 SCR 283		15
AIR 1964 Pat 291		10, 13
AIR 1962 SC 1110 = 1962 Supp (3) SCR 36		10, 13

Awalokeshwar Mishra, for Petitioner;
Pashupati Nath Jha, for Respondent.

ORDER:— This is an application under Articles 226 and 227 of the Constitution of India for issuance of a writ quashing an order of the Bihar School Examination Board (hereinafter called the Board) expelling the petitioner from examination and withholding his result, and a writ calling upon it to declare the result of the petitioner.

2. The petitioner was one of the examinees at the Annual Secondary School Examination of 1975. According to him, the examination held on 10th March, 1975, in one of the papers, namely, Advanced Mathematics, of the centre from which he appeared was cancelled as a whole on the ground of adoption of unfair means on a large scale. There was, however, a re-examination in that subject held subsequently on 16th April, 1975. The petitioner says that he got a telegram to deposit his fee for this re-examination and to obtain the admit-card and thereafter appear thereat.

3. He did all this and appeared at the examination. When the results were published, his result was withheld. He then made enquiry and was told by the Board that since he had been expelled from the examination having been caught red-handed while using unfair means he was not entitled to appear at the subsequent re-examination and his appearance thereat was of no conse-

quence and hence his result was not published.

3A. According to the petitioner as stated in his reply to the counter-affidavit, however, he was never expelled and in view of his having been allowed to appear at the re-examination, his result should have been published.

4. It is urged that the decision of the Board to expel the petitioner from the examination was in violation of the principles of natural justice, no hearing having been given to him. Secondly, it is urged that the Board having allowed him to appear at the examination is barred by principle of estoppel, to ignore the result of his re-examination.

5. On behalf of the respondent, the examination Board, it is said that he had been caught red-handed using unfair means and expelled from the examination. His answer book and chit of paper from which he was copying out attached to his answer book bearing the endorsement that the petitioner was expelled, has been produced in Court. It is said that as a result of this expulsion, in view of Regulation 10 of the Regulations framed by the Bihar School Examination Board, 1964, the Superintendent had the right to expel him and he was thus debarred from appearing in the subsequent papers at that examination. It is said that in a case like this, there was no question of giving notice or personal hearing to the petitioner.

6. In view of the affidavit and the counter-affidavit and particularly the last one filed on behalf of the Examination Board producing the answer book of the candidate and the paper therein from which he was found to be copying on his answer book as also the report of the leader of the flying squad which found mass scale use of unfair means and who is alleged to have expelled 40 candidates, including the petitioner, the fact is proved beyond any doubt that the petitioner was also one of those candidates, who were caught red-handed while using unfair means at the examination and, therefore, expelled. It appears from the report that the invigilators at the examination were also co-operating with the examinees in use of unfair means and that the examinees were using slips and papers on a very large scale. It is thus patent that the petitioner is guilty of having suppressed the fact in his writ petition which was very much to his knowledge. In his writ petition he said that he came to know for the first time from the Secretary of the Board and the clerk thereof that he had been expelled. This appears to be false. The petitioner being guilty of suppression of fact is not entitled to any writ from this Court. I

would dismiss his petition on that ground alone.

7. There are, however, other reasons for the same. Regulation 10 says that the Superintendent shall have the power to expel a candidate from the examination if he is found guilty of using unfair means or misconduct and further that the Superintendent shall forthwith make a detailed report of such cases to the Secretary and such candidates shall not be allowed to appear in the subsequent papers, unless otherwise directed by the Secretary. In the present case, therefore, the petitioner having been expelled from the examination was not entitled to appear at the subsequent papers. There was no direction by the Secretary to allow him to do so.

8. The next question which arises is whether the principles of natural justice would apply in a case of this kind. The prayer is that the order of expulsion may be quashed on the ground that the petitioner has not been given a hearing. The fact that he had not been given any hearing before he was expelled from the examination is not disputed. In the case of *Smt. Shiva Rani Kumari v. President of Board of Secondary Education* (AIR 1975 Pat 12). I had an occasion of considering at some length the question of application of the principles of natural justice. True, it is well settled that the principle applies to cases where an authority has to discharge judicial or quasi-judicial functions. In several cases the Supreme Court even held the principle of natural justice to be applicable even to administrative orders (See AIR 1967 SC 1269; AIR 1970 SC 150). It is, however, well settled, as I said in the case of *Smt. Shiva Ram Kumari* that the question whether a particular rule of natural justice applies to a given case must depend to a great extent on the facts and circumstances of that case, the frame work of the law under which the enquiry is held and the constitution of the tribunal or body of persons appointed for that purpose. It is equally well settled that when violation of principles of natural justice is alleged the Court has to decide whether the observance of that rule was possible for a just decision on the fact of that case. To my mind, therefore, it cannot be stated as a wide proposition that the principle of natural justice would apply to all cases of administrative orders.

9. In the instant case, there is a regulation which entitles the Superintendent to expel from the examination any examinee whom he finds indulging in act of misbehaviour or using unfair means and the regulation further provides that such person shall not be allowed to appear at the subsequent papers of

the same examination. I may repeat that for the purpose of finding out whether the principle of natural justice applies, it has to be found out as to how the rule and regulations are framed in the particular case. The question thus arises whether or not the act of expelling a candidate from an examination can be a judicial, a quasi judicial or an administrative act. There can be hardly any doubt that it is neither a judicial nor a quasi judicial act. This right has to be exercised by the Superintendent as soon as he finds for himself a candidate using unfair means in the examination. Once the right is exercised there is an end of it. If an examinee appearing at the examination is not allowed to appear thereat and is physically removed from the examination hall, it cannot be anything but an administrative act. Could such a rule have envisaged giving a notice to the examinee, of hearing him and then taking the action of expelling him from the examination hall? The answer is obvious. The order of expulsion which has to be passed at the moment on the existence of fact is effective at the very same moment or to be precise a few moments later cannot by any stretch of imagination be said to be a case where the examinee is to be given a notice of the charge and to be heard in defence. Looking at the regulation and the circumstances of the case of expulsion I have not the slightest doubt that the principle of natural justice has no application at all to a case like this.

10. Learned counsel for the petitioner has, however, placed great reliance on the decision in the case of Board of High School and Intermediate Education, U. P. v. Ghanshyam Das Gupta (AIR 1962 SC 1110). The facts of that case were entirely different. It was not a case where the candidate had been expelled having been caught red-handed using unfair means at the examination. That was a case of cancelling the result of the respondents after the examination had been held and their results had been published. The order was, therefore, obviously passed long after the examination on certain allegations against the three students who were the petitioners in that case without giving them any opportunity of being heard in their defence. The decision given in that case was, therefore, upon the facts of that case, and is, therefore, of no avail to the petitioner. The decision of this Court in the case of Ajit Singh v. Ranchi University (AIR 1964 Pat 291), was referred to in the decision in the case of Board of High School and Intermediate Education, U. P. v. Ghanshyam Das Gupta (AIR 1962 SC 1110) (Supra) was referred to. The facts do not appear in the judgment of the case of Ajit Singh

(Supra) in respect of the manner in which the order was passed by the Syndicate debarring the petitioner of that case from appearing at any University examination but from what appears in the report it cannot be said to be a case where the examinees were found using unfair means and expelled from examination. That decision is also thus of no relevance to the instant case.

11. Learned counsel for the respondent has placed reliance on the decision of the Supreme Court in the case of Bihar School Examination Board v. Subhas Chandra Sinha (AIR 1970 SC 1269). In that case there was an adoption of unfair means by vast majority of examinees at a particular centre and the Examination Board had cancelled the examination as a whole and it was that order of cancellation of the examination that was being challenged on the ground of violation of the principles of natural justice. Hidayatullah, C. J., who delivered the judgment for the Court held that the principle of natural justice has no application to a case of that kind where the examination itself had been cancelled on the ground of a large scale use of unfair means. The learned Chief Justice distinguished the decision in the case of Board of High School and Intermediate Education, U. P. (AIR 1962 SC 1110). In the instant case, the facts are slightly different from the facts of that case though similar in respect of the order of cancellation of the examination as a whole. The petitioner in the instant case is not really making a grievance against the order by which the examination as a whole was cancelled. His grievance is that he should not have been expelled without getting an opportunity of placing his case and it is that which is the point to be answered.

12. Reliance has been placed on behalf of the petitioner on an unreported decision of a Single Judge of this Court in the case of Ashok Kumar v. The Bihar Secondary School Examination Board (C. W. J. C. No. 1192 of 1975 disposed of on 12-9-1975 (Pat). It is true that the facts of that case were very much similar to the instant case. The learned Judge relying on the decision of the Supreme Court in the case of Board of High School and Intermediate Education (AIR 1962 SC 1110) (supra) ordered an enquiry by the Examination Board into the matter and for passing a fresh order after giving the petitioner a reasonable opportunity of being heard. With utmost respect to the learned Judge, I do not read the decision of the Supreme Court in AIR 1962 SC 1110 (Supra) as laying down the proposition that in all such cases the rule of natural justice has to be applied. As I have

said it has to be found on the facts of each case whether the principle of natural justice is applicable and this has to be found from the rules and regulations as well as whether they admit the application of principle of natural justice. I am, therefore, unable to rely on the Supreme Court decision for the purpose for which it was relied on by the learned Judge. Again I say, with utmost respect, that regulation 10 which I have referred to earlier does not seem to have been placed before him for consideration. The decision in AIR 1970 SC 1269 (Supra) was referred to before the learned Judge but he distinguished it on the ground that in the case before him, the petitioners had been picked out as individual examinee on the charge of adopting unfair means.

13. There is another regulation which has not been referred to by me yet and that is regulation 18 of the aforesaid Regulations which provides that in any case where it is found that the examination has been violated by error, improper conduct, or other causes or where mal-practice, fraud, or act of indiscipline or use of unfair means are reported to have been resorted to, the Board shall have the power to cancel the examination or to withhold or amend the result in such case and to take such other action as it may deem fit. Reading the two regulations, Regulations 10 and 18, it becomes obvious that Regulation 10 is a remedy to be resorted to immediately when the examinee is found to be using unfair means. That is the reason why the Superintendent of the examination has been given that power and it has certain result, namely, debarring the candidate from appearing in subsequent papers at the examination. On the other hand, Regulation 18 applies to a case where no action is taken immediately by way of expelling the candidate but after the examination is held, it is detected that the examination was violated by any of the reasons mentioned in the Regulation. In the latter case, of course, the determination of the question or of the allegation is done at a date subsequent to the examination and this order has got to be passed after considering materials. In such a case, it would be fair to hear the examinee in defence and in all the decisions on which reliance has been placed by the petitioner — decision of the Supreme Court in AIR 1962 SC 1110 (Supra) and the decision in AIR 1964 Pat 291, actions were taken subsequent to the examination. None of the cases except that of Ashok Kumar referred to earlier is a case where expulsion of the examinee had been ordered. Reading both the regulations it is easy to find out in which case principle of natural justice would apply and in which

case not. As I have said earlier Regulation 10 does not permit by its very nature application of the principle of natural justice where as a case covered by Regulation 18 may admit the application of the principle.

14. For the reasons aforesaid in my considered view, the petitioner was not entitled to any hearing before the order of expulsion was passed at the time he was found using unfair means in the examination and the order cannot be quashed on that ground.

15. The second argument of learned counsel with regard to the Examination Board being estopped by the principle of estoppel is equally untenable. It is said that the Board had allowed the petitioner to appear at the re-examination of advanced mathematics. A telegram has been produced in support thereof. On behalf of the Board, it is said that the telegram was sent by mistake to the petitioner. It is said that only those persons who had not been caught red-handed and expelled on that ground had been allowed to appear at the re-examination in the same subject but those who were expelled were naturally not allowed to sit at any re-examination in the same paper or examination in other papers. It has also been alleged by the petitioner that he paid the examination fee and thereafter appeared at the re-examination. This fact is controverted by the Examination Board and it is said that he had never deposited the fee and had some how managed to sit at the examination. If the petitioner knew the fact, as he did, that he had been expelled from the examination along with several others, he is only trying to take advantage of a telegram sent to him by mistake. I have no hesitation in accepting the affidavit on behalf of the Board that it was by mistake. As it appears, the examination as a whole had been cancelled and hundreds of telegrams must have been sent to different examinees to appear at re-examination. Perhaps, someone sending the telegram did not know that this petitioner was one of those who had been expelled and could not appear at the re-examination. There is no estoppel where some representation is made in a mistaken view of fact. Besides, it is equally well settled that a person knowing the true facts cannot take advantage of the principle of estoppel (See AIR 1965 SC 1812). This argument also must, therefore, be rejected.

16. In the result, I find that there is no merit in this application and it is accordingly dismissed. In the circumstances of this case, however, I would not make any order as to costs.

Petition dismissed.

AIR 1976 PATNA 305

H. L. AGRAWAL J.

M/s. Gammon India Ltd. and others,
Petitioners v. The Bihar State Electricity
Board, Opposite Party.

Civil Revn. No. 52 of 1974, D/- 8-9-
1975*.

(A) Civil P. C. (1908), Order 9, Rule 2 — Dismissal of suit for non-payment of process fee — Two of the several defendants not served with summons as requisite process-fee was not paid — Court dismissing the suit against all the defendants — Held, dismissal was improper and contrary to the provisions of law. AIR 1974 Pat 289 Distinguished. AIR 1921 Pat 422 (1) Rel. on. (Para 7)

(B) Civil P. C. (1908), Section 151 — Inherent powers of the Court — Includes power to correct its own mistakes suo motu or at the instance of the party to suit — Restoration of the whole suit dismissed for non-payment of process fee in respect of some of the defendants was held to be illegal.

While invoking inherent jurisdiction and recording a finding that entire suit could not be dismissed the Court should not have restored the whole suit. In other words, having recorded a finding that there was no sufficient cause for the non-compliance of the order for filing fresh requisites for issue of summons to some of the defendants and having further found that on that account the whole suit should not have been dismissed the lower Court committed an obvious mistake in restoring the suit against those defendants as well. AIR 1953 SC 23 Rel. on.

(Paras 7 and 8)

Cases Referred:	Chronological	Paras
AIR 1974 Pat 289 =	1974 BLJR 423	7
AIR 1953 SC 23 =	1953 SCR 136	7
AIR 1921 Pat 422 (1) =	2 Pat LT 256	7

Jyoti Narayan, for Petitioners; Ray Paras Nath and Ganesh Prasad Jayaswal, for Opposite Party.

ORDER:— In this application in revision by some of the defendants some interesting questions have been raised for decision.

2. The plaintiff opposite party instituted a money suit for recovery of a sum above Rs. 35,000/- against the defendants. By order dated 1-11-1971 the court below called upon the plaintiff to take steps for fresh service of summonses upon defendants 4 and 5. Although service of summons upon the principal defendant (Petitioner No. 1) had been validly effected as agreed at both

the hands in this Court, the court below, in the same order as well as in the impugned order, has recorded that service upon the said defendant had not been effected as the summons had been mis-sent. However, in spite of several adjournments the plaintiff failed to take any steps in regard to the filing of the process, etc. for service of summons on the aforesaid defendants and ultimately by order dated 5-7-1972 the suit was dismissed for default. Long thereafter an application under Order IX Rule 4 of the Code of Civil Procedure (hereinafter to be referred to as the Code) was filed by the plaintiff on 28-11-1972 for restoration of the suit. It was stated in the petition that the plaintiff's "Law Clerk missed to forward a date in his diary for the said money suit and thus the case escaped the diary. The aforesaid mistake was detected during the last annual vacation and thereafter your petitioner's lawyer attempted to obtain information by filing inspection of the records and it was learnt after inspection on 27-11-1972 that the suit had been dismissed for default." It was further contended on behalf of the plaintiff in the said application that it has not committed any wilful mistake nor has it indulged in negligence in the matter and the dismissal of the suit would put it to irreparable loss and injury.

3. Article 122 of the new Limitation Act (hereinafter to be referred to as the Act) has prescribed a period of limitation of thirty days for restoration of a suit dismissed for want of prosecution or failure to pay costs of service of process, etc. and the period of limitation begins to run from the date of dismissal. When the question of limitation was raised during the course of the hearing of the application, the plaintiff filed a petition under Section 5 of the Limitation Act for condonation of the delay, perhaps, applying the ground mentioned in Section 17 (I) (c) of the Act, which prescribes that in the case of an application, for which a period of limitation is prescribed by this Act, the period of limitation shall not begin to run until the applicant has discovered the mistake if his application is for relief from the consequences of a mistake under clause (c). The learned Subordinate Judge reached the following findings:—

(i) There was no sufficient cause for non-appearance of the applicant in the suit which may lead to the restoration of the suit to its original file.

(ii) In view of the fact that Section 5 of the Limitation Act applies to the cases under Order IX Rule 4 of the Code, the period of Limitation can be condoned in this case.

* (Against decision of Narayan Prasad Singh Sub. J., Aurangabad, D/- 18-9-1973).

(iii) There being no evidence that the applicant had knowledge about the dismissal of the suit before 27-11-1972, there was sufficient reason for the applicant for not filing the miscellaneous petition within 30 days from the date of the dismissal of its suit and therefore the period of limitation was fit to be condoned.

(iv) For the failure of the plaintiff to file fresh requisites for service of summons on defendants 4 and 5, the dismissal of the entire suit did not appear to be correct. Therefore the order of dismissal was fit to be set aside and the suit fit to be restored to its original file.

4. On reference to the findings reached by the learned Subordinate Judge, it is plain that he has refused to restore the suit under the provisions of Rule 4 of Order IX of the Code, having recorded an express finding that there was no sufficient cause for the plaintiff for not taking steps as ordered by the court.

5. A question now arises as to whether, having recorded the said finding, the learned Subordinate Judge could still restore the suit under his inherent powers, as has been purported to be done. Although in paragraph 10 of the order he has referred to the apparent mistake committed by him in dismissing the entire suit when the plaintiff was called upon to file requisites for service of summons on defendants 4 and 5 alone he has also referred in the next paragraph to the facts that the original suit was for a substantial claim and a fresh suit was barred by limitation.

6. Mr. Jyoti Narayan appearing for the petitioners seriously contended that the learned Subordinate Judge, in the circumstances, has committed an obvious error of jurisdiction in invoking his inherent power on reference to the valuation of the suit or the ultimate loss to which the plaintiff could otherwise have been put.

7. Pressing the question of limitation, Mr. Jyoti Narayan contended that assuming that the court below had committed an error in dismissing the entire suit and the said mistake could be corrected under the inherent powers, the application must have been made within a reasonable time and the plaintiff itself being not diligent in coming to the court, it should not have been granted any indulgence under the cloak of the inherent powers. He placed reliance upon a decision in the case of Somar Bhuiya v. Kapil Kumar, (AIR 1974 Pat 289). In that case an application under Order IX Rule 4 of the Code had been dismissed for default. The plaintiff thereupon made an application for restoration of the said application under Sec-

tion 151, but that itself was very much delayed. In that event it was held that although there was no period of limitation fixed for such an application under Section 151, a person who wants to invoke the inherent jurisdiction of a court must himself be diligent and not guilty of any laches. The facts in the instant case are, however, entirely different. The plaintiff itself did not seek invocation of the inherent jurisdiction of the court but for restoration of the entire suit dismissed against all the defendants it applied under Order IX Rule 4. It was the court itself which in course of the deliberations of the points argued, took the view that a mistake had been committed in dismissing the whole suit when the order was for the plaintiff to file requisites for service of summons on defendants 4 and 5 alone. This Court in the case of Ramanand Singh v. Chandrama Singh AIR 1921 Pat 422 (1) held that non-payment of process fee for one defendant did not justify dismissal of the suit as against the other defendants. It is obvious, therefore that the learned Subordinate Judge was not right in dismissing the whole suit for non-payment of the process fee and not filing other requisites for service of summons on defendants 4 and 5. It is well settled that a court is authorised to correct its own mistake. Although the learned Subordinate Judge has made reference to the high valuation of the suit and the loss to which the plaintiff would be put to on account of limitation to bring a fresh suit, nonetheless, those circumstances were not made the basis for exercise of the inherent power. It may be, that he might have been influenced by those considerations which were not irrelevant. The basis of the finding, however, is the mistake that he has committed in dismissing the entire suit. He has, therefore, not invoked any jurisdiction on those considerations but has exercised the said power when the matter had already been before him. And, here lies the basic distinction. Once this position is correctly appreciated the question of limitation becomes irrelevant. The provision of Section 151 of the Code, which envisages inherent jurisdiction gives the Court abundant power to exercise it if it thinks necessary for the ends of justice or for preventing abuse of the process of the court. It can pass such order as it thinks fit. At the same time it is also open to a party to bring to the notice of the court by application that there has been such an abuse of the process of the court or it is necessary for the ends of justice that a particular order should be passed. Although this proposition is well settled, reference may be made to only one decision of the Supreme Court in Keshardeo v. Radha Kissen, (AIR

1953 SC 23). The court was, therefore, justified in exercising the inherent jurisdiction vested in it.

8. However, the learned Subordinate Judge has committed an error at this stage as well. While invoking the inherent jurisdiction and recording a finding that the entire suit could not be dismissed, for the reasons already stated, he should not have restored the entire suit. In other words, having recorded a finding that there was no sufficient cause for the non-compliance of the order for filing fresh requisites for issue of summons to defendants 4 and 5 and having further found that on that account the whole suit should not have been dismissed, he committed an obvious mistake in restoring the suit against those two defendants as well.

9. I would accordingly allow this application in part and direct that the money suit in question will be restored only against the defendants other than defendants 4 and 5. There will be no order as to cost.

Revision partly allowed.

AIR 1976 PATNA 307

SHAMBHU PRASAD SINGH AND
S. ALI AHMED JJ.

Babulal Yadav and others, Petitioners
v. Director of Consolidation and others,
Respondents.

Civil Writ Jur. Case Nos. 192 and 193
of 1975, D/- 30-9-1975.

(A) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 26 — Variation or revocation of existing scheme by fresh scheme — Section does not confer unbridled power and is hence not invalid. (Ibid S. 3 (1)).

The section envisages preparation of a fresh scheme according to the provisions of the Act. Section 3 (1) stipulates that the object of a scheme for consolidation of holdings should be better cultivation of lands. Preparation of a fresh scheme under Section 26 can also therefore be only for that object mentioned in Section 3 (1). Therefore there is a guideline for preparing a fresh scheme under the section. As such it cannot be said that the section is ultra vires for conferring an unbridled power to vary or revoke a scheme. (Para 17)

(B) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 26 — Variation or revocation of existing scheme by fresh scheme — It need not have to be the result of change in

agrarian policy of the Government — Guideline for exercise of power under section viz. better cultivation of land may be achieved even without any such change. (Para 19)

(C) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 26 — Variation or revocation of existing scheme by fresh scheme — It is entirely different from and based on much wider grounds than the power under Section 35 to correct illegality of orders. (Ibid, Section 35).

The powers under the section and under Section 35 (correction of illegality in orders) are quite different. If the order confirming the scheme is set aside under Section 35 for illegality that does not amount to making an altogether new scheme in part or as a whole. Variation or revocation of a scheme under Section 26 is on much wider grounds and not merely on illegality in any order passed under the Act. The power under Section 26 cannot be used for correction of illegalities in orders. When the revocation order under Section 26 does not show it to be for correction of illegalities in any order, it cannot be said that the wrong sought to be set right by the revocation order could have been corrected by exercise of the power under Section 35. (Para 20)

(D) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 26 — Revocation of existing scheme by fresh scheme — Revocation refused — On same grounds later revocation ordered — Order is not illegal for absence of power of review under the Act.

There is no provision for review under the Act. Yet for this reason an order for revocation under the section passed on the same grounds on which earlier the revocation was refused, is not illegal. The words 'at any time' in the section show that the Government may vary or revoke a scheme whenever it considers the same necessary. No time limit has been fixed therefor. (Para 21)

(E) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 26 — Revocation of existing scheme by fresh scheme — Revocation includes partial revocation — Hence revocation only in respect of four tolas of a village is not illegal. (Para 23)

(F) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), S. 26 — Revocation of existing scheme by fresh scheme — Surreptitious interpolations in records made in a number of cases after confirmation of scheme — In spite of different views of other officials revoca-

tion ordered on application of one of parties — Revocation order not found to be for helping that party — Revocation is unimpeachable for mala fides. (Ibid Ss. 35 and 25). (Bihar Consolidation of Holdings Rules (1958), R. 20).

When interpolations in records have been made surreptitiously in a number of cases after confirmation of the scheme, they cannot be corrected under Section 35. They cannot also be corrected by payment of compensation under Section 25 or R. 20 of the Bihar Consolidation of Holdings Rules. Damage done to raiyats by such interpolations cannot be compensated by adjustments in the payment of compensation. When in such a case revocation is ordered it cannot be said that it is a view which could not have been taken by a reasonable man. Just because other officials take a different view the revocation order will not be mala fide. When the revocation order has been passed on the application of a party and the order does not appear to have been for helping that party out of intimate friendship with him (as alleged in the petition challenging the revocation order) no mala fides is established. When one of the officials had suggested revocation if the percentage of mistakes in the revenue records was 30 to 40% the fact that the percentage was not so much will not by itself be sufficient to show the order to be mala fide. AIR 1964 SC 72 and AIR 1950 SC 222 and AIR 1972 Pat 93 (FB), Applied. (Paras 31 and 32)

Even if the High Court holds that in such a case any other person might possibly not have ordered revocation, it cannot interfere by writ. It has to restrain itself from acting as a court of appeal. (Para 33)

(G) Bihar Consolidation of Holdings and Prevention of Fragmentation Act (22 of 1956), Section 26 — Revocation of existing scheme by fresh scheme — Preparation of fresh scheme ordered — Before taking steps under Section 8 fresh notification under Section 3 is essential. (Ibid Ss. 8, 3 and 7).

A scheme confirmed remains valid till varied or revoked by a subsequent confirmed scheme. This is clear from the section. Till the subsequent scheme is confirmed the earlier scheme will be effective. But that does not justify, while preparing a fresh scheme, to commence from the stage of draft scheme. The word 'may' in Section 3 (1) means shall. It gives a discretion to the Government to decide whether a scheme is necessary. But once a scheme is found necessary, before taking steps under Section 8, the notification of the intention under Sec-

tion 3 (1) should be given and fresh village advisory committee should be constituted under Section 7. Such notification given for the earlier scheme had lost itself when the scheme was confirmed and that notification cannot be a basis for the fresh scheme.

(Para 34)

Cases Referred: Chronological Paras
AIR 1972 Pat 93 = 1971 Pat LJR 471 32
(FB)
AIR 1964 SC 72 = (1965) 1 SCA 259 32
AIR 1950 SC 222 = 1950 SCR 621 32

Shreenath Singh, J. C. Sinha, S. B. Sanyal, Ch. S. N. Mishra, K. N. Keshav, Harekrishna Kumar and N. C. Ganguli, for Petitioner; Tarakant Jha (Govt. Advocate), Tarakeshwar Dayal, Ravi Nandan Sahay, Manmohan, R. C. Sinha and S. N. Jha (J. C. to G. A.), for Respondents.

SHAMBHU PRASAD SINGH, J.:— A scheme under the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Act') in relation to village Barakhurd, Thana No. 61, Thana Bihar, District Patna (now Nalanda) was confirmed on 20th of July, 1972. On 12th of August, 1972, notices for delivery of possession and measurement were issued. On 13th of October, 1972 delivery of possession and demarcation of holdings were completed but before certificates of transfer could be distributed an order staying their distribution was passed by the then Revenue Minister of the State of Bihar, Shri Kedar Pandey. The order was passed in May June, 1974 on an application of Jagat Kishore Prasad Narain Singh resulting in holding up of distribution and grant of certificate of transfer in respect of the holdings allotted to different raiyats under the scheme.

The Revenue Minister also passed an order in purported exercise of power under S. 26 of the Act revoking and cancelling the old scheme of consolidation of holdings in tola Dharampur, Mahagupur, Noni-abighe and Manare of the said village Barakhurd and also for preparation of a fresh scheme of consolidation of holdings. In pursuance of this order, the consolidation officer, Ekangarsarai, as directed by Director of Consolidation, passed an order dated 16th of December, 1974, commencing de novo proceeding under the Act from the State of Khanapuri. The petitioners of these two writ applications pray for quashing of the aforesaid orders staying the distribution and grant of certificates of transfer and revocation of the old scheme as well as the

preparation of a fresh scheme in respect of the lands of the aforesaid four tolas.

2. There are two petitioners in C. W. J. C. No. 193 of 1975, namely Chandrawati Singh and Raghuraj Singh. Chandrawati Singh is the wife of Ram Kishore Prasad Narain Singh, brother of Jagat Kishore Prasad Narain Singh, and Raghuraj Singh is the husband of Janak Kishori, a sister of Jagat Kishore Prasad Narain Singh. In C. W. J. C. No. 192 of 1975 originally there were 60 petitioners. Subsequently learned lawyer appearing for the petitioners got the names of as many as 23 of the petitioners deleted and now there are only 37 petitioners. Jagat Kishore Prasad Narain Singh is respondent No. 5 in C. W. J. C. No. 193 of 1975 and respondent No. 4 in the other case.

The Consolidation Officer, Ekangarsarai, is respondent No. 3 in C. W. J. C. No. 193 of 1975 and respondent No. 2 in the other case. The Director of Consolidation, Bihar, is respondent No. 4 in C. W. J. C. No. 193 of 1975 and respondent No. 1 in the other case. State of Bihar is respondent No. 1 in C. W. J. C. No. 193 of 1975 and respondent No. 3 in the other case. Shri Kedar Pandey the then Revenue Minister is respondent No. 2 in C. W. J. C. No. 193 of 1975. He has not been made a party in the other case. Chandrawati Singh and Raghuraj Singh, the petitioners of C. W. J. C. No. 193 of 1975 are respondent Nos. 5 and 6 respectively in the other case. The points for decision in the two cases being almost common they have been heard together and are being disposed of by this judgment wherein Chandrawati Singh and Raghuraj Singh will be referred to as the Petitioners of C. W. J. C. No. 193 of 1975 and other respondent of either case according to their number in C. W. J. C. No. 193 of 1975.

3. Order for notification under Section 3 of the Act in respect of village Barakhurd was passed by respondent No. 3 as early as 11th of January, 1962 and the scheme, as stated earlier, was completed on or about 20th of July, 1972. According to the case of the petitioners of both the cases, various steps in relation to preparation of the scheme as envisaged by the Act were taken during this period. Objections were invited and received under Section 12 of the Act in the year 1967-68 after the publication of the draft scheme and again in 1972 under Section 13 of the Act and no objection at all was filed by respondent No. 5 at any stage. It was only some time in 1973 (on 17th of February, 1973) that respondent No. 5 filed a petition annexure 3 to C. W. J. C. No. 193 of 1975 before respondent No. 3 for recording

his name in place of the petitioners of C. W. J. C. No. 193 of 1975. Respondent No. 3 submitted a report (annexure A to the counter affidavit of respondent No. 5) which according to the aforesaid petitioners, was collusive one.

The same matter was, however, agitated before and heard by the Deputy Director of Consolidation and disposed of by his order dated 10th of January, 1974. (annexure 4 to C. W. J. C. No. 193 of 1975). He rejected the prayer of respondent No. 5. Respondent No. 5 then filed an application under Section 35 of the Act before the Board of Revenue which was heard and disposed of by the Additional Member, Board of Revenue. He rejected the application. Against that order respondent No. 5 also moved this Court in C. W. J. C. No. 190 of 1974 which was not admitted. Respondent No. 5 then filed an application before respondent No. 1 for revocation of the old scheme and preparation of a new scheme under Section 26 of the Act.

The then Revenue Minister (Shri Lahtan Choudhary) took the view that it would not be proper to revoke the whole scheme at the instance of an individual who could pursue his remedy in civil court. The Chief Minister recorded his concurrence to this view. The order of rejection, as claimed by the aforesaid two petitioners, was communicated to respondent No. 5 vide letter No. 943 dated 28th of May, 1974.

4. In the meantime, however, on 30th of April, 1974, Shri Kedar Pandey took over as Revenue Minister. It is claimed on behalf of the two petitioners of C. W. J. C. No. 193 of 1975 that Shri Kedar Pandey and respondent No. 5 are intimate friends and taking advantage of the fact respondent No. 5 filed a fresh petition (annexure 8 to C. W. J. C. No. 193 of 1975) on 17th of May, 1974 before the Revenue Minister making out in substance the same case as in the previous application to the Government which had been refused and respondent No. 2 passed an order staying the distribution of the certificates of transfer which is sought to be challenged in these writ applications.

On coming to know of this new move of respondent No. 5 petitioners of C. W. J. C. No. 193 of 1975 protested against the reopening of the matter firstly by an application dated 24th of June, 1974 addressed to the Chief Minister (annexure 9) and again by an application dated 29th of July, 1974 addressed to the Revenue Minister (Annexure 9/A). Respondent No. 2 mala fide and with oblique motive of helping his friend

and favourite respondent No. 5 circumvented the earlier decisions and the views of the departmental officers and recorded a decision that the consolidation proceeding should be taken up again by a fresh scheme on the ground that there had been many irregularities in the proceeding. When the matter was put up before the Chief Minister he recorded his views against the reopening of the matter and observed that the whole scheme should be revoked only if the mistakes and irregularities could not be rectified by the procedure suggested by respondent No. 4. The Chief Minister wanted the matter to be re-examined by the Law Department. Respondent No. 2, however, mala fide side-tracked the matter and after obtaining the report from the Deputy Director of Consolidation reiterated his decision that there should be fresh proceeding with fresh scheme in accordance with S. 26 of the Act. The Chief Minister appears to have merely signed below the decision of respondent No. 2 evidently without applying his mind to his own earlier minutes and other relevant considerations.

Respondent No. 2 firstly desired a fresh scheme only in respect of tola Dharampur alone evidently because his friend and favourite respondent No. 5 was interested only in the lands of that tola. It was only after the Deputy Director pointed out that revocation and fresh scheme could not be for Dharampur alone that respondent No. 2 decided for revocation and fresh scheme for three other tolas. It is asserted on behalf of petitioners of C. W. J. C. No. 193 of 1975 that mala fide exercise of power by respondent No. 2 would be further evident from the fact that an order purporting to be under Section 26 of the Act was passed though a decision had already been taken by the Government earlier to delete Section 26 from the Act.

5. The petitioners of C. W. J. C. No. 192 of 1975 after stating some of the facts which have been stated by the petitioners of C. W. J. C. No. 193 of 1975 have asserted that after delivery of possession of the lands allotted to them under the scheme they have settled down and have invested huge sums of money for the improvement of lands, namely, by sinking of tube-wells, by improving the soil, putting on earth as well as proper fertilizer and by setting up electrical pumps for providing proper water facilities for the purpose of cultivation. They further claim that some of them have built up their homes over the lands allotted to them to look after the cultivation and thus invested a lot of money in relation to lands which have come to their possession pursuant to the implementation of the scheme. According to

them, majority of the petitioners have received certificates of transfer granted to them and thus achieved the civil right which was suspended for 10 years between 1962 to 1972. They also claim to have made representation to the Chief Minister objecting to the prayer of respondent No. 5 for getting the scheme annulled and revoked.

6. Three counter affidavits have been filed on behalf of the respondents in C. W. J. C. No. 193 of 1975 one on behalf of respondent No. 5, another on behalf of respondents Nos. 1, 3 and 4 and the third on behalf of respondent No. 2. Respondent No. 5 in his counter affidavit has stated that the husband of petitioner No. 1, who is younger brother of respondent No. 5, was incharge of the affairs of respondent No. 5 during the relevant period and he misused the confidence reposed in him by respondent No. 5 and got clouded by misconduct and malfeasance the right, title and interest of respondent No. 5 over the extensive property situate within the area for which consolidation scheme was under preparation. In a title partition suit No. 87/7 of 1943/1945 which was instituted by respondent No. 5 and husband of petitioner No. 1 against their father, by compromise separate takhtas were allotted to respondent No. 5, husband of petitioner No. 1 and to their mother and their father. After the death of their father his property was inherited by respondent No. 5, husband of petitioner No. 1 and their mother.

In the consolidation proceeding the husband of petitioner No. 1 got dishonestly recorded 29.63 acres of land in the name of petitioner No. 1, 34.41 acres of land in the name of petitioner No. 2 and 25.68 acres of land in the name of wife of respondent No. 5. Respondent No. 5 came to know of this fraud only after the consolidation proceeding was over and he filed an application before respondent No. 3 that lands, houses and orchard belonging to respondent No. 5 be recorded in his name. Respondent No. 5 in spite of the consolidation proceeding continues to be in possession of the lands including the house and garden etc. and a proceeding under Section 145 of the Code of Criminal Procedure is pending. On an application made by respondent No. 5 to the Commissioner of Patna Division, an enquiry was made by the Additional Collector, Nalanda, who in his report (annexure A to the counter affidavit) recommended for annulling the entire scheme by resort to the powers vested in respondent No. 1 under S. 26 of the Act. However, after adverse orders were passed against respondent No. 5 by the Deputy Director Consolidation and the Additional Member,

Board of Revenue, and his writ application before this Court (C. W. J. C. No. 190 of 1974) was summarily dismissed with an observation that respondent No. 5 could move the State Government for appropriate action under Section 26 of the Act to revoke the scheme. Respondent No. 5 did submit a representation before respondent No. 1 for annulling the scheme and respondent No. 1 declined to interfere on the ground that the scheme could not be annulled only to suit the convenience of an individual. But as it was without any enquiry by the competent authorities for ascertaining the extent of bungalings, forgery and alterations in the scheme by unscrupulous field staff, respondent No. 5 made a fresh representation before respondent No. 2 on 17th May, 1974. Respondent No. 2 did pass an order on this representation staying distribution of certificates of transfer but it was not on account of any mala fides on the part of respondent No. 2 as there was no political affinity between respondent No. 5 and respondent No. 2. Some other tenants also had moved competent authorities for modification or annulment of the scheme on the ground of interpolations therein and after the representation of respondent No. 5 dated 17th of May, 1974 was subjected to detailed investigation at various levels and order for annulling the scheme was passed after considering the enquiry reports submitted by various officers including the Director of Consolidation, the Secretary of Revenue Department and the Land Reforms Commissioner. The order was passed not only to subserve larger interest of the tenants of the locality but also to make an example for the whole of the State so that similar situation might not be repeated elsewhere.

7. Respondent Nos. 1, 3 and 4 in their counter affidavit after stating relevant facts deny the allegation that the report of respondent No. 3 was collusive. It is averred that after the filing of the representation of respondent No. 5, the whole matter was examined afresh and decision to prepare a fresh scheme was taken. It is admitted that amendment of the Act in which it was proposed to delete Section 26 was under consideration but it is asserted that so long Section 26 was on the statute the power vested in the authorities under that section could be exercised.

8. Respondent No. 2 in his counter affidavit has denied that respondent No. 5 was his intimate friend and favourite. He has further stated that no doubt the matter was reopened on the petition of respondent No. 5 but the final decision was taken by respondent No. 1 after the whole matter was enquired into by officers at different levels

which had revealed that large number of irregularities and interpolations had taken place during the course of preparation of the scheme of consolidation in the said village.

9. On behalf of the petitioners of C. W. J. C. No. 193 of 1975 a reply to the counter affidavit of respondent No. 5 has also been filed. The affidavit has been sworn in by the husband of petitioner No. 1 and he strongly denies that he was incharge of the properties of respondent No. 5 during the relevant period. It is asserted that as respondent No. 5 misused his position and trust and put the petitioner and his family to suffer loss of property in pursuing frivolous litigation with regard to a will which respondent No. 5 had got forged, he (respondent No. 5) granted a raiyati interest in favour of the petitioners. It is also denied that respondent No. 5 had no knowledge of the consolidation proceeding till 1972.

It is stated that the ancestral house which was allotted to respondent No. 5, husband of petitioner No. 1 and their mother has not been recorded in the consolidation proceeding in the name of petitioner No. 1 as averred by respondent No. 5 but it is denied that there is any gradan attached to it or it is surrounded by compound wall. It is further stated that the vague allegations made by respondent No. 5 of bungalings, interpolations, forgery and alterations in the scheme by unscrupulous field staff are not borne out by the records.

10. In C. W. J. C. No. 192 of 1975 a petition was filed on behalf of respondent No. 5 (respondent No. 4 in C. W. J. C. No. 193 of 1975) praying for an enquiry for finding out the facts about the filing of the case by those petitioners whose names were subsequently deleted from the application. In relation to that controversy some more applications, affidavits and counter affidavits were also filed. It is not necessary to state the averments in those petitions, affidavits and counter affidavits at this stage. Reference may be made to them if and when necessary. Two counter affidavits were filed one on behalf of respondent No. 5 (respondent No. 4 in the case) and another on behalf of respondents Nos. 1, 3 and 4; (Nos. 1, 2 and 3 in the case).

In his counter affidavit respondent No. 5 has almost reiterated what he has stated in his counter affidavit in the other case. He has also denied the allegation that after delivery of possession of the lands allotted to them under the scheme, the petitioners of this case have settled down and invested huge sums of money for the improvement of lands, namely, by sinking of tube-wells etc. and that

they have built up their homes over the lands allotted, to look after their cultivation. Rather, it has been asserted that the tenants have not taken delivery of possession of their lands. Respondent Nos. 1, 3 and 4 in their counter affidavit also have reiterated what they have stated in their counter affidavit in C. W. J. C. No. 193 of 1975. However, it is admitted that petitioner Nos. 1, 3, 9, 10, 11, 16, 17, 18, 22, 23, 25 and 26 of C. W. J. C. No. 192 of 1975 have installed their tube wells on their lands after delivery of possession. It is denied that the tenants have constructed any residential building on the lands delivered to them but it is stated that some pucca sheds have been constructed by some of the petitioners to cover their tube-wells for protecting them from rains etc.

11. A reply to counter affidavits of the respondents has also been filed on behalf of the petitioners of C. W. J. C. No. 192 of 1975. It is not necessary to state the averments made therein in detail except that it has been reiterated therein that the tenants invested huge sums of money over the lands allotted to them under the scheme after taking delivery of possession thereof.

12. Some further supplementary affidavits have been filed in both the writ applications on behalf of respondent No. 5. A supplementary affidavit has also been filed on behalf of the petitioners of C. W. J. C. No. 193 of 1975. A supplementary affidavit has also been filed on behalf of respondent No. 2 in C. W. J. C. 193 of 1975. I do not propose to state facts stated therein. They may also be referred to if and when necessary.

13. Additional grounds were filed in C. W. J. C. No. 192 of 1975 while the hearing of the cases was going on. These grounds challenge the vires of Section 26 of the Act mainly on the ground that it confers unguided and unbridled power on the State to vary and revoke a confirmed scheme.

14. The following points have been urged on behalf of the petitioners of C. W. J. C. No. 193 of 1975.

(i) Under Section 26 of the Act State could vary or revoke a scheme only where as a change of agrarian policy it decides that such change or variation is necessary; as in the instant case, no such decision has been taken by the State, the revocation of the scheme is illegal.

(ii) All irregularities including illegality and impropriety could be corrected by the Member, Board of Revenue if necessary by orders under Section 35 of the Act in view of delegation of power to him under Section 34 of the Act and the Act does not contemplate revocation of the scheme under Section

26 for correction of such irregularities, illegalities and improprieties.

(iii) The State Government having already rejected the petition of respondent No. 5, it could not reopen the matter again on a subsequent application as no power of review has been conferred upon it under the Act.

(iv) The order of revocation of the scheme was illegal as respondent No. 2 did not apply his mind to the facts relevant for the purpose.

(v) An order as contained in Annexure 1 for starting a consolidation proceeding from the stage of Khanapuri without issuing a notification under Section 3 of the Act is illegal and fit to be quashed.

(vi) The scheme could not be revoked only in respect of four tolas of the village; if at all, it could be revoked for the entire village.

(vii) As the order of revocation was passed by respondent No. 2 mala fide, it was fit to be quashed.

15. Learned counsel appearing for the petitioners of C. W. J. C. No. 192 of 1975 supported the aforesaid grounds urged on behalf of petitioners of C. W. J. C. No. 193 of 1975. He also urged the following two points:

(i) The order of revocation was illegal inasmuch as it was passed without notice to the petitioners who were affected by it.

(ii) Section 26 of the Act itself being ultra vires as it confers unguided and unbridled powers on the State to vary and revoke a confirmed scheme, the order of revocation purported to have been passed under that section was illegal.

16. I propose to dispose of first the two points specially raised by learned counsel for the petitioners in C. W. J. C. No. 192 of 1975. In paragraph 21 of the writ application itself they have stated that they also represented to the Chief Minister that if the representation of respondent No. 5 for revoking and varying the scheme was allowed that would entail great harassment, prejudice and amount to unsettling twelve years' efforts with all the rigours of the Act which the petitioners had undergone and, therefore, the representation of respondent No. 5 may be rejected. The order cancelling and revoking the confirmed scheme in relation to the four tolas was passed after this representation of the petitioners had been filed. It could safely be presumed that that was considered before the order was passed. In the circumstances it is not open to the petitioners to say that they had no notice of the representation of respondent No. 5 for revoking the scheme and had no

opportunity to place their case before the authorities. The order of revocation of the confirmed scheme in the circumstances cannot be quashed on the ground of want of notice to the petitioners and violation of principles of natural justice.

17. Section 26 of the Act reads as follows:

"A scheme for the consolidation of holdings confirmed under this Act may, at any time, be varied or revoked, by a subsequent scheme prepared published and confirmed in accordance with this Act."

This section read disjointly from other provisions of the Act undoubtedly appears conferring unbridled power on the State for varying or revoking a confirmed scheme without providing any guideline, but the Section itself makes it clear that a scheme already confirmed under the Act can be varied or revoked only by a subsequent scheme, prepared, published and confirmed in accordance with the Act. So the section envisages preparation of a fresh scheme according to the provisions of the Act for varying or revoking a scheme already confirmed. Now Section 3 (1) lays down.

"With the object of effecting consolidation of holding for the purpose of better cultivation of lands in any area, the State Government may, after such enquiries as it may deem fit, by notification in the official Gazette declare its intention to make a scheme before the consolidation of holdings in that area."

It is obvious from this sub-section that a scheme can be prepared only with the object of effecting consolidation of holdings for the purpose of better cultivation of lands in any area. Preparation of a fresh scheme under Section 26 can also, therefore, be ordered only for the aforesaid object as mentioned in Section 3 (1) of the Act. It is, therefore, not correct to say that the Act does not provide any guideline for the purpose of ordering preparation of a fresh scheme under Section 26. Once such a scheme is prepared, published and confirmed in accordance with the Act, the scheme already confirmed early stands varied or revoked. It is not, therefore, correct to say that the State Government has been given unbridled power without any guideline for varying or revoking a scheme. The contention of learned counsel for the petitioners that section 26 of the Act is ultra vires on the aforesaid ground, in my opinion, is devoid of any substance and must be overruled.

18. After going through the petition for ordering enquiry and affidavits and counter affidavits filed in relation to the filing of the writ application by the petitioners whose names were subsequently deleted, I am con-

vinced that whosoever was responsible for filing the writ petition did not come to this Court with clean hands. Undoubtedly, signatures of some of those persons who were made petitioners in the writ petition and were subsequently deleted were forged. Some of them were admittedly dead and, therefore, signatures of dead persons were also forged. Petitioners of such a case are not entitled to any sympathy from this Court specially in exercise of writ jurisdiction and the petition is fit to be rejected on this ground alone.

19. I now take up for consideration the points raised in C. W. J. C. No. 193 of 1975 which have also been adopted by the petitioners of C. W. J. C. No. 192 of 1975. So far as the first point is concerned, in my opinion, there is no substance in it. Section 26 of the Act has already been quoted earlier. There is nothing therein to indicate that a scheme already confirmed could be varied or revoked only where as a change of agrarian policy it is decided that such variation or revocation is necessary. It has already been pointed out that the guideline for varying or revoking a scheme under S. 26 is "better cultivation of lands in the area." Better cultivation of lands in the area may be achieved even without any change in the agrarian policy of the Government. If the Government is satisfied that for the purpose of better cultivation of lands in the area a confirmed scheme should be varied or revoked, then on the language of Section 26 or any other provision of the Act it is not possible to hold that as there is no change in the agrarian policy of the Government the variation or revocation of the confirmed scheme is invalid.

20. For appreciating the second point, it is necessary to refer to section 34 (1) and 35 of the Act. Section 34 (1) lays down that the State Government may, by notification in the official Gazette, delegate any of its powers or functions under this Act to any officer not below the rank of a Collector. Section 35 provides that the State Government may, at any time, for the purpose of satisfying itself as to the legality or propriety of any order passed by an officer under this Act, call for and examine the records of any case pending before or disposed of by such officer and may pass such order as it thinks fit.

There is a proviso to Section 35 which requires that no order shall be varied or reversed without affording the parties interested an opportunity of being heard. The power vested in the State Government under Section 35 has been delegated by it to the member, Board of Revenue. This position is admitted. But nothing has been placed before us

to show that the power vested in the State Government under Section 26 of the Act has been delegated to anyone. The powers under Sections 26 and 35 are quite different. Under Section 35 the State Government is authorised to call for records for satisfying itself as to legality or propriety of any order passed by an officer under this Act and thereafter to pass such orders as it thinks fit.

Section 26 speaks of varying or revoking a confirmed scheme. Varying or revoking a confirmed scheme is different from examining the legality or propriety of any order passed by an officer under the Act and varying or reversing such an order. Of course, under Section 13 an order has to be passed by the Director of Consolidation for confirming the scheme and under Sec. 35 the legality or propriety of such an order may be examined by the Board of Revenue in exercise of the power delegated to it by the State Government. But in varying or revoking a scheme under Sec. 26, only the examination of the legality or propriety of the order of confirming the scheme is not involved. If an order under Section 13 of the Act is illegal or improper and that is set aside under Section 35, that will not involve making an altogether new scheme in part or as a whole. The Board of Revenue in such a case can only order for removal of the illegality or impropriety. But Sec. 26 contemplates variation or revocation of a scheme on much wider grounds, not on the ground of an illegality or an impropriety in any order passed under the Act.

Sections 35 and 26 obviously relate to different matters. Had not that been so and if all the powers which could be exercised under Section 26 can be exercised under Section 35 of the Act, then there would have been no necessity of enacting Sec. 26. For instance, in the instant case the scheme has not been revoked on account of any illegality or impropriety in any order passed under the Act. It has been revoked on the ground that there was widespread corruption among the field officers and even after the confirmation of the scheme there were fraudulent alterations in the records. These fraudulent alterations are not supported by any order of an officer. Therefore, they could not be corrected in exercise of powers under Section 35 on the ground of illegality or impropriety.

It is correct to say that power under Section 26 should not be utilised for correction of illegalities or improprieties in any order passed by an officer under the Act, but the order of revocation on the face of it does not show that it has been passed for correction of such illegalities or improprieties.

Therefore, there does not appear any substance in the contention of learned counsel for the petitioners that wrong of the nature which is sought to be corrected by revocation of the scheme under Section 26 of the Act could be corrected by the Member, Board of Revenue, in exercise of powers under Section 35 of the Act delegated to him under Section 34 (1) of the Act.

21. Coming now to the third point raised on behalf of the petitioners, I find that the Act does not confer any power of review, but that does not mean that once a prayer for varying or revoking a confirmed scheme has been refused, then a confirmed scheme cannot be varied or revoked thereafter. The use of the expression 'at any time' in Section 26 indicates that whenever the State Government considers it necessary to vary or revoke a scheme for the purposes of better cultivation of the lands in the area it may vary or revoke the scheme. No time limit has been or can be fixed for the purpose. In the circumstances prevailing few days earlier variation or/and revocation of the scheme may not be justified but it may be justified under the circumstances prevailing few days after.

Therefore, it will be against the spirit of the Act to lay down that once a prayer for variation or revocation is refused the matter cannot be re-opened again. Of course, it may not be desirable to order variation or revocation of scheme on the basis of same facts on which variation or revocation was prayed for and the prayer refused, but such an order will not be without jurisdiction. It would only be improper and a question may arise whether an order passed by the State Government under Section 26 of the Act for variation or revocation of a scheme, if it is improper, can be set aside by this Court in exercise of writ jurisdiction.

In the instant case, as it appears from the order of respondent No. 2 in annexure 10 he did not vary or revoke the scheme on the basis of the facts on which the prayer was refused earlier. Of course, the two petitions of respondent No. 5, one which was rejected and the other on the basis of which the revocation has been ordered do not contain different sets of facts, but the order of variation or revocation passed by respondent No. 2 on the face of it shows that it was not made only on account of petition of respondent No. 5 dated 17th of May, 1974. The order was made after taking into consideration applications filed by other tenants as well as reports made by officers. Whether the order of respondent No. 2 can be set aside on the ground that it was passed mala fide

has to be examined separately. but I do not think on the facts and circumstances of the case, it can be held that the order is bad for absence of provision for review in the Act.

22. Point No. (iv) that respondent No. 2 did not apply his mind to the facts relevant for the purpose is allied to point No. (vii) that he passed the order mala fide, for, it has been contended that non-application of mind to the facts relevant for the purpose amounted to mala fide in law. This point may, therefore, be considered together with point No. (vii) raising the question of mala fide of respondent No. 2.

23. There is no substance in point No. (vi) that the scheme could not be revoked only in respect of four tolas of the village if at all it could be revoked for the entire village. If the scheme could be varied with reference to four tolas and thereby other tolas of the village were not affected, then partial revocation only in respect of the four tolas could be made. There is nothing in Section 26 or any other provision of the Act to show that there could not be partial revocation. 'Revocation' includes partial revocation and the revocation only in respect of four tolas of the village cannot be held to be illegal on the ground that it is not in respect of the entire village.

24. Elaborate arguments have been advanced relating to point No. (vii), namely, that the order of revocation was passed by respondent No. 2 mala fide. In order to appreciate the respective contention of the parties relating to this point, it is necessary to refer to annexures 7 and 10 which contain notings of Government officials and orders passed thereon by the Revenue and the Chief Minister. It may be stated here that counsel for all the parties have freely referred to these notings and orders and no one has raised any objection to their being considered for deciding the question of mala fide. Annexure 7 contains notings and orders on the first application of respondent No. 5 for revocation of the scheme under Section 26 of the Act.

The sum and substance of the notings of the Special Secretary, Shri Ramakant Srivastava, dated 15th March, 1974 is that though in appropriate cases the State Government has power to order for a fresh consolidation, difficulties to an individual cannot be basis for that. By way of illustration he stated some circumstances which, according to him, could be basis for ordering fresh consolidation after revoking the earlier one. He further pointed out in his notes that respondent No. 5 could agitate the matter by filing a suit in the civil court and that if necessary opinion of the law Department might be ob-

tained on the question. The Chief Secretary while endorsing the file to the Revenue Minister pointed out that as Additional Member, Board of Revenue, he had given his opinion in the matter on any application under Section 35 of the Act and that may be seen. The then Revenue Minister, Shri Lahtan Choudhary, in his minutes dated 17th of March, 1974 also took the view that it would not be proper to revoke the whole scheme for an individual who had not filed necessary applications before the appropriate officers at proper time. That person may go if he so liked to the Civil Court for redress of his personal grievances. He further observed that after the Chief Minister saw the file, opinion of the Law Department might also be obtained. The Chief Minister put his signature below the signature of the Revenue Minister on 29th of March, 1974 thereby endorsing the views of the Revenue Minister. The file was then sent to the Law Department and the opinion given by the Department was that the view taken by the Revenue Minister was correct.

25. It appears that thereafter the file was not again placed before the Revenue Minister or the Chief Minister until respondent No. 5 filed another application (Annexure 8 to C. W. J. C. 193 of 1975) on 17th May, 1974 before respondent No. 2, Shri Kedar Pandey, who had already taken over as Revenue Minister on 30th of April, 1974. Two rejoinders were filed to the said application of respondent No. 5 on behalf of petitioner No. 1, Chandrawati Devi. The first one (annexure 9) was addressed to the Chief Minister and the second one (annexure 9/A) was addressed to the Revenue Minister. On 20th of May, 1974, the Revenue Minister passed an order of stay on the said petition of respondent No. 5. The notings, as it appears from annexure 10, relating to the petition of respondent No. 5 dated 17th of May, 1974 started from 31st of May, 1974.

Shri Thakurdas Mehta Director of Consolidation, respondent No. 4, in his notes stated that the Revenue Minister had ordered that the file may be placed before him and action in that connection may be stayed in the meantime. He thereafter stated about the orders passed on the earlier petition of respondent No. 5 and the fact that the opinion of the law Department was also obtained. He also noted that respondent No. 5 had been informed of this. It is, however, not in dispute that the information was given to respondent No. 5 by a letter dated 28th May, 1974 after the order for stay had already been passed by respondent No. 2 on 20th of May, 1974. The Special Secretary, Shri R. K. Srivastava,

endorsed this note of Shri Mehta on 1st of June, 1974. The file was placed before respondent No. 2 on 10th of June, 1974 and he ordered for a discussion on 17th of June, 1974 at 4 P. M. After discussion the Secretary noted on 19th June, 1974 that the Revenue Minister wanted that the report of Additional District Magistrate and records of consolidation be called for and if on examining them it appeared that in the consolidation scheme there had been 30 to 40 per cent mistakes the State Government may consider the question of having a new scheme.

Shri Mehta again reiterated his earlier view in his notes dated 3rd of July, 1974. Shri B. B. Verma, Additional Secretary in his notes addressed to the Land Reforms Commissioner on 3rd of July, 1974 after referring to the earlier notes and orders opined that on the application of respondent No. 5 the distribution of certificates of transfer should not be stayed but if on examination of the records it appeared that in the records of consolidation there were 30 to 40 per cent mistakes, then the matter may be re-opened. He also suggested that respondent No. 4 be asked to enquire himself into the matter in detail and submit his report within a month and further action should be taken only after receipt of his report. The Chief Secretary endorsed the notes of the Additional Secretary to the Revenue Minister. Respondent No. 2 thereafter ordered for a discussion with the Land Reforms Commissioner.

26. After holding discussions, respondent No. 2 passed the following orders on 20th of July, 1974:—

“आयुक्त से बातें हुई। इस मामले में उस वक्त वे (एडीसन मेम्बर बोर्ड ऑफ रेवेन्यू) भी थे।

ऐसी हालात में अपनी कोई दूसरी राय देने में असमर्थता प्रगट की। इस मामले में मैंने विशेष सचिव एवं निर्देशक से भी पृष्ठ 14/टि. पर बातें की थी।

पुनः सचिका में श्री. जे. के. पी. सिंह एवं श्री राम किशोर प्र. नारायण सिंह के व्यक्तिगत मामले को ही बात उठाई हुई है। विभाग को पृष्ठ 14/टि. के विमर्श के आलोक में कार्रवाई करनी चाहिये थी।

प्रश्न श्री जे. के. पी. एन. सिंह एवं उनके भाई के व्यक्तिगत मामले का नहीं है परंतु धर्मपुर ग्राम में की गई चकबंदी कार्य के संबंध में है। इस संबंध में बहुत पूर्व में ही आवेदन विभाग में दिये गये थे कि उक्त ग्राम में चकबंदी कार्य में गड़बड़ी हुई। इसकी जांच भी अपर समाहर्ता नालंदा द्वारा कराई गई थी। अपर समाहर्ता नालंदा ने अपने पत्रांक 284 आर

दिनांक 24/4/74 के द्वारा अपना प्रतिवेदन दिया था जिसका जिक्र पृ 14/टि. के विमर्श पर है। यह प्रतीत होता है कि उक्त प्रतिवेदन पर विभाग ने कोई कार्रवाई नहीं की। पृष्ठ 14/टि. की टिप्पणी के बावजूद भी केवल व्यक्तिगत मामले की ही चर्चा की गई है।

हमने अपर समाहर्ता के प्रतिवेदन को देखा है। उससे स्पष्ट है कि उक्त ग्राम के चकबंदी कार्य में अनियमितता बरती गई है। अपर समाहर्ता के प्रतिवेदन के पृष्ठ ४ से प्रतीत होता है कि उस समय तक की गई जांच के अनुसार 96 मामले में अनियमितता हुई है। अपर समाहर्ता ने अपनी जांच में अनियमितता को ठीक पाया है। यह संभव है कि इसके अभाव और भी मामले हो जिसमें जांच नहीं हुई हो।

चकबंदी पदाधिकारी एकंगर सराय की प्रतिवेदन जिसे उन्होंने अपने पत्रांक 158 दिनांक 28/5/73 के द्वारा निर्देशक चकबंदी को भेजा था विचार करने के योग्य है, अपने पृष्ठ 4/टि. में उन्होंने कहा है कि धर्मपुर ग्राम में हुई अनियमितता के कारण वहां जनता का विश्वास उठ गया है। चकबंदी पदाधिकारी ने सिफारिश की थी कि धर्मपुर ग्राम में चकबंदी की नई योजना बननी चाहिये जैसा अन्य ग्रामों में निर्देशक के आदेश के पूर्व में हुआ है।

हमारे विचार में यदि चकबंदी पदाधिकारी एवं अपर समाहर्ता के प्रतिवेदन पर विभाग में समय पर कार्रवाई की गई होती तो चकबंदी कार्य के लिये यह लाभदायक होता। इन प्रतिवेदनों से मैं निष्कर्ष पर पहुंचा हूं कि वास्तव में धर्मपुर ग्राम में चकबंदी कार्य में बहुत अनियमितता बरती गई है और वहां के लोगों को न्याय देने के लिये उचित है कि वहां चकबंदी कार्य फिर से किया जाय। राज्य की जनता और विशेष रूप से धर्मपुर ग्राम की जनता को चकबंदी कार्य में पुनः आस्था कायम रखने के लिये यह आवश्यक है कि धर्मपुर ग्राम में चकबंदी कार्य पुनः हो जिससे सभी अनियमितता को समाप्त किया जा सके।

परंतु विभाग से समय पर इस ओर ध्यान नहीं देने के कारण बहुत खलब हो गया है। कोई आदेश देने के पूर्व में विधी परामर्श की राय जानना चाहिये कि वर्णित परिस्थिति में बिहार चकबंदी की धारा 26 के अंतर्गत ग्राम धर्मपुर थाना एकंगर सराय जिला नालंदा में नये सिरे से चकबंदी कार्य कराने की योजना बनाने का आदेश पारित किया जा सकता है या नहीं।

27. The matter was then sent to the Law Department and the Law Secretary gave the following opinion:—

“Law Deptt. can advise on the facts submitted in the file. On the basis of facts noted at page 5-7 in Law Deptt. at page 8/N agreed with the minutes of the then Minister Revenue at page 7/N that it is not desirable to revoke the confirmed scheme and to prepare a fresh scheme for the benefit of a single person.

2. Section 26 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 is quoted below for ready ref.

‘Power to vary or revoke scheme;

Scheme for the consolidation of holdings confirmed under this Act may at any time be revoked, varied or revoked by a subsequent scheme prepared, published and confirmed in accordance with this Act.’

3. In the minutes at page 20-21/N Minister Revenue has pointed out that there are 96 irregularities in consolidation work in village Dharampur and in case it is found that those irregularities have not been cured yet because there are difficulties in curing them then there may be a justification to prepare a subsequent fresh scheme.

4. It is for the administrative Deptt. to enquire and ascertain the real facts and in case it is found that a fresh scheme is not proposed to be done for a single individual but it is proposed to meet and cure numerous irregularities which would not be cured and in spite of attempts even now, they cannot be cured, then there can be no legal objection in preparing a fresh scheme under Section 26 of the Act.”

Thereafter on 22nd of August, 1974, respondent No. 2 recorded his opinion that he would like that respondent No. 4 should himself enquire into the matter whether the mistakes as pointed out in the report of the Additional Collector, Nalanda, have been corrected or not and submit his report within a week. Respondent No. 4 thereafter reported that in view of Section 25 of the Act there could be no legal difficulty in correcting the irregularities in the consolidation proceedings. The Chief Secretary in his notes dated 21st of September, 1974, pointed out that there were 724 raiyats in village Barakhurd but there were irregularities only in case of 74. The mistakes in 20 cases had already been corrected. Therefore, in his opinion there was no justification for revoking the entire consolidation scheme. According to him, the mistakes in the remaining 54 cases could be corrected in the same way as they had been

corrected in 20 cases. He also pointed out certain defects in the report of respondent No. 4 and according to him, respondent No. 4 had not gone deep into the matter.

28. When the file was placed before respondent No. 2 on 1st of October, 1974, he recorded the following minutes which were addressed to the Chief Minister:—

‘ इस संचिका में नालंदा जिले के नूर सराय अंचल के बारा खुर्द ग्राम के धर्मपुर टोले में चकबंदी कार्य में हुई अनियमितताओं के संबंध में हो रहा है। इस संबंध में पृष्ठ 20.20/टि. पर मेरी टिप्पणी से विषय स्पष्ट होगा। विधि परामर्शी की राय पृष्ठ 21-22/टि. पर है।

अपर समाहर्ता के प्रतिवेदन से स्पष्ट है कि बाराखुर्द ग्राम के धर्मपुर टोले में प्रतिनियुक्ति अमीन ने बहुत अनियमिततायें की थी। अपर समाहर्ता के प्रतिवेदन के अनुसार उस समय तक 96 मामले में अनियमितता पायी गयी थी। संबंधित जमीन के विरुद्ध आरोप के बावजूद जैसा कि अपर समाहर्ता के प्रतिवेदन से प्रतीत होता है ठीक तरह से कार्यवाही नहीं हुई साथ ही इन अनियमितताओं को सुधारने संबंध में संतोषप्रद कार्यवाही नहीं की गई। इस संबंध में भूमि सुधार आयुक्त की राय से मैं सहमत हूँ कि इसके लिये चकबंदी पदाधिकारी एवं उप निदेशक दोषी हैं।

नूर सराय अंचल के बाराखुर्द ग्राम के धर्मपुर टोले में लगभग 280 रैयत हैं जिसमें 96 मामलों में धोर अनियमिततायें हुयी हैं। इन अनियमितताओं में अबतक सिर्फ 20 मामलों में ही सुधार किये गये हैं। राज्य में चकबंदी कार्यक्रम में भ्रष्टाचार एवं अनियमितताओं के संबंध में बहुत शिकायतें आ रही हैं एवं विधान सभा में भी चर्चा होती रही है। इस विशेष मामले में उक्त अमीन द्वारा की गयी अनियमितताओं भ्रष्टाचार का नमूना है। विभागीय पदाधिकारियों द्वारा दिये गये विचार से मैं सहमत नहीं हूँ कि चकबंदी अधिनियम की धारा 20 के अंतर्गत इन अनियमितताओं का सुधार हो सकेगा। भूमि सुधार की दिशा में चकबंदी कार्य बहुत ही आवश्यक है। अतः इस तरह की गंभीर अनियमितताओं के लिये चुप रहना उचित नहीं है क्योंकि चकबंदी में आम जनता का विश्वास माना आवश्यक है।

अतः मैं चाहूंगा कि नूर सराय अंचल के बाराखुर्द ग्राम के टोले में चकबंदी अधिनियम की धारा 26 के अनुसार नयी योजना बनाकर पुनः कार्यवाही की जाय जिससे वहाँ के एवं राज्य की जनता में

चकबंदी कार्यक्रम के प्रतिविश्वास सुदृढ़ हो। यह पहला उदाहरण है कि धारा 26 के अनुसार कार्यवाही की जा रही है। नयी योजना वरीष्ठ पदाधिकारी की देखरेख में कार्यान्वित होनी चाहिये।”

On 4th of October, 1974, the Chief Minister recorded the following minutes:—

“The Law Deptt. had given a conditional advice that is:—

‘In case it is found that a fresh scheme is not proposed to be done for a single individual but it is proposed to meet to cure numerous irregularities which could not be cured and in spite of attempts even now, they cannot be cured then there can be no legal objection in preparing a fresh scheme under Section 26 of the Act.’

In the light of this legal advice the Director has since reported that irregularities were committed in 191 out of 4785 holdings and that out of the said 191 holdings, correction has already been made in respect of 49 holdings. The Director has further stated that correction can be made in respect of the remaining 142 holdings also under S. 11 (5) of the relevant Act read with R. 20. The Law Deptt. should see this report of the Director and advise whether correction in respect of the remaining holdings can be done even now under the provision mentioned by the Director? If it is so then recourse should be taken to this procedure instead of revoking the entire scheme. If, however, the mistakes and irregularities cannot be rectified by this procedure there would be no option left but to revoke the whole scheme even though it would mean obliterating the labour of 12 years.”

29. On 16th of October, 1974, respondent No. 2 again ordered for discussion on 17th October, 1974 at 12.30 P. M. Thereafter on 22nd of October, 1974 respondent No. 2 passed the following orders:—

“कृपया 102-108 पृ. देखा जाय। निर्देशक चकबंदी की टिप्पणी से प्रतित होता है कि इस टोले की पुनः चकबंदी करने में करीब 70 हजार रुपये खर्च होंगे। और करीब डेढ़ वर्ष समय लगेगा। इससे कम समय लगे इसका भी प्रयास किया जा सकता है।

मेरी राय में इसे स्वीकार करना चाहिये ताकि हमेशा के लिये एक उदाहरण यह बन जाय।

मेरी टिप्पणी पृ. 28/टि. पर कृपया देखी जाय।”

Respondent No. 2 suggested for revoking of the scheme and ordering for a fresh scheme. The Chief Minister endorsed this on 1st of December, 1974. The aforesaid order of res-

pondent No. 2 was for revoking the scheme only for tola Dharampur, but on further consideration as evidenced by annexure 10/A it was decided to revoke the scheme and order for a fresh scheme in respect of three other tolas as well.

30. The respective cases of the parties as stated in the writ application, counter-affidavits and reply to counter-affidavits on the question of friendship and intimacy between respondent No. 5 and respondent No. 2 has already been noticed while stating the facts of the case. On the materials on the record it is not possible to hold that respondent No. 2 and respondent No. 5 were very intimate and such friends as to make respondent No. 2 go out of his way for helping respondent No. 5. Respondent No. 2, as already stated, in his counter-affidavit has denied intimate friendship between him and respondent No. 5 and has admitted that they were only known to each other. It is, therefore, not possible to hold that respondent no. 2 acted mala fide and helped respondent No. 5 on account of his intimate friendship with him.

31. It has, however, been contended on behalf of the petitioners that the notings referred to above themselves show that respondent No. 2 went out of his way in helping respondent No. 5 and even if it was not established that the two were intimate friends, the conduct of respondent No. 2 in revoking the scheme and ordering for a fresh scheme without materials justifying it shows that he acted mala fide. Much emphasis has been laid in this connection as to the percentage of mistakes in the consolidation records relating to the village and it has been pointed out that though the percentage was much less than 30 to 40 per cent, even then the old scheme was revoked and preparation of a fresh scheme was ordered.

It has also been submitted that the opinion of the Law Department was not obtained as desired by the Chief Minister in his minutes dated 4th October, 1974. The Chief Minister in his minutes dated 4th of October, 1974 wanted to know the opinion of the Law Department as to whether the mistakes could be rectified in the manner suggested by respondent No. 4. The mistakes, as already noticed, were interpolations in the records in good number of cases after confirmation of the scheme. As observed earlier, these interpolations which were made surreptitiously and not by an order of any officer could not be corrected under Section 35 of the Act. Respondent No. 4 in his notes stated that in his opinion the mistakes could be rectified by adjusting payment of compensation and refer-

red to section 25 of the Act in that connection.

In the minutes of the Chief Minister dated 4th October, 1974, it has been stated that according to respondent No. 4, the mistakes could be corrected under Section 11 (5) of the Act read with Rule 20. Section 11 provides for preparation of a draft scheme and nothing can be done under that section after the scheme has been confirmed. Rule 20 deals with payment of compensation and the manner in which it is to be deposited under Section 19. I for myself do not see how the interpolations could be corrected by payment of compensation under Section 25 of the Act or Rule 20 of the Bihar Consolidation of Holdings Rules, 1958. In my opinion, even the damage done to particular raiyats by interpolations in the consolidation records after confirmation could not be compensated by adjustments in the payment of compensation. It, therefore, can easily be assumed that the opinion of the Law Department would not have gone against the view taken by respondent No. 2 as it appears from annexure 10, respondent No. 2 ordered for revocation of the scheme and preparation of a fresh scheme on the ground that there were interpolations in good number of cases on account of corruption in the field staff and in such cases preparation of a fresh scheme should be ordered for setting an example.

It cannot be said that the view taken by respondent No. 2 was such which could not be taken by a reasonable man. Simply because the Secretaries or others had taken another view it cannot be held that the order passed by respondent No. 2 which was endorsed by the Chief Minister was mala fide specially when on the materials on the record it is not found possible to hold that respondent No. 2 helped respondent No. 5 on account of intimate friendship between the two. The fact that the percentage of mistakes in the revenue records was not 30 to 40 per cent is by itself not enough to hold that order passed by respondent No. 2 was mala fide. If the mistakes relating to tola Dharampur were alone to be taken into consideration the percentage of such mistakes, according to respondent No. 2, was much higher.

32. Reliance was placed by learned counsel for the petitioners on the decision of the Supreme Court in *S. Partap Singh v. State of Punjab* (AIR 1964 SC 72). The facts of that case were quite different and in the circumstances of the case before us it cannot be held that the order passed by respondent No. 2 was mala fide. It is well established that it is for the person who alleges mala fide in the authorities to prove it. In

province of Bombay *v. Kushaldas S. Advani* (AIR 1950 SC 222) it was observed—

“The point is that it lies heavily on the person who challenges the bona fides of a public authority or who contends that the authority had acted outside its powers to establish his case on cogent legal evidence. He cannot succeed by leaving the matter in the air and to the ingenuity of his counsel in creating an atmosphere of mere suspicion, which falls far short of legal proof.”

The law on the subject as to what is mala fide justifying judicial review of administrative action was fully discussed by Untwalia, J. (as he then was) in the case of *N. P. Mathur v. State of Bihar* (AIR 1972 Pat 93) (FB). Applying those tests I do not think that the petitioners in these cases have been able to establish that the order for revocation of the scheme and preparation of a fresh scheme passed by respondent No. 2 was mala fide.

33. It may be that another person may have taken a different view and, as it was respondent No. 5 who was mainly responsible for bringing to the notice of the authorities the interpolations in the consolidation records after the scheme was confirmed and large scale corruption in the field staff and as on his earlier application it had been ordered that the matter should not be re-opened on the basis of the grievances of an individual and respondent No. 5 may file a civil suit for the redress of his grievances if he so liked, may not have ordered for revocation of the old scheme and preparation of a new one. But as held earlier, in absence of any mala fides on the part of respondent No. 2 and any legal difficulty in passing the aforesaid order which does not appear to have been passed on irrelevant considerations by taking a view which could not be taken by a reasonable man, this court in exercise of writ jurisdiction cannot interfere with the order even if it agreed with the contention of learned counsel for the petitioners that the other view could also possibly be taken. While exercising writ jurisdiction this Court has to exercise restraint on its temptation to act as a court of appeal and quash an order of Minister on such a ground.

34. The only point which now remains to be discussed in point No. (v) that an order as contained in annexure 1 for starting a consolidation proceeding from the stage of Khanapuri without issuing a notification under Section 3 of the Act is illegal and fit to be quashed. As it appears from the notes (annexure 10/A) of the Deputy Director of Consolidation of Holdings addressed to respondent No. 4 it has been suggested therein that in preparing a new scheme steps should

be taken for preparation of up-to-date records-of-right before consolidation in accordance with the provisions of Section 8 of the Act. The aforesaid contention appears to have been advanced on the basis of this suggestion and I am of the opinion that there is force in the contention that if a fresh scheme is to be prepared before taking steps under Section 8 of the Act a fresh notification under Section 3 should be issued and fresh village Advisory Committee should be constituted under Section 7 of the Act.

It may, however, be stated here that Mr. Shreenath Singh who gave reply on behalf of the petitioners also suggested that in preparing a new scheme it may not be necessary to undo all what has been done under Sections 8, 9 and 10 of the Act and the authorities may start with the preparation of a draft scheme as envisaged by Section 11 of the Act. In this connection Mr. Singh submitted that the scheme which has been confirmed is not killed in praesenti, but valid until a new scheme is prepared. There appears substance in this contention that a scheme confirmed remains valid until it is varied or revoked by a subsequent scheme prepared, published and confirmed in accordance with the Act. That is manifest from the language of Section 26 itself. Therefore, so long a new scheme is not confirmed the scheme which has already been confirmed shall remain valid. But that will not justify, while preparing a new scheme, to start from the stage of the preparation of a draft scheme. Section 3 (1) of the Act has already been quoted earlier. Section 3 (2) reads as follows:—

“(2) The substance of the notification shall be announced by beat of drum in the village comprised in the notified area and copies of the notification shall be hung up at the offices at all the Gram Panchayats, if any, the police-stations, the offices of the Anchal Adhikaris and the village cutcherries of the State Government for collection of rent in such area.”

No doubt, sub-section (1) of it says that the State Government may, after such enquiries as it may deem fit, by notification in the official gazette declare its intention to make a scheme for the consolidation of holdings. But, in my opinion, the word ‘may’ (after the expression “State Government”) means ‘shall’ and it is imperative on the State Government to issue a notification in the official gazette declaring its intention to make a scheme. The expression ‘may’ has been used for giving a discretion for the State Government to decide whether a scheme for consolidation of holding should be made or not in a particular area, but once it is decid-

ed that a scheme should be made for a particular area, then a declaration in the official gazette of the State’s intention must be notified.

Certain consequences as mentioned in Sections 4, 5 and 6 of the Act follow from the said notification and if a notification is not made, suits or legal proceedings may be instituted in respect of the lands in such area and the lands may be transferred without sanction leading to complications and hindrance in the preparation of the scheme. As soon as the earlier scheme was confirmed the notification issued under Section 3 by respondent No. 1 for that scheme lost its force and on the basis of that notification preparation of a fresh scheme cannot be made nor persons holding lands in the area be restrained from instituting suits or legal proceedings or transferring their lands without sanction. In my opinion, therefore, once the State Government has decided to get a fresh scheme prepared for the aforesaid four tolas of village Barakhurd, it must get published a notification in the official gazette of the State’s intention before taking any other action in connection with preparation of the scheme.

35. In the result, the prayer of the petitioners for quashing the order of respondent No. 2 for revocation of the old scheme and preparation of a new scheme in respect of the lands of the aforesaid four tolas of village Barakhurd is refused. As distribution and grant of certificates of transfer may lead to complications in preparation of the new scheme which has been decided upon by respondent No. 1, the prayer of the petitioners for quashing the order of respondent No. 1 staying the distribution and grant of certificates of transfer is also refused. However, let a direction issue to respondents 1, 3 and 4 that before taking any action in connection with the preparation of a fresh scheme a fresh notification under Section 3 of the Act should issue and the direction of respondent No. 4 for commencing de novo proceedings under the Act from the stage of Khanapuri only should be modified.

It is made clear to avoid any confusion that in view of the allegations of wide-spread corruption in the field staff it may be open to the authorities in the preparation of the new scheme to ignore the records prepared under the scheme going to be revoked by the new scheme and act on the earlier records. If I had to deal only with C. W. J. C. No. 192 of 1975, for reasons stated earlier, I would have dismissed it outright, but in view of the fact that both the writ applications are inter-connected and a direction is being issued for modification of the order of

AIR 1971 Madh Pra 162 = 28 STC 558 18

AIR 1969 Orissa 130 15, 16, 17

AIR 1969 Orissa 182 15, 16

AIR 1966 SC 334 = (1966) 1 SCR 120 12

AIR 1965 SC 1740 = 1965 SCD 1168 13,

16, 17, 22

AIR 1964 SC 1006 = (1964) 6 SCR 261

16, 17, 22

Kuldip Singh with Rajeshwar Kumar Gupta, J. P. Singh Sandhu and R. L. Batta, for Petitioners; H. L. Sibal with J. L. Gupta, N. K. Sodhi and G. C. Garg (for Nos. 2 and 3) and D. N. Rampal, Asst. Advocate-General (for No. 1), for Respondents.

S. S. SANDHAWALIA, J.:— Whether a writ of mandamus can or should issue for a claim of money simpliciter—is the significant issue which arises at the very threshold of this case admitted directly to a hearing by a Full Bench.

2. The facts are not in serious dispute. Thirty-one partnership business firms of Tarn Taran, district Amritsar, have jointly moved this writ petition to claim a writ of mandamus for the refund of unspecified sums of money which are alleged to have been paid by them under a mistake of fact or law to the Market Committee, Tarn Taran. It is the common case that under the earlier unamended Section 23 of the Punjab Agricultural Produce Markets Act (hereinafter called the Act) the Market Committees were entitled to levy fee ad valorem at the rate of Rs. 1.50 P. on the purchase or sale of agricultural produce worth Rs. 100 only. By the Ordinance No. 40 of 1974, the aforesaid Section 23 was amended and the market fee was raised from Rs. 1.50 P. to Rs. 2.25 P. ad valorem. This ordinance was later replaced by the Punjab Agricultural Produce Markets (Amendment) Act No. 13 of 1974 and was given retrospective effect from the date of the issue of the earlier Ordinance. The vires of the amending Act were challenged by a spate of writ petitions filed by business firms all over the State and it is not denied that some of the present petitioners were also parties to the said writ petitions. Two hundred and eleven such writ petitions came up together before a Division Bench consisting of Tuli and Pattar JJ. and were disposed of by a common judgment in *M/s. Hanuman Dall & General Mills, Hisar v. The State of Haryana*, AIR 1976 Punj & Har 1. Therein the amending Act enhancing the rate of the levy of market fee was struck down as unconstitutional. It is significant to note that in that set of

writ petitions express prayers for the refund of the excess tax had been made but in the concluding and the operative part of the order, the Bench in terms observed that the impugned statute was being struck down but in all other respects the writ petitions were being dismissed with no order as to costs. It was also noticed in the said judgment that no other point of substance apart from that challenging the vires of the statute had been urged before it and indeed it was the common case before us also that the matter regarding the refund of unquantified sums alleged to have been paid in excess was not pressed or argued before the Division Bench.

3. After the aforesaid decision had been rendered there arose a spate of writ petitions of the present nature claiming in effect that unquantified sums of excess tax alleged to have been paid under mistake of law or fact be directed to be refunded to the petitioners. On behalf of the respondents, a four-fold preliminary objection to the very competency of the writ petitions was raised. It was first alleged that a joint writ petition was not maintainable. Apart from this, it was highlighted that the remedy was misconceived and no writ petition under Article 226 of the Constitution for the mere recovery of money could lie and the petitioners must be relegated to filing regular civil suits therefor. Objection was also raised that the direction to refund could be given only by way of consequential relief in the petitions earlier filed but no refund having been granted therein a fresh writ for recovery of money alone was barred. The bar of limitation was pleaded on the ground that under the statutory provisions applicable the claim for refund was being made beyond a period of six months from the 8th of November, 1974, when the decision in *M/s. Hanuman Dall & General Mills' case* (AIR 1976 Punj & Har 1) (*supra*) was rendered. Lastly it was claimed that the writ petitions be dismissed for having suppressed material facts on the point whether the sums claimed to be refunded had not been actually recovered by the petitioners from the buyers under the provisions of the Act and the Rules.

4. As the very maintainability of the writs of this nature was put in serious doubt, the Motion Bench thought it expedient to place the matter even for admission before a Full Bench. On the 22nd of August, 1975, the Full Bench ad-

mitted this petition as a representative one of nearly a hundred others of this nature, for a regular hearing.

5. To clear the ground I may at the very outset point out that on behalf of the thirty-one petitioner-firms here, the primary and indeed the sole relevant claim is the refund of unspecified sums of money alleged to have been paid by them in excess of the lawful fee imposable upon them under the unamended Section 23 of the Act. This claim at once raises the issue whether the scope and nature of the writ of mandamus warrants its issuance for the purpose of recovery of money and money alone.

6. There is no dispute (and indeed it was conceded to be so on behalf of the respondents) that the Courts under Article 226 of the Constitution whilst quashing a taxing statute or setting aside an illegal order can grant as a consequential relief the refund of illegally collected taxes or direct the payment of a specific amount of money. The particular issue, therefore, is whether in the absence of any challenge to a statutory provision or order, the relief for the payment of a sum of money simpliciter can be claimed.

7. As will appear hereafter the issue is concluded against the petitioners by binding and authoritative precedent. Nevertheless the point is of adequate significance to merit a brief examination on principle as well.

8. In Halsbury's Laws of England, scope and the nature of a writ of mandamus has been pithily described as follows:—

"The order of mandamus is an order of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty."

The statement of the law on the scope of mandamus in *Corpus Juris Secundum* is—

"* * as a writ commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. It is a proceeding to compel someone to perform some duty which the law imposes on him, and the writ may prohibit the doing of a thing, as well as command it to be done."

9. It is evident from the aforementioned authoritative exposition of the law that the sine qua non for the issuance of a writ of mandamus is the existence of a statutory or a public duty devolving upon the person or the body against whom the said writ is directed. Equally settled it is that along with this must co-exist a corresponding right in the petitioner which would entitle him to claim the enforcement of the said statutory public duty. Unless these two pre-conditions are satisfied, the requisite foundation for the issuance of a writ of mandamus can hardly be said to exist. Applying this twin test in the present case, I am of the view that neither one stands satisfied. The array of learned counsel for the petitioners were wholly unable to pin-point even a single statutory provision in the Agricultural Produce Market Act or the Rules framed thereunder, which imposed upon the respondent any statutory public duty to pay unquantified sums of money claimed on behalf of the numerous petitioners. Equally no provision in the same set of laws could be pointed out which would inhere in the petitioners a fundamental right to the relief which they seek to claim. Indeed on the face of it, (as in the present case) in a contentious claim of money regarding which the parties are at issue, it can hardly be ever said that there devolves on one a statutory or a public duty to pay money or a fundamental or unequivocal right to receive the same in the other. The necessary conditions precedent, therefore, for the issuance of a writ of mandamus are thus non-existent.

10. Authoritative legal opinion has repeatedly highlighted the fact that the high prerogative writ of mandamus would issue only to compel performance of constitutional, fundamental or public duties. It needs no great erudition to say that every legal right would not entitle its claimant a writ of mandamus. Can a mere claim of money be raised to the pedestal of a statutory or fundamental right? I believe that the answer to such a query must necessarily be in the negative. As in the present case, the petitioners rest their claim either in contract or in tort. Is a contractual right to money or a tortious claim of damages competent to be treated as a statutory or a fundamental right? I believe that it can possibly be termed neither one nor the other. It has to be borne in mind that not all claims of legal right stand on the exalted footing of statutory and fundamental rights.

or their corresponding duties for which alone the writ of mandamus is a competent remedy.

11. The primary scope and the function of a writ of mandamus has been pithily expressed in the phrase that this writ is issued to command and execute and not to enquire and adjudicate; not to establish a legal right but to enforce one. It is only where the legal public duty is clear, unqualified and specific that a writ of mandamus can be truly claimed. It has not to be granted where the claim of the petitioner has, in fact, to be first established and adjudicated upon before it can be enforced. As in the present case, a variety of financial claims on behalf of the petitioners have been contested on a number of grounds by the respondents which would make it patent that these have first to be established. That obviously is not the scope of a writ of mandamus. Ferris in his authoritative work on the Law of Extraordinary Legal Remedies has this to say on the point—

"The office of mandamus is to execute, not adjudicate. It does not ascertain or adjust mutual claims or rights between the parties. If the right be doubtful, it must be first established in some other form of action; mandamus will not lie to establish as well as enforce a claim of uncertain merit. It follows, therefore, that mandamus will not be granted where the right is doubtful."

12. I refrain from enlarging the examination of the issue on principle, because, as already observed, the matter seems to be well covered by precedent. On the scope and nature of the jurisdiction in a writ of mandamus, it suffices to recall the following observations of their Lordships in *Lekhraj Sathramdas Lalvani v. Deputy Custodian-cum-Managing Officer, Bombay*, AIR 1966 SC 334—

"But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties

prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdictions. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under Section 10 (2) (b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution."

13. However, the case which directly and conclusively covers the matter against the petitioners is *Suganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740. Therein also the petitioner had exclusively claimed the refund of tax alleged to have been illegally collected from him by the respondent-State of Madhya Pradesh. The High Court dismissed the petition and on appeal, their Lordships of the Supreme Court concretely formulated and considered the proposition whether the petition under Article 226 of the Constitution praying solely for the refund of money alleged to have been illegally collected as tax by the State was maintainable. They answered the same in unequivocal terms as follows:—

"We have not been referred to any case in which the Courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore, could take action under Article 226 for the protection of their fundamental right and the Courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the

return of which the petitioner claims a right."

Following the abovesaid decision, a Full Bench presided over by Chief Justice T. V. R. Tatachari in *Mohan Meakin Breweries Ltd. v. Union of India*, AIR 1975 Delhi 248, has categorically opined that a writ of mandamus is not competent in respect of a mere money claim. In coming to the aforesaid conclusion, the Full Bench approved the identical view by an earlier Division Bench in *Air Foam Industries (P) Ltd., New Delhi v. Union of India*, 1974 Delhi LT 120. Therein the Bench in a very exhaustive and considered judgment dismissed the writ petition in limine (after notice of motion to the respondents) and concluded as follows:—

"In substance the present petition amounts to invoking the jurisdiction of the High Court under Article 226 to decide a money suit. The jurisdiction conferred by Article 226 is not meant for this purpose. If money is due to the petitioners their remedy is in the ordinary Courts of law by a civil action."

14. In the light of the aforementioned discussion I conclude that both on principle and precedent, a writ of mandamus is not maintainable exclusively for the recovery of a sum of money simpliciter.

15. Before parting with this aspect of the case, I feel bound to refer to *M. Abdul Hassan v. State of Orissa*, AIR 1969 Orissa 180 and *Satya Bhushan Ray v. State of Orissa*, AIR 1969 Orissa 182 upon which strong reliance was placed on behalf of the petitioners. Undoubtedly these judgments lend support to the proposition canvassed by the learned counsel. However with respect, I must regret my inability to follow the view delineated therein for the reasons which appear hereafter.

16. It may first be noticed that in *Satya Bhushan's case* (AIR 1969 Orissa 182) the same Division Bench merely followed its own earlier precedent in *M. Abdul Hassan's case* (AIR 1969 Orissa 180) without any independent or additional reasoning. The two judgments, therefore, are in effect one. The fatal fallacy from which the aforementioned cases seem to suffer is their failure to notice *Sugganmal v. State of Madhya Pradesh*, AIR 1965 SC 1740 which directly covers the issue on all fours, as I have already noticed. It is apparent from a close perusal of these judgments that this binding precedent was not brought to the notice of the

learned Judges of the Division Bench at all. Secondly it has to be borne in mind that in the Orissa cases the learned Judges relied primarily on *State of Madhya Pradesh v. Bhailal Bhai*, AIR 1964 SC 1006 for arriving at their conclusion. Now it is significant to remember that in *Sugganmal's case* (supra), their Lordships had themselves considered and extensively quoted from their earlier precedent in *Bhailal Bhai's case* and it was thereafter that they concluded that no writ of mandamus exclusively for refund of tax was maintainable. The construction which the Supreme Court itself places on an earlier precedent is obviously binding and authoritative and it may, therefore, be aptly said that the Orissa Bench did not correctly appreciate the ratio in *Bhailal Bhai's case*. Indeed a close reference to that judgment does not at all evidence any such fact that the claim therein was exclusively and only for money.

17. Again a close perusal of the judgment in *M. Abdul Hassan's case* (AIR 1969 Orissa 180) would reveal that the issue was apparently not adequately canvassed before their Lordships either on principle or on the basis of the relevant case law. There is no adequate discussion of the point on first impression, and as I have already mentioned, the Bench came to the conclusion primarily upon its construction of some earlier Supreme Court authorities. Their reliance on *Bhailal Bhai's case* (AIR 1964 SC 1006) was not well merited. Equally the other judgments to which a reference has been made do not appear to me as directly covering the issue. Consequently I feel compelled to hold that the view expressed in the Orissa cases runs directly contrary to the ratio decidendi laid down by their Lordships of the Supreme Court in *Sugganmal's case* (AIR 1965 SC 1740), I would, therefore, respectfully dissent from the Orissa cases.

18. I may also briefly brush aside the reliance on behalf of the petitioners on *Caltex (India) Ltd., Indore v. Asst. Commr. of Sales Tax, Indore Region, Indore*, AIR 1971 Madh Pra 162. This judgment clearly reveals that the claim therein was for the quashing of the order of the Assistant Commissioner of Sales Tax and a consequent refund resulting therefrom. The Bench set aside the relevant part of the impugned order and as an additional relief directed the refund of the tax which had been deposited in pursuance of the same. This case obviously

is not one of an exclusive claim of money and as noticed earlier, there is no quarrel with the legal proposition that refund of tax or a payment of money may certainly be ordered as a matter of consequential relief.

19. I may now proceed to examine the second facet of the issue. Assuming entirely for the sake of argument that a writ of mandamus is competent (as an abstruse legal proposition), the question still remains whether it is a sound and proper exercise of judicial discretion to grant the same in a case of exclusive money claim. It is axiomatic that the writ jurisdiction generally is discretionary but it appears to me that even stricter considerations apply as regards mandamus. In the *Corpus Juris Secundum*, this is highlighted by the following statement of law:—

"Mandamus is very generally described as an extraordinary remedy in the sense, as discussed *infra* 17-29, that it can be used only in cases of necessity where the usual forms of procedure are powerless to afford relief; where there is no other clear, adequate, efficient, and speedy remedy."

It is unnecessary to quote extensively from Halsbury's Laws of England, and it suffices to say that therein also an identical view of the law finds mention.

20. Applying the aforesaid dictum here, can it be said with any degree of plausibility that for a mere money claim the usual forms of the Civil Courts are powerless to afford relief or that they do not provide an adequate remedy to recover plain sums of money? The doors of the ordinary Courts of civil jurisdiction are wide open for deciding contentious money suits. Indeed they appear to my mind as the true and correct forums for determining the plain issues of fact and of law which might inevitably arise therein. Why should the vast network of the ordinary Civil Courts functioning for this very specified purpose be denuded of their jurisdiction to adjudicate such claims? Why should the superior Courts take on an unnecessary and onerous burden which can be adequately and competently discharged by the lower Courts? Why should the respondents be denied their ordinary right to defend the claim by the ordinary process of evidence and trial and their consequential rights of appeal? All these are matters which deserve a cogent answer but when posed to the learned counsel

for the petitioners they could hardly advance any adequate reply.

21. In the exercise of their power of judicial review, it is not exceptional for the High Courts to strike down the provisions of taxing statutes or mandatory rules framed thereunder. This would inevitably raise innumerable claims of money both by those who had challenged these provisions as also by others who had not been equally vigilant. If it were to be held that all such claims can become directly matters for a mandamus by the High Court, it would inevitably open a Pandora's box of ills for the superior Courts, flooding them with varied, diverse, and contentious claims of money alone. I believe judicial notice can well be taken of the fact as to how overburdened the writ jurisdiction of High Courts has become in the last two decades. I, therefore, think that on such empirical considerations also it is hardly a sound decretion for the High Court to entertain a mere money claim in its extraordinary writ jurisdiction when the same can be adequately dealt with in other forums.

22. Apart from first impression, binding precedent also seems to me to lean heavily against the exercise of such discretion for recovery of money claims alone. The only judgment of this Court brought to our notice is categorical. In Civil Writ No. 1317 of 1972 (Ram Chand Syam Dass v. The State of Haryana) decided on 11th October, 1972 (Punj). Tuli, J., rejected a similar claim for a mandamus to refund the tax as wholly misconceived within the writ jurisdiction. Even in Bhailal Bhai's case (AIR 1964 SC 1006) (*supra*) on which some misplaced reliance was placed on behalf of the petitioners, it has been observed as follows:—

"At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a Civil Court or to deny defences legitimately open in such actions. It has been made clear more than once that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of mandamus."

Lastly it is fair to recall that in Sugganmal's case (AIR 1965 SC 1740) (*supra*), their Lordships concluded as follows on this issue:—

"We, therefore, hold that normally petitions solely praying for the refund of

money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the Civil Court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction."

Following the abovequoted binding observations, I would decline to exercise the judicial discretion in favour of the petitioners and relegate them to their ordinary remedy by way of civil action which can easily provide them with full and adequate relief.

23. In fairness to the respondents, it must be noticed that it was strenuously submitted on their behalf that the claims of some of the petitioners for refund were clearly barred on the principles of constructive res judicata. This was primarily on the ground that these petitioners were parties to the earlier set of writ petitions challenging the vires of the amending statute and the Division Bench in that case had not granted them the relief of refund, though the claim therefor had been duly made in those writ petitions. An argument was also advanced on behalf of the respondents that consequently in the present writ petition there was a patent misjoinder of parties and causes of action. Again the bar of limitation was raised on the provisions of Section 31 of the Punjab Agriculture Produce Market Act, 1961, and Rule 33 of the Punjab Agricultural Produce Markets (General) Rules, 1962. Ancillary issues as to the terminus a quo for the commencement of the period of limitation were also raised claiming that the time should run against the petitioners from the 30th of April, 1974, and not from the 8th of November, 1974, when the judgment in the previous set of writ petitions was pronounced. In face of all these defences raised on behalf of the respondents it was claimed that in any case triable issues of fact and law had arisen which would further negate the right of the petitioners to claim any relief within the writ jurisdiction.

24. In view of the fact that I have declined relief to the petitioners on the preliminary ground, I do not propose to examine these collateral matters. The writ petition is consequently dismissed leaving the petitioners to seek their ordinary remedies at law, and without any order as to costs.

PREM CHAND JAIN, J.:— I agree.
MAN MOHAN SINGH GUJRAL, J.:
I agree.

Petition dismissed.

**AIR 1976 PUNJAB & HARYANA 310
FULL BENCH**

S. S. SANDHAWALIA, PREM CHAND JAIN AND MAN MOHAN SINGH GUJRAL, JJ.

Chanan Singh, Appellant v. Smt. Majo and another, Respondents.

Second Appeal No. 146 of 1969, D/- 27-4-1976.*

(A) Punjab Redemption of Mortgages Act (2 of 1913), S. 12 — S. 12 curtails general right of redemption — Order of Collector passed under Ss. 6 to 11— Effect — Suit to redeem brought more than one year after the order is time-barred. (1974) 76 Pun LR 418, Overruled.

The Punjab Redemption of Mortgages Act, 1913, is a special Act providing for a quick and efficacious procedure for the redemption of certain mortgages of land in Punjab. The intention of the Legislature in enacting S. 12 is clear that when parties have resorted to the special jurisdiction of the Act and an order has been duly passed therein, then the same would become final and binding on them, unless either one of them avoids it by instituting a suit against that order. (Paras 8, 9)

Assuming for a moment that the Redemption of Mortgages Act provides for a summary jurisdiction in the context of mortgages of land, it does not follow therefrom that the provisions thereof would cease to have any effect on the substantive rights of the mortgagor who voluntarily resorts thereto. It is settled law that a special procedure or a special statute would override a general one. On this general principle also the particular provisions of Section 12 would certainly affect and curtail the general right of redemption. (Para 10)

Again, it appears plain on principle that if a party seeks the benefit of a special jurisdiction, then necessarily he must equally accept the burden thereof. It would hardly lie in the mouth of a mortgagor that he may take advantage of Sections 6 to 11 of the Redemption of Mort-

* (Case referred by P. C. Jain, J., D/- 12-12-1974.)

gages Act for securing a quick and efficient remedy for the redemption of land, but in case he is adversely affected thereby, he would not be bound by the restrictive provisions of Section 12 of the same statute. This would apply equally to a mortgagee as well. (1974) 76 Pun LR 418, Overruled; AIR 1943 Lah 176 (FB); AIR 1925 Lah 385. AIR 1934 Lah 384 (FB); AIR 1938 Lah 638; AIR 1971 SC 2342 and 1971 Pun LJ 204 (Delhi), Rel. on; AIR 1934 PC 205, Disting. (Para 11)

(B) Punjab Redemption of Mortgages Act (2 of 1913), S. 12 — Petition under S. 4 dismissed as premature — Order is not hit by stringent provisions of S. 12 and a suit for redemption under the general law, brought more than 1 year after the order, is not time-barred. AIR 1943 Lah 176 (FB), Foll. (Para 22)

(C) Interpretation of Statutes — Interpretation, which would render provision nugatory, to be avoided.

It is a settled principle of construction that the words in a statute are designedly used, and an interpretation of a provision must be avoided which would render it either nugatory or a part thereof, otiose. (Para 9)

(D) Interpretation of Statutes — A special procedure or statute would override a general one. (Para 10)

Cases Referred: Chronological Paras
(1974) 76 Pun LR 418 = 1974 Pun LJ 325

1, 5, 6, 7, 9, 12,

13, 14, 15, 17, 18

AIR 1971 SC 93 = (1970) 2 SCR 405 15

AIR 1971 SC 2342 = 1970 Pun LJ 770 15

1971 Pun LJ 204 = 73 Pun LR (D) 67 16

AIR 1965 Punj 502 = 67 Pun LR 969 15

AIR 1943 Lah 176 = 45 Pun LR 292 (FB)

5, 15, 22, 23

AIR 1938 Lah 638 = 40 Pun LR 886

5, 15

AIR 1934 PC 205 = 61 Ind App 362

13, 14

AIR 1934 Lah 384 = 36 Pun LR 337 (FB)

15

AIR 1925 Lah 385 = 26 Pun LR 383

10, 15

H. L. Soni, for Appellant; D. S. Kang, for Respondents.

S. S. SANDHAWALIA, J.:— Doubts about the correctness of the ratio decidendi in the Division Bench judgment of this Court in Gurditta Singh v. Harbans Singh, (1974) 76 Pun LR 418, have rightly necessitated this reference to the Full Bench.

2. The legal issues, which fall for determination herein, arise from plead-

ings and facts which are not in serious dispute. The original owner of the land in the suit was one Gopal Singh, who mortgaged the same to Mst. Mejo, respondent, for Rs. 260. The deed of mortgage was executed at Kasur (now in Pakistan) on June 25, 1942, the period of mortgage being 20 years. Subsequently, Gopal Singh executed another mortgage deed in favour of Chanan Singh, plaintiff-appellant, on the 13th of October, 1959, whereby he vested him with the right to get the land in dispute redeemed from the first mortgagee, Shrimati Mejo. Apparently during the subsisting period of the original mortgage, i.e. on the 13th of June, 1962, Chanan Singh plaintiff-appellant filed an application for redemption of the land in dispute in the Court of the Sub-Divisional Officer (Civil), Patti, under Section 4 of the Redemption of Mortgages Act, 1913. This application was resisted on behalf of Smt. Mejo, on the specific ground that the period of the mortgage was yet subsisting on the date when the application for redemption was made and consequently the plaintiff led no evidence in support of his case and the application was ultimately dismissed on the 19th of November, 1962.

3. Chanan Singh plaintiff-appellant then brought the suit, from which these proceedings arise, on 27th of January, 1965. He claimed redemption on the facts aforementioned and particularly averred in paragraph 5 of his plaint that since the period of the original mortgage in favour of Shrimati Mejo had now expired by the efflux of time he was entitled to claim the redemption of the suit land. In resisting the suit, Shrimati Mejo defendant-respondent raised a preliminary objection that since the application of the plaintiff for redemption of the land in dispute was dismissed by the Collector on the 19th of November, 1962, and no suit had been brought by him for getting that order set aside within the prescribed limit of one year, the order of the Collector had become conclusive under Section 12 of the Redemption of Mortgages Act, 1913 (hereinafter called 'the Act'), and was, therefore, beyond challenge.

4. On the pleadings of the parties, the trial Court first framed the following preliminary issue:—

"Whether the suit is time barred?"

5. Relying basically on the Division Bench judgment in AIR 1938 Lah 638, the trial Court concluded that the plaintiff-appellant was bound in law to insti-

tute a suit to set aside the order of the Collector dismissing his application under Section 12 of the Act, within the prescribed period of limitation. Consequently it held that the suit of the plaintiff was plainly barred by time and dismissed the same. On appeal the learned Additional District Judge, Amritsar, affirmed the findings of the trial Court. The present Regular Second Appeal, first came up before my learned brother Jain J., and in his lucid order he noticed the apparent conflict of Gurditta Singh's case, (1974) 76 Pun LR 418 (supra) with the previous Full Bench judgment in Tulsi Dass v. Diala Ram, AIR 1943 Lah 176 (FB). and, therefore, referred the matter to a larger Bench.

6. On behalf of the appellant Mr. H. L. Soni, inevitably placed reliance on Gurditta Singh's case (1974) 76 Pun LR 418 (supra) to contend that a substantive right of redemption inheres in the plaintiff appellant and the mere dismissal of his application by the Collector under the Act is hardly relevant to the issue and cannot affect his right to bring a suit for redemption.

7. Undoubtedly the observations in Gurditta Singh's case, (1974) 76 Pun LR 418 (supra) lend firm support to the aforesaid contention. In the said case Tuli J., speaking for the Bench, has taken a view that the remedy provided by the Act of 1913 was a summary one, which was merely in addition to the substantive remedy of redemption and was not in any way in substitution thereof. Upon that premises it has been further opined that the dismissal of an application under Sections 6 to 11 of the said Act cannot have the effect of extinguishing the right of the mortgagor to redeem the property and the only result thereof would be that no second application can be filed under the same jurisdiction in view of Section 13 of the Act. It has been further held that the remedy by way of a regular suit for redemption would remain wholly unaffected by the dismissal of an application by the Collector, unless the latter in categorical terms holds that the mortgage does not subsist and that the mortgagor has no right to redeem.

8. With the greatest respect I find myself unable to concur with the aforementioned enunciation of law. The matter has necessarily to be examined first in the light of the statutory provisions. A reference to the seventeen sections of the Redemption of Mortgage Act, 1913 would

make it manifest that the statute is a special Act providing for a quick and efficacious procedure for the redemption of certain mortgages of land in Punjab. Specifically it applies to a mortgage of land in cases where the mortgage money does not exceed Rs. 5,000 and further where the area of mortgaged land does not exceed 50 acres. Within its limited field it is a miniature code in itself. Section 4 of the Act provides for the presentation of a petition for redemption to the Collector by the mortgagor. Sections 5 to 11 then lay down the procedure for the disposal of the said petition in the different situations visualised by the statute. The material provision for our purpose is Section 12, the relevant part whereof is in the following terms:—

"12. Any party aggrieved by an order made under Sections 6, 7, 8, 9, 10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage but, subject to the result of such suit, if any, the order shall be conclusive."

9. I am of the view that the plain language of this provision is clear and unequivocal. It lays down in terms that unless a suit is brought to set aside any order of the Collector (passed under Sections 6 to 11 of the Act), which may be to the detriment of either party, the said order would become conclusive. The intention of the Legislature appears to be clear that when parties have resorted to the special jurisdiction of the Act and an order has been duly passed therein, then the same would become final and binding on them, unless either one of them avoids it by instituting a suit against that order. One cannot imagine that the Legislature would have possibly intended that a dispute which had been focussed and decided under the special proceedings of the Act, before the Collector, should nevertheless remain suspended and inchoate till either one of the parties exercises his substantive right of redemption which might well extend to another 60 years. It is a settled principle of construction that the words in a statute are designedly used, and an interpretation of a provision must be avoided which would render it either nugatory or a part thereof, otiose. If the view expressed by Tuli J., were to be adopted, in regard to the dismissal of a redemption application under Sections 6 to 11 of the Act, then the provisions of Section 12 aforementioned would virtually stand effaced from the statute book. This is a result which has necessarily to

be avoided. I am, therefore, of the view that the plain and categorical language of Section 12 negates the construction which has been sought to be placed upon it by the Division Bench in Gurditta Singh's case, (1974) 76 Pun LR 418 (supra).

10. Assuming for a moment that the Redemption of Mortgages Act provides for a summary jurisdiction in the context of mortgages of land, it does not follow therefrom that the provisions thereof would cease to have any effect on the substantive rights of the mortgagor who voluntarily resorts thereto. There can hardly be any doubt that the Act is a special statute operating in a narrow and limited field. It is settled law that a special procedure or a special statute would override a general one. On this general principle also the particular provisions of Section 12 would certainly affect and curtail the general right of redemption. If authority were needed for this plain proposition in the particular context of this Act, then reference may be made to a Division Bench judgment of Shadi Lal, C. J. and Le Rossignol J. in *Kaura v. Ram Chand*, AIR 1925 Lah 385, wherein it was observed:—

"Many authorities have been cited to us at the Bar to establish the proposition that when an order passed under a special Act is declared by that Act to be conclusive, it cannot be ignored and no relief is open to the aggrieved party unless that order be set aside. On that point we require no authority, for the Act itself is quite clear on the subject."

11. Again it appears plain to me on principle that if a party seeks the benefit of a special jurisdiction, then necessarily he must equally accept the burden thereof. It would hardly lie in the mouth of a mortgagor that he may take advantage of Sections 6 to 11 of the Redemption of Mortgages Act for securing a quick and efficient remedy for the redemption of land, but in case he is adversely affected thereby, he would not be bound by the restrictive provisions of Section 12 of the same statute. This would apply equally to a mortgagee as well. The salutary rule that the benefit and the burden of a provision must go together cannot be deviated from in the present context either.

12. On a closer analysis of the judgment in Gurditta Singh's case, (1974) 76 Pun LR 418 (supra), one cannot help remarking that apparently the issue was

not adequately debated before the learned Judges constituting the Bench, both on principle and authority. There does not appear to be any discussion in depth of the legal principles involved. Equally, the learned counsel for the parties were sorely remiss in not bringing to the notice of the Bench a string of earlier decisions which directly covered the point. It was in the context of this unawareness of the earlier authorities that Tuli J. had expressed a view (with which Dhillon J. concurred) which runs counter to prior binding precedent without even advertent thereto.

13. Primary reliance of Tuli J. in arriving at the conclusion which he has in Gurditta Singh's case (1974) 76 Pun LR 418 (supra) was on the judgment reported as *Raghunath Singh v. Mt. Hansraj Kunwar*, AIR 1934 PC 205. An examination of that judgment would show that what deserves significant notice is the fact that not the least hint of any issue arising under the Redemption of Mortgages (Punjab) Act, 1913, arose in that case. This was obviously so because the case before their Lordships of the Privy Council came from the jurisdiction of the Allahabad High Court where no such enactment was in force. Lord Russell in framing the judgment himself noticed that the two principal points for decision on the facts of that case were whether any and what amount of mortgage money was due and whether a second redemption suit was maintainable. The first point obviously has no relevance because no point of law arose therefrom. On the second point, their Lordships noticed the three contentions raised on behalf of the appellant (the respondents were not represented before them) and on the particular facts of the case held that the second suit for redemption was in no way barred in view of the fact that the questions in the earlier suit were wholly different from those in the second suit and consequently no question of *res judicata* arose. It was also held on the facts of the case that the failure to make payment in compliance with the earlier decree did not bar a second suit and the mortgagor's right to redeem would not be extinguished under Section 60 of the Transfer of Property Act, 1882.

14. It appears plain to me that the observations in that case were in the context of the peculiar facts and circumstances thereof and did not lay down any general proposition that the right of re-

redemption is so inviolable as not to be cut down by the express terms of a statute. As already noticed, the provisions of the Punjab Redemption of Mortgages Act did not at all fall for consideration before their Lordships. It is platitudinous to remark that in the face of a mass of authority on the specific provisions of the aforementioned Act, a resort to mere general principles flowing from an observation here and there from Raghunath Singh's case (AIR 1934 PC 205) can hardly be justifiable. In the present case, where the primary and indeed the whole argument is directed to the specific provisions of Sections 6 to 11 of the Redemption of Mortgages Act and in particular to the effect of the unequivocal language of Section 12 thereof, the observations in Raghunath Singh's case can hardly be of any aid. In my view, the reliance on this judgment in Gurditta Singh's case (1974) 76 Pun LR 418 does not appear to be justifiable and it is indeed wholly wide of the mark.

15. Once the Privy Council judgment is out of the way, the rather brief rationale of the judgment in Gurditta Singh's case (1974) 76 Pun LR 418 does not bear the test of a close scrutiny. Principle apart, the view that the Redemption of Mortgages Act provides for a summary remedy only and is in addition to and not in substitution of the general right of redemption is contrary to a string of precedents from which it is not now possible to differ and to which, as already noticed, Tuli J. did not even advert. As early as 1925, the Division Bench of Chief Justice Shadi Lal and Le Rossignol J. had held in Kaura's case (AIR 1925 Lah 385) (*supra*) that the provisions of the Redemption of Mortgages Act, 1913, were as much substantive law as any other. After discussion, they had held as under:—

"Our conclusion then is that the real nature of the suit contemplated by the Legislature in Section 12 of Act II of 1913 is a suit to set aside the Collector's order. That order unless it be set aside is conclusive and as in the case before us that order was not set aside within the period of limitation provided, the present suit to redeem the mortgage is out of time."

To the same effect appears to be the view of the Full Bench in Gangu v. Mahanraj Chand, AIR 1934 Lah 384, in which the aforementioned judgment was referred to with approval. Reference in this context can also usefully be made to an-

other Division Bench judgment in Prabhu Mal v. Chandan, AIR 1938 Lah 638. But the most prominent case on the point is the very elaborate judgment recorded by the three learned Judges of the Full Bench in Tulsī Das v. Dīālā Ram, AIR 1943 Lah 176 (FB), which has the added merit of having been noticed with approval by their Lordships in Sheolal v. Sultan, AIR 1971 SC 93. In the same judgment, their Lordships also endorsed the view of a Division Bench of this Court in Dewan Chand v. Raghbir Singh, (1965) 67 Pun LR 969 = (AIR 1965 Punj 502). It appears to me that the observations of their Lordships of the Supreme Court in Shiv Lal v. Chet Ram, 1970 Pun LJ 770 = (AIR 1971 SC 2342), also tend to negate the view expressed in Gurditta Singh's case.

16. Before parting with the authorities on the point, it is instructive to advert to the considered judgment of the Division Bench (Hardayal Hardy and T. V. R. Tatachari, JJ., as their Lordships then were) of the Delhi High Court reported as Mir Chand v. Devia, 1971 Pun LJ 204. After an elaborate discussion of the principle and authorities on the point, their Lordships concluded in the following terms:—

"Our opinion, therefore, is that whenever the Collector makes an order which comes within the ambit of Sections 6 to 11 of the Act, regard being had to the substance of the order and not merely to its form, the order is one contemplated under Section 12 of the Act and if that order adversely affects the rights of the parties in respect of the mortgage, the only remedy of the aggrieved party is to establish his or her rights by filing a suit for which the time limit prescribed under Article 14 of the Limitation Act is one year from the date of the order

.....
The party aggrieved by the order cannot sit quiet and make up after the expiry of the period of one year and assert his rights under the mortgage contending that he is seeking his remedy under the general law and has, therefore, no need to have the Collector's order set aside and can ignore it."

17. In the wake of such massive precedent, it suffices to say that the view of the Division Bench in Gurditta Singh's case (1974) 76 Pun LR 418 runs counter to the aforementioned string of binding decisions and also does not appear to be supportable on principle. It does not lay down correct law and with respect I would, therefore, overrule the same."

18. The second string to the bow of the appellant, however, appears to be an effective one. Deprived of his reliance on Gurditta Singh's case, (1974) 73 Pun LR 413 Mr. Soni, learned counsel for the appellant, fell back to contend that the order of dismissal passed by the Collector on November 19, 1962, was primarily on the ground that the application for redemption was premature as the period of the mortgage had not fully elapsed. The counsel submitted that such a dismissal was not one under Sections 6 to 11 of the Act and, therefore, was not hit by the provisions of Section 12 thereof. In substance, the submission was that the dismissal of a premature application for redemption cannot in any event bar the institution of a regular suit later.

19. In order to appraise the above-said contention, it is necessary to first clear some cobwebs regarding the facts of the case even at the cost of a slight repetition. In para 1 of the plaint, the plaintiff had categorically averred that the mortgage deed was executed on June 25, 1942 and the specific period of the mortgage was for 20 years. It was pointed out that the mortgage deed having been executed at Kasur, which is now in Pakistan, it was not possible to produce a certified copy thereof. The aforementioned averments were not denied by the defendants in the corresponding parts of para 1 of their written statement. Indeed, it was submitted on their behalf that the original deed had been misplaced. In particular, it was pleaded in para 4 of the plaint that the plaintiff had moved an application for redemption before the Collector, Patti, which was resisted on the specific ground that the period of the mortgage had not yet elapsed and consequently the application was dismissed on this summary ground. Significantly, these averments were again not controverted on behalf of the defendants and it was merely stated that the application had been dismissed and the said order had not been got set aside within the period of limitation and had, therefore, become final. In para 5 of the plaint, the plaintiff had again averred that since the period of the mortgage had now elapsed, a right of redemption accrued to him and these pleadings were answered in routine by stating that the plaintiff had no right of redemption.

20. From the above noticed state of pleadings and the uncontroverted facts, it is evident that under the deed, the mortgage was to subsist till June 25, 1962. Admittedly, the application before the

Collector was brought before the expiry of the period of mortgage on June 13, 1962, and was thus hardly competent. The plaintiff asserted in no uncertain terms that the defendants had resisted the aforesaid application primarily on the ground that the application was not competent during the period of the mortgage and this resulted in its summary dismissal. These facts were not denied even in the pleadings of the defendants and in this background the two line cryptic order of dismissal was passed by the Collector on November 19, 1962. On the present facts, therefore, there is no manner of doubt that the earlier dismissal of the application of the plaintiff was a summary one, patently on the ground of the same being premature.

21. That being so, the core of the matter here is whether an order of dismissal by the Collector on an application under Section 4 of the Act, on the ground that it is premature, is within the scope of Section 12 of the Act.

22. In seeking an answer to the aforementioned question, it is unnecessary to examine it in any detail or on principle because it is covered on all fours by the authoritative decision of the Full Bench in *Tulsi Dass's case* (AIR 1943 Lah 176) (FB) (supra). In that case owing to an earlier conflict of authority, two questions were referred to the Full Bench which were formulated in the following terms:—

"1. Whether an application made under Section 4 of the Act for redemption of a mortgage cannot be treated as an application under the Act, if it is rejected or dismissed by the Collector on the ground that it is premature?

2. Whether the orders contemplated under Section 12 of the Act are confined to those orders only which are made on the merits of the case or cover all orders irrespective of the fact whether they dispose of any question on the merits or not?"

As is manifest, question No. 1 above is identical with the issue arising in the present appeal. On this point, all the three learned Judges of the Full Bench were unanimous in their view that the dismissal of such an application on the ground of the same being premature was not hit by the stringent provisions of Section 12 of the Act and there was thus no bar to a suit being brought for redemption of the mortgage under the general law. I am entirely in agreement with this view and indeed the Full Bench judgment is bind-

ing on us or in any case is of great persuasive force.

23. In passing, it may be noticed that on the second question, which was before the Full Bench in Tulsi Dass's case, (AIR 1943 Lah 176) (FB), the learned Judges were at variance with each other and an examination of the judgment would show that no clear or concise conclusion on the said question appears to be deducible. This was indeed noticed by the Bench. This is evident from the final order where it was mentioned that the appeal was being dismissed but on different grounds. I am of the view that in the present case, no issue of the nature of the second question before the Full Bench arises and it would, therefore, be academic to examine or pronounce on the same.

24. In view of my aforesaid conclusion on the legal issue, it is held that the suit in the present case was not barred by time and the preliminary issue is decided in favour of the plaintiff. The appeal is hereby allowed and the judgments of the two Courts below are set aside. The case would now go back to the trial Court for an expeditious disposal. The parties will bear their own costs.

PREM CHAND JAIN, J.:— I agree.

MAN MOHAN SINGH GUJRAL, J.:
I agree.

Appeal allowed.

AIR 1976 PUNJAB & HARYANA 316 FULL BENCH

**A. D. KOSHAL, S. S. SANDHAWALIA
AND PREM CHAND JAIN, JJ.***

Balwant Singh, Petitioner v. The State Bank of India and others, Respondents.

Civil Revn. No. 420 of 1973, D/- 12-2-1976.†

(A) Civil P. C. (1908), O. 7, R. 11 (a)
— Plaintiff disclosing cause of action in respect of part of claim against some of defendants — Plaintiff cannot be rejected in its entirety — AIR 1971 Andh Pra 313, Dissented from.

A plaintiff which does not disclose a cause of action in respect of the part of

*(Note:— The judgments in the case are printed in the order in which they are given in the certified copy.—Ed.)

†(Case Referred by A. D. Koshal, J., D/- 4-10-1974.)

the claim against some of the defendants, cannot be rejected as a whole. AIR 1971 Andh Pra 313, Dissented from. Case law discussed. (Para 8)

The provisions of Order 7, Rule 11 (a) would be attracted only in a case where by reason of the plea that a plaintiff does not disclose a cause of action, the plaintiff is to be wholly non-suited, but this rule would have no applicability to cases where a plaintiff discloses a cause of action in respect of the part of the claim against some of the defendants, as in that event the names of the defendants against whom there is no cause of action or the suit is barred by law, have to be struck off and the suit has to proceed against the remaining defendants. (Paras 10, 11)

Clause (a) deals with the situation where the plaintiff does not disclose a cause of action. The plain reading of clause (a) shows that it would apply only in a case where a plaintiff does not disclose any cause of action. The word 'a' in this clause would mean 'any', and when word 'any' is read in place of 'a', then it would make it clear that the intention of the Legislature was to empower the Court to reject a plaintiff only where it did not disclose any cause of action. If the intention of the Legislature had been to give power to the Court to reject the plaintiff, where it did not disclose a cause of action in respect of the part of the claim against some of the defendants, then this clause would have been differently worded. In a case, where there is a joinder of parties and causes of action and a decree is bound to be passed in respect of one or more of the causes of action and against some of the defendants, the provisions of Rule 11 (a) of Order 7 cannot legally be invoked. Any other interpretation would not only offend the common sense and the dictates of justice but would also offend the provisions about the misjoinder of parties and causes of action. (Para 8)

A. D. Koshal, J. (agreeing): The very idea of a plaintiff being rejected 'in part' is repugnant to the provisions of Rule 11 of Order VII of the Code of Civil Procedure. The plaintiff in a suit is the document evidencing the suit and not the suit itself and can, therefore, either be rejected or retained which, in other words, merely means that it can either be thrown out or proceeded with. It cannot be torn up in two parts, one of which is discarded and the other entertained. This is clearly deducible from the language of the Rule. Expressions like 'in its entirety' or 'in part'

are thus wholly inapt in relation to the rejection of the plaint. (Para 12)

Cases Referred: Chronological Paras

AIR 1971 Andh Pra 313 = (1971) 1 Andh LT 36 10

AIR 1962 Raj 36 = 1962 Raj LW 49 8

AIR 1960 Cal 484 8

AIR 1952 Punj 38 9

AIR 1951 Nag 419 = ILR (1949) Nag 560 8

AIR 1950 Orissa 257 9

AIR 1941 Pat 461 = 22 Pat LT 392 9

AIR 1936 Lah 1021 = 39 Pun LR 299 9

AIR 1935 Mad 389 = 41 Mad LW 591 9

AIR 1931 Mad 175 = 59 Mad LJ 923 9

AIR 1921 Sind 106 = 17 Sind LR 9 8

B. S. Gupta with Gurdev Singh, for Petitioner; R. K. Chhibbar with Rajinder Paul (for No. 1) and Mohinder Singh Poonia (for No. 6), for Respondents.

PREM CHAND JAIN, J.:— Balwant Singh has filed this petition under Section 115 of the Code of Civil Procedure, against the order of the learned Subordinate Judge, 1st Class, Sonapat, dated 7th February, 1973, refusing to reject the plaint as a whole in a suit filed by the State Bank of India, respondent No. 1 (hereinafter referred to as the Bank) for the recovery of Rs. 1,17,268.59 Paise, against the petitioner and eight other defendants. The relevant facts of the case, may briefly be stated, thus:—

On 7th January, 1966, the Bank granted instalment credit facility to Messrs. Cooks Manufacturing, Sonapat, defendant No. 1 (hereinafter referred to as the firm), to the extent of Rs. 14,950 which was repayable by the firm in 12 instalments spread over a period of three years. Defendant No. 5 stood surety for the repayment of the amount advanced to the firm. On 18th July, 1966, the firm was granted overdraft facility to the extent of Rupees 10,000 by the Bank and in this account a sum of Rs. 7,291.31 Paise was due from the firm on 13th November, 1966, for the repayment of which, defendant No. 4 stood surety on the 11th November, 1967. The amount due on this account swelled to Rs. 9,178.01 Paise, as on the date of the suit. On 11th November, 1967, the firm was also granted a cash credit loan accommodation by the Bank to the extent of Rs. 80,000 repayment of which, along with any interest which might become due, was guaranteed by defendant No. 4. On the date of the suit, a sum of Rs. 99,640.58 Paise had become due in this account. Defendants Nos. 2 and 3 are the partners of the firm. On 17th June,

1966, defendant No. 2, created a mortgage by deposit of title deeds of property detailed in paragraph 13 of the plaint in favour of the Bank, which later on learnt that the said property had been fictitiously mortgaged by defendant No. 2 in favour of defendants Nos. 6 and 7, both of which are Co-operative Societies. On the basis of the allegations referred to above, the plaintiff prayed for a decree for an amount of Rs. 1,17,268.59 Paise with costs and with future interest at the rate of 9 per cent per annum from the date of suit till the date of its realisation.

2. The defendants contested the suit. After the written statement was filed, defendant No. 4 made an application on 22nd August, 1972, praying that the plaint be rejected in pursuance of the provisions of Rule 11 of Order VII of the Code of Civil Procedure. The application was resisted by the Bank. After hearing the learned counsel for the parties, the trial Court found that the plaint discloses no cause of action as against defendant No. 4 in respect of the amount of Rs. 8,450 claimed on account of instalment credit facility; that the plaint discloses no cause of action against defendant No. 5 qua the overdraft facility and cash credit loan accommodation and that there being no allegation in the plaint that any notice under Section 79 of the Punjab Co-operative Societies Act had been served on defendants Nos. 6 and 7, the plaint discloses no cause of action against them. On the basis of the aforesaid findings, the trial Court held that the plaint was to be rejected not as a whole but only against defendants Nos. 6 and 7 whose names the trial Court directed to be struck off from the plaint vide impugned order. As earlier observed, it is against that order of the learned Subordinate Judge that the present revision petition has been filed.

3. This petition came up for hearing before brother Koshal J. considering the importance of the question of law involved, brother Koshal J. thought it proper to refer the matter for decision to a larger Bench. That is how we are seized of the matter.

4. The short question that requires determination in this case is, whether a plaint which does not disclose a cause of action in respect of the part of the claim against some of the defendants, is liable to be rejected in its entirety.

5. In order to decide the controversy, it would be appropriate to reproduce certain relevant provisions of the

Code of Civil Procedure, which read as under:—

"Order 7, Rule 11.

The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so.

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law.

Order 1, Rule 4 (b).

Judgment may be given without any amendment—

(a)

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.
Order 1, Rule 5.

It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Order 1, Rule 9.

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Order 2, Rule 6.

Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient."

6. On the basis of clause (a) of Rule 11, Order VII of the Code of Civil Procedure, what was sought to be argued by Mr. B. S. Gupta, learned counsel for the petitioner, was that the plaint did not disclose any cause of action against the petitioner and some of the other defendants and as such was liable to be rejected in toto. According to the learned counsel on principle as well as the law as it stands a plaint cannot be rejected in part, with the result that a plaint which only discloses a cause of action in respect of

the part of the claim against some of the defendants, has to be rejected as a whole. On the other hand, Mr. Chhibber, learned counsel for the respondents, contended that clause (a) did not envisage the rejection of the plaint as a whole if the same disclosed a cause of action in respect of the part of the claim against some of the defendants, and such a claim was bound to be tried by the Court. After giving my thoughtful consideration to the entire matter, I find myself unable to agree with the contention of Mr. Gupta, learned counsel for the petitioner.

7. From the perusal of the various rules of Order 1 and Order 2 referred to above, it is abundantly clear that no technical objection in respect of misjoinder of causes of action and parties would non-suit the plaintiff wholly. It is further evident that in enacting these salutary rules of law, the intention of the Legislature has been to prevent the technicalities overcoming the ends of justice and from operating as a means of circuity of litigation. To further achieve this end, Section 99 of the Code of Civil Procedure was added, which is evidently based upon the principle that the rules of procedure are made to subserve the ends of justice and not to defeat them.

8. Now in this context, adverting to the provisions of Order 7, Rule 11 of the Code of Civil Procedure, I find that the rule mentions four grounds on which the Court is bound to reject the plaint. Clause (a) with which we are concerned, deals with the situation where the plaint does not disclose a cause of action. To my mind, the plain reading of clause (a) shows that it would apply only in a case where a plaint does not disclose any cause of action. The word 'a' in this clause would mean 'any', and when word 'any' is read in place of 'a', then it would make it clear that the intention of the Legislature was to empower the Court to reject a plaint only where it did not disclose any cause of action. If the intention of the Legislature had been to give power to the Court to reject the plaint, where it did not disclose a cause of action in respect of the part of the claim against some of the defendants, then this clause would have been differently worded. In a case, where there is joinder of parties and causes of action and a decree is bound to be passed in respect of one or more of the causes of action and against some of the defendants, the provisions of Rule 11 (a) of Order 7 cannot legally be invoked. Any

other interpretation would not only offend the common sense and the dictates of justice but would also offend the provisions about the misjoinder of parties and causes of action referred to above. There is a clear distinction between a case where the plaint itself does not disclose any cause of action and a case in which, after the parties have produced oral and documentary evidence, the Court on consideration of the entire matter, comes to the conclusion that there was no cause of action for the suit. In the former case, the provisions of Order 7, Rule 11 are attracted, but in the latter case, after adjudication, the suit has to be dismissed. However, if after trial it is found that part of the claim has been substantiated, then a decree in respect of that claim has to be passed and in that eventuality, the whole suit would not be dismissed. After all, a cause of action is a bundle of material facts alleged by the plaintiff to make out his right to sue and claim relief against the defendants. But if on scrutiny it is found that certain facts do not give him right to sue some of the defendants in respect of the whole relief or any part of the relief claimed, then the plaint would not deserve to be rejected nor after adjudication the entire suit would be dismissed, but as envisaged by Order 1, Rule 4 of the Code of Civil Procedure, a decree would have to be passed without any amendment against such defendants only as may be found to be liable and according to their respective liability. It may further be observed that under Order 1, Rule 5 of the Code of Civil Procedure, it is not necessary that every defendant should be interested as to all the relief claimed in any suit against him. In this view of the matter, I am definitely of the opinion that a plaint which does not disclose a cause of action in respect of the part of the claim against some of the defendants, cannot be rejected as a whole. This view of mine finds full support from the decisions of various High Courts to which I am presently making a detailed reference. In *L. Collins v. Charles Broth & Co. Ltd.*, AIR 1921 Sind 106, it was observed thus:—

"The rule in England as far as I am aware has been as in India, viz., to exercise the powers under Order VII, Rule 11 with great circumspection and only if the Court is satisfied that even if the plaintiff proves all the allegations of fact he sets forth in the plaint, he would still not be entitled to any relief whatever."

In *Shankarrao Balaji v. Shambihari*, AIR 1951 Nag 419, the learned Judges observed as under:—

"Our conclusion is that the plaint discloses no cause of action against defendant 6 the Provincial Government. This would involve a rejection of the plaint under Order 7, Rule 11 (a) if defendant 6 had stood alone, but it is clearly not possible to reject a plaint which discloses a cause of action against certain defendants and none against the rest. The only feasible course in such a case is to discharge the defendant against whom no cause of action is disclosed, and have his name struck off from the plaint; and that is what we would have done. But as the plaintiffs do not wish to amend their plaint there is nothing more we can do." In *Ajit K. Saha v. Nagendra N. Saha*, AIR 1960 Cal 484, it has been observed thus:—

"In a case where there is a joinder of causes of action and a decree is bound to be passed in respect to one or more of the causes of action, a plea by way of demurrer cannot be taken. A plea by way of demurrer can only be taken when by reason of the plea the plaintiff is wholly non-suited."

In *Mst. Chandani v. Rajasthan State*, AIR 1962 Raj 36, the learned Judge observed thus:—

"On a careful consideration of these rival views, I am disposed to accept the latter as the sounder of the two. Order 7, Rule 11, Civil Procedure Code, undoubtedly lays down, inter alia that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. It seems to me, however, that this rule, would be attracted into its full application where the suit as a whole would be so barred, and different considerations may reasonably arise where such a suit happens to be barred against some of the defendants but may still be good, against the others.

With utmost respect, I have not been able to persuade myself to accept the view that even where such a suit may be good against some of the defendants in spite of its being bad against certain others, the whole suit must necessarily be thrown out. This seems to me to be opposed to all considerations of common sense and to the dictates of justice, nor do I think that such a result should be held to be a necessary consequence of the rule as it is generally embodied in clause (d) of Rule 11, and to my mind it is normally intend-

ed to be applicable to a case where there is a single plaintiff or a single defendant and a suit by or against him is wholly barred by any law.

Thus, where a plaint does not disclose a right of action against one or some of the defendants but it does against the rest, or where a suit would be barred by law against one or some of the defendants but not against the rest, the just and proper course, in my opinion, should be not to reject the plaint as a whole but to strike out the names of the defendants against whom there is no cause of action or the suit is barred by law and allow it to proceed against the rest. This would of course be subject to the paramount consideration that such a suit, as a matter of substantive law, would be maintainable against the remaining defendants."

9. Let me now proceed to examine various judicial pronouncements produced in support of the proposition that in case a plaint does not disclose a cause of action in respect of the part of the claim against some of the defendants, then the whole plaint has to be rejected. Mr. Gupta learned counsel, placed reliance on Venkata Rangiah v. Secy. of State, AIR 1931 Mad 175; Venkata Rangiah Appa Rao v. Secy. of State, AIR 1935 Mad 389; Maq-sud Ahmad v. Mathra Datt & Co., AIR 1936 Lah 1021; Noor Mohammad v. Abdul Fateh, AIR 1941 Pat 461; Harihar Mahapatra v. Hari Otha, AIR 1950 Orissa 257; and Bansi Lal v. Som Parkash, AIR 1952 Punj 38. After going through all these decisions, I find that none of them is relevant to the point in controversy and is of no assistance in deciding the point agitated by the learned counsel for the petitioner. In Venkata Rangiah Appa Rao Bahadur's case, the learned Judge of the Madras High Court, found that there was non-compliance of the provisions of Section 80 of the Code of Civil Procedure and that non-compliance with the requisites of Section 80 entailed rejection of plaint under clause (d) of Rule 11. The learned Judge further observed that even if cl. (d) of Rule 11 did not apply, then also the plaint was liable to be rejected on the ground that it did not comply with the provisions of Section 80. This view of the learned Judge was affirmed by the Let-ters Patent Bench in the same case reported in AIR 1935 Mad 389. In Bansi Lal's case (supra), the facts were that the plaintiff filed a suit challenging the five alienations. An objection was raised that

the claim was under-valued. The objection was upheld and the plaintiff was asked to make up the deficiency in court-fee; instead of making up the deficiency in court-fee, the plaintiff amended the plaint and limited his challenge only to three alienations. On these facts, the learned Judge held that the plaint had to be rejected in toto. I fail to understand how these decisions have any relevancy to the point in issue. So far as Maq-sud Ahmad's case (supra) is concerned, the same again is wholly irrelevant and no reference need be made to its facts. In Noor Mohammad's case (supra), again, the question of rejection of plaint was decided on the basis of the provisions of Section 80 of the Code of Civil Procedure, and that decision is of no help. To the same effect is the decision in Harihar Mahapatra's case (supra).

10. The only decision which needs consideration is of the Andhra Pradesh High Court in Kalepu Pala Subrahman-yam v. Tiquiti Venkata Peddiraju, AIR 1971 Andh Pra 313. In that case the learned Subordinate Judge held that the suit was barred by time in respect of items 1, 2 (a), 2 (b), 2 (c) and 3 (a) of plaint B Schedule and items 1 and 2 (a) of plaint C Schedule and rejected the plaint only in respect of these items. In respect of the other claims, the plaintiff was directed to file an application under Section 47 of the Code of Civil Procedure. A revision was filed against the said order by the plaintiff. The learned Judge dismissed the revision petition and passed an order to the effect that when a part of the claim had been held to be time-barred, then the whole plaint was liable to be rejected. With utmost respect, I am unable to agree with this view of the learned Judge. If there are various claims in the plaint, out of which some are time-barred, then the plaint is not liable to be rejected and the suit has to proceed in respect of the claims which are within limitation.

11. As a result of the above discussion, I hold that the plea raised by the petitioner is untenable and the contrary view is neither sound nor just and is not warranted by the language of the statute. Consequently, my answer to the question posed is that the provisions of Order 7, Rule 11 (a) of the Code of Civil Procedure, would be attracted only in a case where by reason of the plea that a plaint does not disclose a cause of action, the plaintiff is to be wholly non-suited, but this rule would have no applicability

to cases where a plaint discloses a cause of action in respect of the part of the claim against some of the defendants, as in that event the names of the defendants against whom there is no cause of action or the suit is barred by law, have to be struck off and the suit has to proceed against the remaining defendants. The case would now go back to the learned Single Judge for disposal on merits.

A. D. KOSHAL, J.:— 12. I fully agree and would like to emphasise that the very idea of a plaint being rejected 'in part' is repugnant to the provisions of Rule 11 of Order VII of the Code of Civil Procedure. The plaint in a suit is the document evidencing the suit and not the suit itself and can, therefore, either be rejected or retained which, in other words, merely means that it can either be thrown out or proceeded with. It cannot be torn up in two parts, one of which is discarded and the other entertained. This is clearly deducible from the language of the rule. Expressions like 'in its entirety' or 'in part' are thus wholly inept in relation to the rejection of the plaint.

S. S. SANDHAWALIA, J.:— 13. I agree with my learned brother Jain, J.
Answer accordingly.

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AJIT SINGH BAINS, J.

State Bank of India, Petitioner v. M/s. Sakow Industries Faridabad (Pvt.) Ltd., New Delhi, Respondent.

Civil Misc. No. 49-M of 1975, D/- 10-5-1976.

(A) Civil P. C. (1908), Ss. 22, 23 (3) read with S. 151:— High Court's power to transfer a suit pending in a Court subordinate to it to another Court subordinate to different High Court — Exercise of, in the ends of justice or to prevent abuse of process of Court.

The petitioner State Bank had filed a suit in Alipore Court in West Bengal against the defendants for recovery of loans amounting to 53 lacs. The defendant Company also filed a suit in the Ballabgarh Court in Punjab and Haryana for a permanent injunction restraining the petitioner Bank from interfering with the peaceful possession of its premises and its estates. Before the final settlement of issues in the Ballabgarh suit the

petitioner Bank filed an application before the High Court of Punjab and Haryana under Ss. 22, 23 (3) read with S. 151 Civil P. C. for transfer of the latter suit to the Alipore Court.

Held that as the same questions of law and fact were involved in the suits and moreover, the parties were also the same, the High Court could order transfer of the case in exercise of its powers under S. 23 (3) read with S. 151. In the peculiar circumstances of the present case, it would meet the ends of justice and prevent the abuse of the process of the Court if the case pending in the Ballabgarh Court is transferred to the Court at Calcutta in which the connected matter is pending between the petitioner Bank and the said Company. AIR 1924 Lah 306 and AIR 1934 All 14, Foll.

(Paras 6, 7)

Cases Referred: Chronological Paras

(1972) Suit No. 542 of 1972	2
AIR 1934 All 14 = 1933 All LJ 1507	7
AIR 1924 Lah 306 = 69 Ind Cas 772	7

R. K. Chhibbar (A. K. Srib of M/s. Sandersons & Morgans, Solicitors, with him), for Petitioner; T. S. Doabia, for Respondents.

ORDER:— The State Bank of India has filed the present application under Sections 22 and 23 (3) read with Section 151 of the Code of Civil Procedure for transfer of Suit No. 844 of 1972 pending in the Court of the Subordinate Judge Ist Class, Ballabgarh, to the Court of the Subordinate Judge at Alipore, District 24 Parganas (West Bengal). It is alleged in the application that the petitioner-Bank through its Ballyguange Branch at Calcutta advanced to one Messrs. Sakow Industries (Private) Limited (hereinafter referred to as the 'said Company') various types of loans amounting to about Rs. 53 lakhs for the Industrial units of the said Company in Calcutta in the State of West Bengal and Faridabad in the State of Haryana. The said loans also included the loans advanced to Messrs. Tochi and Asavari carrying on business at 36, Industrial-cum-Housing Estate, Faridabad. These concerns were owned by Shri S. P. Mehta, who is Director of the said Company. All the liabilities of the loans were taken over by the said Company later on. It is also alleged in the petition that the loans advanced to the said Company were personally guaranteed by its two Directors, namely, Shri S. P. Mehta and Shrimati Nirmala Devi Mehta (wife of Shri S. P. Mehta). The said Company also

pledged, hypothecated, charged its goods, machinery, produce, merchandise, bills and book-debts etc. with the petitioner-Bank lying in the godowns of the said Company at Rajpur and Khaikhli in the State of West Bengal and at 36, Industrial-cum-Housing Estate, Faridabad, as security for the repayment of the loans. The said-Company also agreed to mortgage with the petitioner-Bank their lands and buildings at 36, Industrial-cum-Housing Estate, Faridabad as security. It was also agreed upon that if the said Company does not abide by the financial discipline regarding the repayment of the aforesaid loans, the petitioner-Bank shall be entitled to call for the entire amount of loans including interest and other charges accrued thereon and to take physical possession of all the goods, produce, stocks, merchandise etc. The whole amount advanced to the said-Company by the petitioner-Bank amounted to about Rs. 53 lakhs. Not a single penny out of the loans advanced was returned by the said-Company in spite of persistent demands made by the petitioner-Bank.

2. In order to realise the loans, the petitioner-Bank filed a civil suit in the High Court at Calcutta in its ordinary civil jurisdiction for the recovery of a sum of Rs. 53,05,463.02 against the said-Company and the two guarantors, namely, Shri S. P. Mehta and Mrs. Nirmala Devi Mehta (Suit No. 542 of 1972—State Bank of India v. Sakow Industries (Private) Ltd.). The High Court appointed two Receivers on November 24, 1972, to take possession of the godowns of the said-Company. The Receivers succeeded in taking possession of the godowns at Rajpur but were not allowed to take possession of the godown at Khaikhli. They however, did not attempt to take possession of the godowns at Faridabad. The aforesaid suit was filed in the High Court at Calcutta on November 23, 1972, whereas the said-Company changed its registered office from 10, Middleton Row, Calcutta, to 13, Lower Range, Calcutta, on November 16, 1972. As the new registered office of the said-Company did not fall within the original side territorial jurisdiction of the Calcutta High Court, the said-Company raised an objection regarding the jurisdiction of the Calcutta High Court and the petitioner-Bank, in view of the said objections, withdrew the aforesaid suit from the Calcutta High Court with liberty to file a fresh suit on the same cause of action against the defen-

dants in a proper forum vide order of the High Court dated December 18, 1972. During the interval that elapsed between the withdrawing of the suit from the High Court and filing of the fresh suit in the Alipore Court, it was found by the petitioner-Bank that the said-Company had broken the locks of the petitioner-Bank from their godowns at Khaikhli in breach of loan agreements and put the locks of one Messrs. Sakow Trading and Industrial Corporation, a sister partnership concern of the said Company having its Head Office at 10, Middleton Row, Calcutta. The persons interested in the said-Company started carrying on their unit at 36, Industrial-cum-Housing Estate, Faridabad, in a different name of Messrs. Sakow Industries (Faridabad) Private Limited with a view to defraud the petitioner-Bank of the huge amount due from the said-Company. It is also alleged that the Directors of Sakow Industries (Faridabad) Private Limited are related to the Directors of the said-Company. This fact is not even denied in the written statement filed on behalf of the respondent in this application. A fresh suit was also filed by the petitioner-Bank in Alipore Court on January 13, 1973, against the said-Company, that is, Messrs. Sakow Industries (Private) Limited, its two guarantors, namely, Shri S. P. Mehta and Mrs. Nirmala Mehta, and the two new concerns, namely, Sakow Trading and Industrial Corporation and Sakow Industries (Faridabad) Private Limited who claimed themselves to be the lessees and owners of all the securities of the petitioner-Bank as mentioned above. The Alipore Court also appointed the same Receivers, who were earlier appointed by the Calcutta High Court as Receivers, in this case also, both the Receivers tried to take possession of the godowns at Khaikhli and also made an attempt to take possession of the godowns at Faridabad, but they were prevented to take possession by the plaintiff-Company and Messrs. Sakow Trading and Industrial Corporation. Messrs. Sakow Industries (Faridabad) Private Limited (hereinafter referred to as the plaintiff-Company) filed a suit in the Court of the Subordinate Judge Ist Class, Ballabgarh (Suit No. 844 of 1972, now No. 63 of 1974) for permanent injunction to the effect that the petitioner-Bank be restrained permanently from interfering in the peaceful possession of the premises mentioned in the plaint, that is 36, Industrial-cum-Housing Estate, Faridabad. In the plaint, it is mentioned that the entire premises and buildings at 36,

Industrial-cum-Housing Estate have been taken by the plaintiff-Company on long lease for a period of twenty years through a registered lease deed dated July 11, 1972 from the said-Company. It is further averred that the plaintiff-Company has bought the machineries, manufacturing rights, fittings and fixtures from the previous owners for a valuable consideration.

3. The petitioner-Bank filed its written statement on April 21, 1973, and controverted all the allegations made in the plaint. It was specifically mentioned in the written statement that the present suit was filed in collusion with Messrs. Sakow Industries Private Limited with mala fide intentions to deprive the petitioner-Bank of its securities lying at 36, Industrial-cum-Housing Estate Faridabad. It is also alleged by the petitioner-Bank that the liquidation proceedings were initiated against Messrs. Sakow Industries Pvt. Ltd. in the High Court at Calcutta being Company Petition No. 88 of 1971 and the said liquidation operations culminated in the winding up order passed by the Calcutta High Court on July 23, 1973. In view of the winding up order mentioned above, it was found that the lease granted in favour of the plaintiff-Company by Messrs. Sakow Industries Private Limited and the transfer of all other machineries etc. in favour of the plaintiff-Company was void ab initio under the provisions of Sections 531-A and 536 of the Companies Act as the liquidation proceedings were initiated much before the alleged lease and transfer of machineries etc. on July 11, 1972, in favour of the plaintiff-Company.

4. In order to bring the aforesaid facts on record, the petitioner-Bank then moved an application for an amendment of its written statement in the Court of the Subordinate Judge 1st Class, Ballabgarh, which was allowed by the Court vide its order dated September 5, 1975. The amended written statement was filed and the case was adjourned to December 8, 1975, for replication and framing of issues. The petitioner-Bank also filed a suit against the said-Company in liquidation for specific performance of the contract to create an equitable mortgage in favour of the petitioner-Bank on May 16, 1975, in the High Court at Calcutta and the suit is still pending there. It is in this situation that the present application has been filed.

5. Mr. Chhibbar, the learned counsel for the petitioner-Bank, has urged

that the common questions of fact and law arise in both the cases—one pending in Ballabgarh Court and the other pending in Alipore Court; that the entire amount of loans were granted by the petitioner-Bank through its Ballyguange Branch at Calcutta; that the entire evidence to be led by both the parties is available at Calcutta only and that the Ballabgarh suit was filed by the plaintiff-Company mala fide to harass the petitioner-Bank as a counter-blast and to prevent the Receivers from taking possession of the godowns of the said-Company. I find merit in what the counsel for the petitioner-Bank states. About 53 lakhs of rupees are due from the said-Company to the petitioner-Bank and the aforesaid facts reveal that the said-Company is adopting one method or the other to delay the litigation and to prevent the Receivers from taking possession and the petitioner-Bank to realise its amount due and to hamper the realisation of the debts by the petitioner-Bank. The assets were transferred by the said-Company to the plaintiff-Company after its liquidation. The liquidation took place earlier. Admittedly, the notice in this case has also been served on the opposite party by the petitioner-Bank before moving the present application, as required under Section 22 of the Code of Civil Procedure. Moreover, this application has also been moved before the final settlement of issues in the suit at Ballabgarh.

6. Mr. Doabia, the learned counsel for the respondent-Company, states that Section 22 is strictly not applicable in the present case as the plaintiff-Company could not file the suit in Calcutta and that the issues were also framed earlier and now only additional issues are to be framed. I do not find any merit in either of these contentions. Although some preliminary issues were framed, but after the filing of the amended written statement, an opportunity was given to file the replication and it was only then that the final issues were to be framed. Strictly speaking, even if Section 22 may not be applicable, it is a case where about fifty-three lakhs of rupees are due from the said Company. The Directors of the said Company and of the plaintiff-Company are inter-related. This fact is not denied in their return. The reply given in the return is evasive with regard to the other allegations in the transfer application. Most of the facts are denied for want of knowledge. There is no clear-cut denial.

Moreover, the assets of the said Company were leased to the plaintiff Company during liquidation proceedings which is forbidden under Section 531-A of the Companies Act. Winding up started somewhere in 1971 and the transfers were made to the plaintiff Company in the year 1972, which clearly shows that it was all mala fide in order to create hinderances for the petitioner-Bank to realise debts and to delay the litigation also. The present suit seems to be filed by the plaintiff Company in connivance with the said Company and the purpose seems to be the same. In all the cases pending in Calcutta and Faridabad Courts, same questions of law and fact are involved, parties are also the same, although a little different name is given but the name Sakhow Industries is common in both the suits and the Directors of both these Companies are intimately related to each other, which fact is not denied as stated earlier. In such a situation, I find that it would be in the interest of justice if the case is transferred from the Court at Faridabad to the Court at Calcutta having jurisdiction in the matter. It is, however, pertinent to reproduce Section 23 (3) of the Code of Civil Procedure which is in the following terms:—

"Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate."

7. The plain reading of this Section shows that in a situation like the present, High Court can order transfer of the case to some other Court under the different High Court. Moreover, under Section 151 of the Code of Civil Procedure every court has the inherent jurisdiction to pass any order to meet the ends of justice. In *Pragji Soorji and Co. of Bombay v. Kalu Mal Shori Mal and Co. of Amritsar*, AIR 1924 Lah 306, it has been held that the inherent powers under Section 151 of the Code of Civil Procedure can be used for the purpose of preventing or remedying grave abuses. Same view has been taken in *Datt Singh v. Tej-datt Singh*, AIR 1934 All 14. In the peculiar circumstances of the present case, as the facts enumerated reveal, it would meet the ends of justice and prevent the abuse of the process of the Court if the case pending in the Ballabgarh Court is transferred to the Court at Calcutta in which the connected matter is pending

between the petitioner-Bank and the said Company.

8. For the reasons recorded above, this petition is allowed with costs and Suit No. 844 of 1972 (now No. 63 of 1974) pending in the Court of the Subordinate Judge 1st Class, Ballabgarh, is transferred to the Court at Calcutta in which the connected case between the petitioner-Bank and the said Company is pending. Counsel fee Rs. 300.

Petition allowed.

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B. S. DHILLON AND M. R. SHARMA, JJ.

T. N. Mahajan, Petitioner v. M/s. Janta Steel and Metal Co-op. Industrial Society Ltd. and another, Respondents.

Civil Revn. No. 864 of 1972, D/- 3-5-1976.*

(A) Civil P. C. (1908), S. 115 — Punjab High Court Rules and Orders, Vol. 5, Chap. I-A, R. 7 — Rule requiring revision petitioner to file certified copy of decree or order or judgment along with petition — Rule, if directory — Party not vigilant — Duty of High Court — 1971 Pun LJ 868, Overruled.

Unlike the exercise of appellate jurisdiction revisional jurisdiction can be exercised even suo motu. It is precisely for this reason that an express provision had to be made in Order XLI, Rule 1, enabling the appellate Court to dispense with the copy of the judgment appealed against. In view of the wide ambit and scope of the revisional power, it was not considered necessary to make such a provision in Rule 7 of the Punjab High Court Rules and Orders. There is no express provision in the rules which debars a Court of revision to dispense with the production of the copy of the order or judgment sought to be revised. Scope and object of S. 115, C.P.C. explained. AIR 1961 SC 832, Distinguished. (Paras 5, 6)

Rule 7 is, therefore, directory in nature and it is open to the High Court to entertain a revision petition in the absence of a copy of the order or judgment sought to be revised, or to allow late production of such a copy or even to dispense with its production. The Court would have to exercise discretion on the facts and cir-

*(To revise order of O. P. Saini 1st Addl. Dist. Judge, Ludhiana, D/- 4-3-1972.)

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cumstances of each case and no hard and fast rules can be laid down on this point. However, High Court will not show any indulgence to a party who is not serious and vigilant about prosecuting its own case. 1971 Pun LJ 868, Overruled.

(Paras 8, 4)

When the petitioners filing their revision petition on 10-7-1972 stated in their affidavit that copy of order (under revision) had been applied for and the same would be filed as and when available, but the same was not filed even until date of decision (on 3-5-1976), it was held that the petitioners were not seriously and vigilantly pursuing the petition and no indulgence should be shown to them by High Court.

(Para 9)

Cases Referred: Chronological Paras

1971 Pun LJ 868 = 1971 Ren CR 439 2, 8
AIR 1961 SC 751 = 1961 (1) Cri LJ 773 4
AIR 1961 SC 832 = (1961) 2 SCR 918 6

S. S. Kang, for Petitioner; H. L. Sarin, Sr. Advocate with M. L. Sarin, for Respondents

M. R. SHARMA, J.:— The revision petition filed in this Court was not accompanied by a certified copy of the order passed by the trial Court. The petition was admitted to hearing on an assurance given on behalf of the petitioner that he would file certified copy of the order passed by the learned Court below as soon as the same was made available.

2. When the case came up before me sitting in Chambers, a preliminary objection was raised on the strength of a Single Bench decision of this Court in Behari Lal v. Smt. Kaushalya Devi, 1971 Pun LJ 868, that such a petition was not competent in the absence of a certified copy of the order passed by the trial court and there was no provision of law which entitled the revisional Court to pass an order dispensing with the production of the copy of such an order with the revision petition. I thought the view taken in Behari Lal's case (supra) was too stringent and needed some modification. At my request the learned Chief Justice ordered that this case should be decided by a Division Bench.

3. Rule 7 appearing in Chapter 1-A of Volume V of the Rules and Orders of the Punjab High Court, reads as under:—

"7. Every such petition shall be stamped as required by law and shall be accompanied by a copy of the decree or order in respect of which such applica-

tion is made and by a copy of the judgment upon which such decree is founded. In the case of petitions for revision of the decree or order of an appellate court, a copy of the judgment or order of the court of first instance shall also be filed."

4. The use of the word 'shall' does on a cursory perusal of the rule, show that a petitioner who approaches this Court for exercise of revisional jurisdiction is under a duty to file a certified copy of the decree or order, or judgment passed by the lower court along with the petition for revision. But from the phraseology of the rule alone it cannot be held that this rule is of mandatory character. In *State of Uttar Pradesh v. Babu Ram Upadhyaya*, AIR 1961 SC 751, the Court observed as under:—

"The relevant rules of interpretation may be briefly stated thus: When a statute uses the word 'shall', prima facie, it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom and, above all, whether the object of the Legislature will be defeated or furthered."

5. The power of revision is conferred on this Court under Section 115 of the Code of Civil Procedure, which empowers it to call for the record of any case decided by any Court subordinate to it in which no appeal lies and if the subordinate Court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction so vested in it, or has acted in exercise of its jurisdiction illegally or with material irregularity, this Court can rectify the error and pass such an order as it thinks fit. This power may be exercised by the High Court either suo motu or on a petition presented to it in this behalf. When the High Court exercises suo motu powers, the certified copy of the order or judgment passed by a subordinate Court need not be before it. The High Court can also exercise this juris-

diction ex debito justitiae on the basis of information conveyed to it by anybody other than the aggrieved party. The object is to give relief in case of manifest injustice unhampered by the technical formalities of procedure. In other words, the very nature and design of this statutory provision is such as would not admit of this rule being of mandatory character.

6. Mr. Sarin, the learned counsel for the respondents has relied upon Jagat Dhish Bhargava v. Jawahar Lal Bhargava AIR 1961 SC 832, in which it has been held that the provision of Order XLI, Rule 1, Code of Civil Procedure, which requires that a certified copy of the decree should be filed along with the memorandum of appeal is a mandatory provision and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent. This case is clearly distinguishable because there is a specific provision in the Code requiring the appellant to file a copy of the decree appealed against along with the memorandum of appeal. The right of appeal is a creature of the statute. If a statute lays down that an appeal shall be heard only after some conditions are satisfied, the appellate Court cannot entertain and decide the appeal unless and until those conditions are satisfied. Even then the Supreme Court held in this case that no hard and fast rules of general application could be laid down for dealing with appeals defectively filed under Order XLI, Rule 1.

At the cost of repetition, I would like to add that unlike the exercise of appellate jurisdiction revisional jurisdiction can be exercised even suo motu. It is precisely for this reason that an express provision had to be made in Order XLI, Rule 1, enabling the appellate Court to dispense with the copy of the judgment appealed against. In view of the wide ambit and scope of the revisional power, it was not considered necessary to make such a provision in Rule 7, quoted above. At the same time, there is no express provision in the rules which debars a Court of revision to dispense with the production of the copy of the order or judgment sought to be revised. In a situation like this, the Court can pass suitable orders, either dispensing with the production of such a copy or allowing its production at a late stage as the justice of a particular case demands. The procedural Codes are exhaustive only on the points expressly dealt by them. A Court can always evolve its own procedure regarding the points on

which such Codes are silent in the interest of justice, equity and good conscience.

7. If the stringent view is accepted, then in many cases in which a revisional Court is satisfied that because of erroneous exercise of jurisdiction manifest injustice has resulted, it would be helpless in undoing the wrong. I doubt if the framers of the Code of Civil Procedure intended such a limited construction to be placed on Section 115 of this Code.

8. A Court of revision may insist that a certified copy of the judgment of the trial Court should be filed and may even decline to exercise revisional powers when such a copy is not filed either along with the petition or during the time allowed by it. If the facts are otherwise admitted or there is no dispute about the real purport of the order or the judgment rendered by the trial Court, the High Court may even dispense with the filing of its copy but I fail to see how an embargo can be placed on the rights of a revisional Court to do justice on the basis of technicalities of procedure. I would, therefore, hold that Rule 7 quoted above is directory in nature and it is open to the High Court to entertain a revision petition in the absence of a copy of the order or judgment sought to be revised, or to allow late production of such a copy or even to dispense with its production. The Court would have to exercise discretion on the facts and circumstances of each case and no hard and fast rules can be laid down on this point. It suffices to mention that this Court has seldom shown any indulgence to a party who is not serious and vigilant about prosecuting its own case. With utmost respect to the learned Judge who decided Behari Lal's case, 1971 Pun LJ 868 (supra), it may be said that the view taken by him appears to unduly narrow down the wide scope of the provision of Section 115, Code of Civil Procedure, and does not commend itself to me.

9. Coming now to the case in hand, the revision petition was filed on July 10, 1972. Along with the petition, an affidavit was filed in which it was stated that a copy of the order passed by the learned Senior Subordinate Judge, Ludhiana, had been applied for and the same would be produced in Court as and when it was obtained. Till today this copy has not been filed. This shows that the petitioners are not seriously and vigilantly pursuing this petition. In this situation,

no indulgence should be shown to him. This petition deserves to be dismissed on this score alone and I order accordingly.

B. S. DHILLON, J.:— I agree.

Petition dismissed.

AIR 1976 PUNJAB & HARYANA 327

A. D. KOSHAL, J.

Smt. Brij Rani, Petitioner v. Punjab Handloom Weaver Apex Co-operative Society Ltd. and another, Respondents.

Civil Revn. No. 118 of 1973, D/- 3-3-1976.*

(A) East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (ii) (a)—‘Sublets’, meaning — Transfer by operation of law is not covered — Transfer of rights of tenancy because of operation of Reorganization Act is by operation of law.

The transfer envisaged by sub-cl. (a) is a voluntary transfer by tenant and not a transfer which takes place by operation of law and without any act of volition on his part. (Para 3)

Where the transfer of tenancy rights in the tenanted shop by the Punjab Co-operative Society in favour of the Haryana Co-operative Society took place by reason of a scheme prepared under the provisions of Section 5-D of the Multi-Unit Co-operative Societies Act, 1942 which was added thereto by Section 70 of the Reorganisation Act and the scheme in question was applicable to the Punjab Society (the tenant), the transfer of the rights of tenancy in the said shop cannot be said to have been made to the Haryana Co-operative Society through a voluntary act and not because of the operation of any provisions of the Reorganization Act. The circumstance that the scheme was approved after reference under S. 5-D (3) of the Multi-Unit Co-operative Societies Act long after the transfer of the tenancy rights in favour of the Haryana Society had taken place does not stand in the way of the scheme being operative right from 1-11-1966, (i.e. before the transfer).

(Para 3)

(B) Multi-Unit Co-operative Societies Act (1942), S. 5-D — Scheme prepared under — Depot — Includes tenancy rights in the premises in which the depot was being run. (Para 4)

*(To revise order of J. M. Tandon, Appellate Authority, Ambala, D/- 27-10-1972.)

H. L. Sarin, Sr. Advocate with M. L. Sarin, for Petitioner; V. K. Bhandari (for No. 1) and T. R. Arora (for No. 2), for Respondents.

ORDER :— This is a petition by Brij Rani, the landlady, under sub-section (5) of Section 15 of the East Punjab Urban Rent Restriction Act, 1949 (hereinafter referred to as the Act) against the dismissal by the Tribunals below of her application under Section 13 of the Act for the eviction of her tenant named the Punjab Handloom Weavers Apex Co-operative Society Limited, Chandigarh (hereinafter called the Punjab Society) and the Haryana Handloom Weavers Apex Co-operative Society Limited, Panipat (hereinafter called the Haryana Society) from shop No. 4164 situated at D. C. Road, Sadar Bazar, Ambala Cantt.

2. The application of the landlady was based on the grounds of non-payment of rent and subletting of the premises by the Punjab Society to the Haryana Society. All the arrears of rent along with costs and interest were paid by the Punjab Society on the first date of hearing to the landlady and the only point left in dispute between the parties then was as to whether the Punjab Society was liable to be ejected from the said shop on the ground that it had sublet it to the Haryana Society. The case put forward by the Punjab Society was that the depot being run by it in the said shop was allocated to the Haryana Society under a scheme prepared in pursuance of the provisions of the Punjab Reorganisation Act, 1966 (hereinafter referred to as the Reorganisation Act), that the allocation included the transfer of the right of tenancy in the said shop to the Haryana Society and that the transfer having taken place by operation of law no subletting could be spelt out of it.

Both the Tribunals below have accepted the stand taken by the Punjab Society to be correct in law and that is why the landlady has come up in revision to this Court.

3. Under sub-clause (a) of clause (ii) of sub-section (2) of Section 13 of the Act a tenant is liable to ejection if after the commencement of the Act, he transfers his right under the lease or sublets the building rented out to him, without the consent of the landlord. The transfer envisaged by the sub-clause is thus a voluntary transfer by the tenant and not a transfer which takes place by operation of law and without any act of volition on

his part. The correctness of this proposition is not objected to by Mr. Sarin, learned counsel for the landlady, whose contention, however, is that the transfer of the rights of tenancy in the said shop was made by the Punjab Society to the Haryana Society through a voluntary act and not because of the operation of any provisions of the Reorganisation Act. This contention must be repelled as being without substance. It is common ground between the parties that the transfer of tenancy rights in the said shop in favour of the Haryana Society took place by reason of a scheme prepared under the provisions of Section 5-D of the Multi-Unit Co-operative Societies Act, 1942 (hereinafter called the Multi-Unit Act) which was added thereto by Section 70 of the Reorganisation Act. Mr. Sarin concedes that the scheme in question was applicable to the Punjab Society whose name appears at serial No. 6 in the Fifteenth Schedule to the Reorganisation Act, and that it was certified by the State Government (after it had been prepared by the Board of Directors) on the 27th of October, 1966, but urges in support of his contention that the scheme did not become operative till after the transfer of the tenancy rights to the Haryana Society and that such transfer must be regarded, therefore, as having been made voluntarily by the Punjab Society and not by operation of law. He relies on the provisions of Section 5-D of the Multi-Unit Act which may be reproduced here with advantage:

"5-D. (1) Where, in respect of any Co-operative Society specified in the Fifteenth Schedule to the Punjab Reorganisation Act, 1966, which under the provisions of sub-section (1) of Section 5-A would become a multi-unit co-operative society, the Board of Directors adopts, by a majority of not less than three-fourths of the directors, any scheme for the reconstitution, reorganisation or dissolution of the society, including proposals regarding—

(a) the formation of new co-operative societies and the transfer thereto, in whole or in part, of the assets and liabilities and employees of that society, or

(b) the transfer, in whole or in part, of the assets and liabilities and employees of that society to any other co-operative society in the existing State of Punjab or in the Union Territory of Himachal Pradesh;

and the State Government of Punjab certifies the scheme at any time before the 1st day of November, 1966, then, notwithstanding anything contained in sub-section (2) or sub-section (3) or sub-section (4) of the said section or any other law, regulation or bye-law for the time being in force in relation to that society, the scheme so certified shall be binding on all societies affected by the scheme, as well as the share-holders, creditors and employees of all such societies, subject to such financial adjustments as may be directed in this behalf under sub-section (3) but no such scheme shall be given effect to before the said day:

Provided that where a scheme includes any proposal regarding the transfer of assets and liabilities and employees to any co-operative society referred to in clause (b), the scheme shall not be binding on that existing society or the share-holders and creditors thereof, unless the proposal relating to such transfer is accepted by the existing society by a resolution passed by a majority of the members present at a meeting of its general body.

(2) When a scheme in respect of a co-operative society is so certified, the Central Registrar shall place the scheme at a meeting, held in such manner as may be prescribed by rules made under this Act, of all the persons who, immediately before the date of certification of the scheme, were members of the society, and the scheme may be approved by a resolution passed by a majority of the members present and voting at the said meeting.

(3) If the scheme is not so approved or is approved with modifications, the Central Registrar may refer the scheme to such Judge of the High Court of Punjab and Haryana as may be nominated in this behalf by the Chief Justice thereof and the Judge may direct such financial adjustments to be made among the societies affected as he deems necessary, and the scheme shall be deemed to be approved subject to those financial adjustments.

(4) If in consequence of the directions given under sub-section (3), a society becomes liable to pay any sum of money, the successor State within whose area the society is located shall be deemed to be guarantor in respect of the payment of such money and shall be liable as such."

It is true that the scheme was not approved under sub-section (2) of Section 5-D and had to be referred to Tuli, J., of this Court by the Central Registrar under sub-section (3) of that section and was

approved subject to various financial adjustments by Tuli, J., on the 19th of April, 1971, long before which date the transfer of the tenancy rights in favour of the Haryana Society had taken place but that circumstance does not stand in the way of the scheme being operative right from the first day of November, 1966. Sub-section (1) of Section 5-D clearly lays down that notwithstanding anything contained in sub-sections (2), (3) and (4) of Section 5-A or any other law for the time being in force, a scheme prepared by the Board of Directors and certified by the State Government shall be binding on all Societies affected by it. It further states that no such scheme shall be given effect to before the 1st day of November, 1966. The result is that any scheme prepared and certified before that date becomes operative as from that date even though it is approved neither under sub-section (2) nor under sub-section (3). The only requirement of a scheme in order that it may become operative is that it shall be prepared by the Board of Directors and certified by the State Government before the 1st of November, 1966. That the scheme with which we are here concerned was so prepared and certified is, as already, stated, common ground between the parties. There was, therefore, no impediment in the way of its becoming operative as from that date. The only limitation on its operation was that it was to be subject to such financial adjustments as might be directed in that behalf under sub-section (3). Such adjustments are a matter with which the transfer of the tenancy rights has no concern. The contention is, therefore, repelled.

4. Another contention raised by Mr. Sarin is that the scheme did not provide for any transfer of the tenancy rights in the shop in dispute in favour of the Punjab Society. The relevant clause of the scheme reads:

"Depots: The Delhi Depot be transferred to Haryana Apex Society and other depots be transferred to the respective Apex Societies in the area of which the particular depot falls."

According to Mr. Sarin, the word 'depot' does not include the tenancy rights in the premises in which the depot was being run. However, I do not find myself in agreement with him. In the context in which it is used the word 'depot' was intended to have the widest meaning so that it would include not only the goods lying in the premises of

the depot but also all its assets and liabilities. The rights of tenancy in the shop were rights in immovable property and formed one of the valuable assets of the Punjab Society and would, therefore, be transferable to the Haryana Society under the above extracted portion of the scheme.

5. In the result the petition fails and is dismissed but with no order as to costs.

Petition dismissed.

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B. S. DHILLON AND HARBANS LAL, JJ.
Harchand Singh, Petitioner v. The State of Punjab and others, Respondents.
Civil Writ No. 5926 of 1975, D/- 3-3-1976.

(A) Constitution of India, Arts. 226, 310, 311 — Premature retirement — Writ petition challenging order — Arbitrary and capricious order — Retiring authority not applying his mind to record — Extraneous matter taken into consideration — Order set aside in writ proceedings.

It is within the jurisdiction of the High Court to quash the order of premature retirement in the exercise of its extraordinary jurisdiction under Articles 226 and 227 of the Constitution, in case such an order is found to be arbitrary or capricious. Where, from a perusal of the record of the petitioner and the averments made in the written statement filed on behalf of State the impugned order cannot be termed anything but arbitrary in the circumstances of the case and it is also found that the retiring authority did not apply its mind to the record of the petitioner and an extraneous matter like the alleged complaint which was not in existence at the time of the passing of the impugned order, was also taken into consideration, the impugned order retiring the petitioner was set aside in writ proceedings. 1976 Serv LR 78 (Punj), Rel. on. (Paras 7 & 8)

Cases Referred: Chronological Paras 1976 Serv LR 78 (Punj) 6

Kuldip Singh, Bar-at-Law and Sarup Singh, Advocate with him, for Petitioner; I. S. Tiwana, Deputy Advocate General, Punjab, for Respondents.

HARBANS LAL, J.:— This writ petition has been filed by Harchand Singh, petitioner, under Articles 226 and 227 of

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the Constitution of India for the issuance of a writ of certiorari quashing the order dated October 1, 1975, prematurely retiring him under Rule 3 (1) (a) and (b) of the Punjab Civil Services (Premature Retirement) Rules, 1975 (hereinafter to be called the Rules).

2. The petitioner was appointed as a Sales Tax Sub-Inspector on March 3, 1950, in the erstwhile State of PEPSU. He was promoted to the post of Taxation Inspector on November 1, 1966. He was again promoted to the post of Assistant Excise and Taxation Officer on March 5, 1975 and he joined the said post on March 10, 1975. Before the merger of erstwhile Pepsu with Punjab on November 1, 1956, adverse confidential reports were not conveyed in erstwhile PEPSU. The petitioner was awarded adverse report for the years 1967-68, 1969-70 and 1970-71. On a representation made by the petitioner, all these adverse entries were expunged by the Excise and Taxation Minister by his order dated September 24, 1974, a copy of which is Annexure P-1 to the writ petition. The operative part of which is reproduced below:—

"It is really strange that while on one hand, very serious charges have been levied against Shri Harchand Singh, but on the other hand, he has been either exonerated or the cases have been filed. In spite of these exonerations, the enquiries have been proceeding for which I do not find any reason. I also find that in support of the exonerations, no entries have been made in this ACR for year 1971-72(?) report (Report) (?) is contrary to the Government instructions of 1-3-1961."

On an earlier representation by the petitioner, the Excise and Taxation Minister had also passed an order on April 24, 1974, in his favour a copy of which is Annexure P-2 to the writ petition. The relevant part of that order is as follows:—

"This question has another very serious aspect, i.e. even after expiry of 5/6 years the enquiry was not finally disposed of. Even from that if it is concluded that continuous efforts are being made to obstruct the promotion of Shri Harchand Singh then it would not be wrong. In my view, when once an enquiry has been completed then there is no necessity for holding second enquiry."

The above abstracted order of the Excise and Taxation Minister was also agreed to by the Chief Minister.

3. It has been averred in paragraph 9 of the writ petition that respon-

dent No. 3, Shri Hardial Singh Chatwal Administration Officer, Excise and Taxation Commissioner's Office, Patiala, was biased against him and that the record for the purpose of premature retirement of the petitioner was prepared, processed and tabulated by the said respondent. In paragraph 10 of the writ petition, a number of allegations of mala fides, have been adverted to against respondent No. 3. Those allegations have been denied by respondent No. 3 in his affidavit. The petitioner was promoted as Assistant Excise and Taxation Officer on March 5, 1975 and the impugned order of premature retirement, a copy of which is Annexure P-5 was passed against the petitioner by the Financial Commissioner (Taxation) and Secretary to Government, Punjab, Excise and Taxation Department, on October 1, 1975, that is, within a period of seven months. It is admitted in the affidavit filed in reply by Shri O. P. Garg, Administrative Officer, Excise and Taxation Commissioner's Office, Patiala, on behalf of respondents Nos. 1 and 2 that adverse entries against the petitioner for the years 1950-51, 1951-52, 1952-53, 1953-54, 1954-55 and 1955-56, had not been conveyed to the petitioner. It is however, stated that the subsequent adverse remarks for the years 1956-57 and 1957-58 had been conveyed to the petitioner. It is also admitted that adverse remarks for the 1967-68, 1969-70 and 1970-71, against the petitioner had been expunged on a representation by him. It was also stated that there were adverse remarks for the year 1971-72 against the petitioner and the same had been conveyed to him. In paragraph 13 of the reply, it is stated as under:—

"The petitioner's record has been thoroughly unsatisfactory. In spite of the entries having been expunged there are still a good number of adverse entries regarding his work, conduct and integrity." It is stated in paragraph 14 of the reply that respondent No. 1 had duly considered the record of the petitioner and had come to the conclusion that it was in public interest to retire the petitioner prematurely. In paragraph 15 of the reply, it is stated that a number of complaints against the petitioner were received after his promotion on March 5, 1975.

4. The only contention of Mr. Kul-dip Singh, learned counsel for the petitioner, is that upto the year 1956, no adverse entry, if any, against the petitioner, had been conveyed to him. For the period from the years 1967-68 to 1970-71, ad-

verse entries against the petitioner had been expunged by the Minister, Excise and Taxation, Punjab by his orders, Annexures P-1 and P-2. The promotion of the petitioner as Assistant Excise and Taxation Officer from March 5, 1975 shows that the Government had applied its mind and had come to the conclusion that the record and performance of the petitioner was such as to warrant his promotion to a higher post on March 5, 1975, and, therefore, the previous record could not be taken into consideration for the purpose of retiring the petitioner by the impugned order. On the other hand, the learned counsel for the respondent State, Mr. I. S. Tiwana, urged that for the purpose of retirement, the Government was within its jurisdiction to peruse the entire record of the petitioner and come to an independent decision to prematurely retire the petitioner. According to him, the petitioner had earned a bad report regarding integrity in the year 1971-72 on the basis of which the petitioner could be justifiably retired. For our satisfaction, we called for the record regarding the confidential reports of the petitioner. From the perusal of the confidential report of the petitioner for the year 1971-72, it is found that the Excise and Taxation Officer, Sangrur, had no complaint against the petitioner regarding his reputation for honesty and integrity. Regarding overall assessment, the petitioner was placed in category 'B'. The petitioner was also adjudged as "a good executive official". This assessment by the Assistant Excise and Taxation Officer-cum-Officer Incharge, Sales Tax Check Barrier, Moonak, was agreed to by the Excise and Taxation Officer, Sangrur, as well as the Deputy Excise and Taxation Commissioner, Patiala Division, Patiala. The Excise and Taxation Commissioner, Punjab, seems to have written a few words under his signatures on May 12, 1972 and cut off the same so that it is not possible to make out anything as to what had actually been written by him in the first instance. However, remarks by him on this confidential report are to the following effect:—

"(a) An official of average calibre against whom a number of inquiries regarding false claim of T. A.

(b) Misbehaviour and unauthorised construction of house are pending.

His general reputation is not good."

'A' part of the comments by the Excise and Taxation Commissioner, Punjab, are

written on one side and 'B' part, on the other side of the confidential report. Below, these remarks, notes (i) and (ii) duly typed, have also been appended, which are to the following effect:

"(i) Enquiries regarding false claim of T. A. and misbehaviour have been filed by Government vide their memo. No. 9251-ET(5)-73/3027, dated 23-4-75 and orders of joint Excise and Taxation Commissioner, Punjab, vide orders dated 23-2-1973, respectively.

(ii) Enquiry regarding construction of house has been withdrawn by the Government from the Inquiry Officer, Vigilance Department vide their orders dated 22-10-74."

According to the learned counsel for the petitioner, the report for the year 1971-72, explained above cannot be treated as an adverse report against the petitioner. All the officials up to the Deputy Excise and Taxation Commissioner adjudged the petitioner as 'Good' and according to them there was no complaint against the petitioner regarding his honesty and integrity. According to the remarks of the Excise and Taxation Commissioner, there were enquiries regarding false claim of T. A. and unauthorised construction of house pending against the petitioner on the basis of which the petitioner had been adjudged as, his general reputation is not good." As the petitioner had been later on absolved of all those allegations, therefore, the only conclusion drawn is that the remarks of the Excise and Taxation Commissioner, Punjab, also cannot be construed as adverse against him. There is a good deal of substance in this contention. In the year 1972-73, there was no complaint against the petitioner regarding his honesty and integrity. For the year 1973-74, the petitioner had been adjudged as 'good' for reputation for honesty and integrity as well as regarding behaviour with subordinates, licensees and the public, by all the authorities upto the Excise and Taxation Commissioner. Regarding overall assessment, he was held to be 'hard working and efficient'. For the year 1974-75, the reputation for honesty and integrity of the petitioner was held to be 'fair' and regarding overall assessment, he was held to be 'intelligent' and 'hard working' and that assessment was agreed to by all the officers upto the Excise and Taxation Commissioner.

5. From the reply filed on behalf of the respondents Nos. 1 to 2, as given in paragraph 13, the petitioner was retired

and the impugned order passed by the Government on the basis of the conclusion:

"The petitioner's records has been thoroughly unsatisfactory. In spite of the entries having been expunged, there are still a good number of adverse entries regarding his work, conduct and integrity." These conclusions are not borne out from the record of the petitioner. According to the reply in paragraph 15 of the written statement, there were a number of complaints received against the petitioner after his promotion on March 5, 1975. We specifically enquired from the learned counsel for the State the alleged complaints. We were informed that only one complaint had been received against the petitioner which was dated October 3, 1975. That complaint, obviously, was received after the impugned order (Annexure P-5) was passed, which is dated October 1, 1975. From all this, we are fully convinced that the authority concerned had not applied its mind to the record of the petitioner so as to warrant the conclusion that it was in public interest to retire the petitioner.

6. It was then contended by the learned counsel for the respondent State that though the petitioner had been promoted as an Assistant Excise and Taxation Officer on March 5, 1975, yet it was within the jurisdiction of the Government to retire the petitioner in public interest after perusing the entire record of the petitioner including the one before the date of his promotion. As a principle of law, the appointing authority is not debarred from perusing the entire record of any employee so as to form an opinion whether to retire him or not under the rules. The scope and ambit of the power of the Government in this regard were exhaustively considered by a Division Bench of this court in *Gurdial Singh v. The State of Punjab*, (1976) 1 Serv LR 78 (Punj). In paragraph 38 of the said judgment, the summary of the conclusion arrived at regarding the various matters in controversy in that case has been given. Whereas the right of Government to retire an employee in public interest has been recognised to the fullest extent according to that decision, it has also been held as follows:—

"An order of premature retirement can be quashed or set aside by a court only if it is either shown to have been actuated by malice or is shown to have been passed in an arbitrary or capricious

manner or by an authority not competent to pass such an order under the relevant service rules."

7. Thus it is within the jurisdiction of this court to quash the order of premature retirement in the exercise of its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India in case such an order is found to be arbitrary or capricious. From a perusal of the record of the petitioner and the averments made in the written statement filed on behalf of respondents Nos. 1 and 2, we are of the considered opinion that the impugned order (Annexure P-5) cannot be termed anything but arbitrary in the circumstances of this case. We are further of the opinion that the retiring authority did not apply its mind to the record of the petitioner. An extraneous matter like the alleged complaint which was not in existence at the time of the passing of the impugned order (Annexure P-5) was also taken into consideration.

8. For the reasons recorded above, this writ petition is accepted and the impugned order (Annexure P-5) retiring the petitioner is set aside. There will however, be no order as to costs.

B. S. DHILLON, J.:— I agree.

Petition allowed.

AIR 1976 PUNJAB & HARYANA 332 FULL BENCH

R. S. NARULA, C. J., P. C. JAIN, M. S. GUJRAL, S. C. MITAL AND B. S. DHILLON, JJ.

Surjit Singh, Petitioner v. The State of Punjab and others, Respondents.

Criminal Misc. No. 14 of 1975, in Criminal Writ No. 130 of 1975, D/- 2-12-1975.*

(A) Punjab Panchayat Samitis and Zilla Parishads Chairman and Vice-Chairman (Election) Rules (1961), R. 8 (8) — Election of Chairman and Vice-Chairman — Right of member to cast vote — Necessity of physical presence — Right subject to limitations — Inability of member to be present due to valid detention — Detaining authority is under no obligation to arrange for member's presence — Mandamus cannot issue.

*(Decided by larger Bench on order of reference made by M. M. S. Gujral, S. C. Mital and Gurnam Singh, JJ. on 1-9-1975.)

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It is clear from the scheme of the rules that a member can contest the election of the office of Chairman or Vice-Chairman in absentia whereas if a member wants to cast his vote at the said election, he cannot do so by proxy and thus his physical presence in the meeting is necessary. The statutory right of a member to cast his vote is, however, subject to limitations. Such a right can only be exercised if he is capable of exercising the same. In other words, if a member is unable to present himself at the meeting convened for the purpose, either of his own volition or because of he having been validly detained, he cannot exercise the said statutory right. In a case, therefore, where the detention of a member is valid, there is no obligation on the detaining authority to facilitate the exercise of the right of franchise and thus the High Court under its writ jurisdiction, cannot issue writ of mandamus to the detaining authority for making arrangements for the exercising of such a right which right has become incapable of being exercised because of the valid and legal detention orders. A writ in the nature of mandamus can only be issued if there exists a legal obligation which is sought to be enforced by issuance of such a writ. AIR 1966 SC 657 and AIR 1950 SC 27, Rel. on. C. W. P. No. 4262 of 1975, D/- 28-7-1975 (Punjab), Dist.

(Paras 7, 8)

Cases Referred : Chronological Paras

(1975) Civil Writ No. 4262 of 1975, D/- 28-7-1975 (Punjab)	3, 11, 12
AIR 1966 SC 657 = 1966 Cri LJ 586	9
AIR 1950 SC 27 = (1950) 1 SCR 88	10
Nath Singh, for Petitioner; I. S. Tiwana, Dy. Advocate-General, Punjab, for Respondents.	

JUDGMENT :— This order will dispose of Criminal Misc. No. 14 of 1975 in Criminal Writ No. 130 of 1975.

2. Surjit Singh petitioner in Criminal Writ No. 130 of 1975, younger brother of detenu Kabal Singh, has challenged the detention of Kabal Singh under Articles 226 and 227 of the Constitution of India and has thus prayed for the issuance of a writ in the nature of habeas corpus alleging the detention of Kabal Singh to be illegal and unconstitutional. Kabal Singh detenu was elected as a member of the Block Samiti, Jandiala Guru, while under detention. It is alleged in the miscellaneous application that the election for the office of the Chairman of the Block Samiti, Jandiala Guru was to take place on August 19, 1975. It is alleged that Kabal Singh detenu is popular in

public and is an eminent social worker. He is keen to contest the election of the Chairman of the Block Samiti of Jandiala Guru. Therefore, a prayer has been made in the miscellaneous application that a direction be issued to respondent No. 1 i.e., the State Government of Punjab to permit Kabal Singh detenu to participate in the co-option of Membership of the Block Samiti, Jandiala Guru, which was to be held on August 13, 1975, or any other order as deemed fit, may be passed in the matter.

3. The habeas corpus petition came up for hearing on September 1, 1975, before a Full Bench of this Court consisting of three Hon'ble Judges. The learned Judges constituting the Full Bench being of the opinion that the petition involved points of considerable importance and difficulty, ordered that the file of the case be placed before Hon'ble the Chief Justice for constituting a larger Bench. It was observed that in the miscellaneous application a question has been raised whether the State Government is bound to take the detenu to the place where the polling in the elections to a Panchayat Samiti is to take place and while considering this question, the correctness of the decision of this Court in Civil Writ No. 4262 of 1975, Mool Chand Jain v. Punjab and Haryana Bar Council, Chandigarh, D/- July 27, 1975 (Punjab), will have to be gone into. Therefore, the miscellaneous application was also referred to a larger Bench along with the habeas corpus petition. This is how this application is placed before us.

4. Kabal Singh detenu has been elected as a Member of the Block Samiti, Jandiala Guru, under Section 5 of the Punjab Panchayat Samitis and Zilla Parishads Act, 1961 (hereinafter referred to as the Act). Under Section 17 of the Act, the Deputy Commissioner concerned, or any gazetted officer appointed by him in this behalf, not below the rank of an Extra Assistant Commissioner, shall call the first meeting of the Panchayat Samiti in the manner prescribed, as soon as the election and co-option of all Members of the Panchayat Samiti is notified, to elect the Chairman and Vice-Chairman from amongst the Primary and Co-opted Members. The Punjab Panchayat Samitis and Zila Parishads Chairman and Vice-Chairman (Election) Rules, 1961 (hereinafter referred to as the Rules) have been framed under the Act. Rule 3 of the said Rules provides that the election of the Chair-

man and Vice-Chairman of a Panchayat Samiti shall be held in the office of the Panchayat Samiti or such other place as may be specified in that behalf by the Presiding Officer who shall convene and preside over the meeting called for that purpose. Rule 4 makes a provision for issuing a notice in writing in form A attached with the Rules to the Members specifying the date and time of meeting.

5. Rule 5 is in the following terms:—

"5. Proposing and seconding candidates for office of Chairman and Vice-Chairman.

(1) As soon as the Members have assembled at the appointed time and place the Presiding Officer shall call upon the Members present to propose candidates for the two offices and every proposal shall also be seconded by a member. The names of candidates, their proposers and seconders shall then be recorded in Form B and read out by the Presiding Officer to the members present.

(2) One-half of the total number of members shall constitute a quorum.

(3) If at the first meeting there be no quorum present as specified in sub-rule (2), the Presiding Officer shall adjourn the meeting.

(4) When a meeting is adjourned under sub-rule (3) another meeting shall be convened by the Presiding Officer by giving three days' clear notice to the members.

(5) No quorum shall be necessary for second meeting."

6. Rule 6 makes a provision for the withdrawal of the candidates. According to Rule 7 (1), if only one candidate is duly proposed there shall be no ballot and he shall be declared to have been duly elected, and Rule 7 (2) provides that if there are two or more such candidates the votes of the members present at the meeting shall be taken by ballot in the manner as provided under Rule 8. Rule 8 provides a procedure for taking ballots. Sub-rule (8) of Rule 8 specifically provides that every member wishing to record his vote shall do so in person and not by proxy. The remaining Rules are not relevant for the purposes of the decision of this miscellaneous application.

7. It would be seen that a candidate, who intends contesting an election to the office of a Chairman or Vice-Chairman, has to be proposed by a Member of the Panchayat Samiti and has also to be

seconded by a Member of the said Samiti so that according to the scheme of the rules, the presence of a candidate for contesting such an election is not necessary. It is further clear from the scheme of the rules that no member can vote by proxy and a member, who intends voting, has to be present in the meeting. It would thus be seen that statutory right has been given to a member of the Panchayat Samiti to cast his vote for election of Chairman and Vice-Chairman and to contest the said election if proposed and seconded in the manner provided. It is clear from the scheme of the rules that a member can contest the election of the office of Chairman or Vice-Chairman in absentia whereas if a member wants to cast his vote at the said election, he cannot do so by proxy and thus his physical presence in the meeting is necessary.

8. It is contended by Shri Shrinath Singh, the learned counsel for the detenu, that the detenu has a statutory right to cast his vote according to the provisions of the Act and the Rules made thereunder and, therefore, there is a corresponding duty on the State Government to make arrangements for facilitating the exercise of that right. We are unable to uphold this contention. No doubt it is true that a member of the Samiti has a statutory right to cast his vote but the said right is subject to limitations. Such a right can only be exercised if he is capable of exercising the same. In other words, if a member is unable to present himself at the meeting convened for the purposes, either of his own volition or because of he having been validly detained, he cannot exercise the said statutory right. If the member is being detained by a valid and legal order, the question immediately arises: Whether such a right as mentioned above, casts any obligation on the detaining authority to make arrangements for facilitating the exercise of the said right? The answer clearly is in the negative. The exercise of the right is subject to the condition of the member being present at the time and place of meeting and if a member has been detained under valid orders and there being no provision made in law casting obligation on the detaining authority to make arrangements for the exercise of the said right, it cannot be successfully argued that there is any obligation on the detaining authority to facilitate the casting of vote by making special arrangements. It is, therefore, clear that in a case where the detention of a member is valid, there is no obliga-

tion on the detaining authority to facilitate the exercise of the right of franchise and thus this Court under its writ jurisdiction, cannot issue writ of mandamus to the detaining authority for making arrangements for the exercising of such a right which right has become incapable of being exercised because of the valid and legal detention orders. A writ in the nature of mandamus can only be issued if there exists a legal obligation which is sought to be enforced by issuance of such a writ.

9. If the order of detention is valid, it is obvious that it validly prevents the member from attending the meeting and that being so, no occasion can arise for the exercise of the right of vote. In this connection, reference may usefully be made to a decision of the Supreme Court in *K. Ananda Nambiar v. Chief Secretary to Government of Madras*, AIR 1966 SC 657. In that case, an argument was advanced on behalf of the detenu, who was a Member of Parliament, that the detenu in exercise of the rights granted by Article 105 (1) and (2) of the Constitution of India, was entitled to exercise the same and his detention on that ground was also illegal. This contention was repelled and it was held by their Lordships of the Supreme Court that if the order of detention validly prevents the detenu from attending the session of Parliament, no occasion arises for the exercise of the right of freedom of speech and no complaint can be made that the said right has been invalidly invaded.

10. It would further be seen that when a person is detained by means of a valid order, his right to freedom of movement stands suspended during the course of the period of detention. Right to cast vote, according to the rules referred to above, is necessarily connected with the presence of the member in the meeting convened and if a person is not in a position to attend the said meeting by reason of the valid orders of detention passed by a competent authority, the said right of his stands suspended during the period of detention as it is incapable of being exercised by any other manner because no such provision has been made in law. Reference in this connection may be made to the decision of the Supreme Court in *A. K. Gopalan v. State of Madras*, (1950) 1 SCR 88 = (AIR 1950 SC 27).

11. The learned counsel for the petitioner has placed reliance on a Bench decision dated July 28, 1975, of this Court

in *C. W. P. No. 4262 of 1975 (Punj)*, *Mool Chand Jain v. Punj. & Har. Bar Council, Chandigarh*. That case was decided on its own facts. A contention was sought to be raised on behalf of the respondents in that case that if a person is detained, all his civil rights stand suspended. This contention was not accepted because it is obvious that merely because a person is detained, all his civil rights cannot come to an end. It will depend on the nature of rights. For instance, by a valid detention, the right to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India are such rights which in the nature of things will be incapable of being exercised as the freedom of movement is restricted under the valid orders of detention. But there are other civil rights such as the acquisition and holding of property etc., which even though a person is under valid detention, are capable of being exercised. It was in this context that the contention raised in the said case was repelled.

12. No doubt the respondent State of Haryana in *Mool Chand's case* (*C. W. No. 4262 of 1975, D/- 28-7-1975 (Punj)*) (*supra*) was directed to make appropriate arrangements for enabling some of the advocates mentioned in that petition to cast their votes to the election of members of the Bar Council of Punjab and Haryana, but it may be pointed out that the precise point whether the State Government was under legal obligation to make such arrangements, was not raised and thus was not decided in that case. It may further be pointed out that some of the advocates regarding whom the directions were issued for making arrangements for casting of votes, were in jail in proceedings under Sections 109/151 of the Code of Criminal Procedure. I have no doubt in my mind that as regards the persons detained under such provisions and in cases where the detention of a detenu is under challenge before this Court, this Court has ample powers in appropriate cases to issue directions of any nature including the directions, directing the authorities to make proper arrangements for exercising the right of franchise, but whether the said power should be exercised or not, would depend on the facts and circumstances of each case. However, it may be made clear that even in cases of those categories, the detained persons

have no legal right which is enforceable in the Court of law but at the same time the Court has got powers to issue interim relief of any kind which it may consider appropriate keeping in view the facts and circumstances of each case.

13. Keeping in view the facts and circumstances of this case, no ground is made out for the issuance of the directions prayed for.

14. For the reasons recorded above, there is no merit in this miscellaneous application and the same is hereby dismissed.

Application dismissed.

AIR 1976 PUNJAB & HARYANA 336

RAJENDRA NATH MITTAL, J.

Gurbachan Singh and others, Plaintiffs-Appellants v. Rajinder Kaur and another, Defendants-Respondents.

Second Appeal No. 1205 of 1965, D/- 27-2-1976.*

(A) Punjab Security of Land Tenures Act (10 of 1953), S. 18 — Instalment amount of purchase price to be deposited by tenants — Transfer of, how to be effected — Jurisdiction of Assistant Collector to order transfer on application of owner. (i) T. P. Act (1882), Ss. 3 and 123; (ii) Civil P. C. (1908), S. 2 (2)).

Core of the definition of an 'actionable claim' in S. 3, T. P. Act is that a claimant should be entitled to knock at the door of a Court and the Court should recognise the claim for granting relief to him. S. 18 (4) (c) of the Punjab Security of Land Tenures Act provides a summary remedy for recovering arrears of instalments of purchase price from the tenants through revenue officers and it is not necessary to institute a suit. As no suit is required to be instituted for realising the amount of instalments, it cannot be said to be an actionable claim. The amount of instalments is also not a decree as defined in S. 2 (2) of the Civil P. C., though it partakes some of the traits of a decree. A decree is not an actionable claim but is in the nature of property. The amount of instalments recoverable under S. 18 can be said to be moveable property and it can be gifted by a registered instrument or by delivery. As the instalments have to be paid by tenants at future dates they

*(From decree of B. L. Singal, Addl. Dist. J., Hissar, D/- 17-8-1965.)

were not in owner's possession and could not be gifted by delivery. The only method possible for gifting them is by a registered instrument. Case law referred.

(Para 5)

On an application made by the owner for transfer of instalments-amounts to a certain person. Assistant Collector has no jurisdiction to pass an order of transfer. The order will be illegal, as the transfer should be made by a registered instrument.

(Para 8)

(B) Punjab Security of Land Tenures Act (10 of 1953), S. 18 — Proceedings under — Civil P. C. does not apply — Provisions in the Code relating to assignment of decrees will not apply in the case of transfer of instalments of purchase price due from tenants under S. 18. AIR 1928 Lah 70, Distinguished.

(Para 7)

(C) Limitation Act (1963), Art. 100 — Suit for declaration that owner was entitled to withdraw amount of instalments of purchase price and that transfer order passed by Assistant Collector was null and void and for restraining defendants from realising amount of instalments — If governed by Art. 100. (Ibid, Art. 113).

Where an order of officer is illegal or ultra vires, it does not require to be set aside and Art. 100 will not apply. AIR 1957 Punj 108, Foll.

(Para 9)

Where the plaintiffs filed a suit for declaration that the owner of land was entitled to withdraw the amount of instalments of purchase price and that the order of transfer passed by Assistant Collector was null and void and for restraining the defendants from realising instalments amount, it was held that the prayer to get the impugned order set aside was surplusage and the suit was one for declaration with a consequential relief falling within the purview of Art. 113. (Corresponding Art. 120 of the Limitation Act, 1908).

(Para 9)

Cases Referred: Chronological Paras

AIR 1957 Punj 108 = 59 Pun LR 72	9
AIR 1928 Lah 70 = 107 Ind Cas 603	7
AIR 1921 Mad 113 = 40 Mad LJ 124	5
(1900) ILR 24 Bom 502	5
(1886) ILR 12 Cal 610	5
(1885) 30 Ch D 261 (CA)	5

D. N. Awasthy, for Appellants; Achhra Singh, for Respondent No. 1.

JUDGMENT:— This regular second appeal has been filed by the plaintiffs against the judgment and decree of the Additional District Judge, Hissar, dated August 17, 1965.

Ex. 1 was executed for consideration by both the defendants in favour of the plaintiffs. It accordingly decided issues Nos. 1 and 2 in favour of the plaintiffs. As regards issue No. 3, it found that since the instalments which became due in the months of Magh sudi 6, and Falgun sudi 6, Samvat 2015, were not paid on due dates, the whole amount became payable on Magh sudi 7, Samvat 2015, corresponding to February 13, 1959. It was further held that since the suit was brought on March 28, 1962 after the expiry of three years from February 13, 1959, it was barred by time. On appeal by the plaintiffs, the lower appellate court affirmed the findings recorded by the trial court on issues Nos. 1 and 2. The findings of these issues have not been challenged before me.

3. Dealing with issue No. 3, the lower appellate court observed as under:

"According to the agreement instalment fell due of every month on sixth Sudi. Looking to the credit side, I find that there was a default when Rs. 100/- and Rs. 100/- were paid on Agahan Sudi 8 and Posh Sudi 7 respectively. Similarly Rs. 200/- were paid on Phagun Sudi 13. A heavy burden laid on the shoulder of the plaintiff to show that he waived his right, but, unfortunately from the entries of credit side it cannot be said with certainty that the acceptance of instalment by delay relates to instalment of which month. Only acceptance of money with interest cannot be treated as a waiver of the right. Plaintiff was bound to prove something else that at the instance of the defendant he waived the right of forfeiture. The notice Ex. 1 in which plaintiff claimed remaining amount of Rs. 1,100/- and interest Rs. 1,000/- completely, shatters the case of the plaintiff that they waived their right of forfeiture clause when instalments were not paid in time. The claiming of interest Rs. 1,000/- which could only be figured out when the interest is claimed at Rs. 2% per month on the amount from date of defaults. Under these circumstances I am not prepared to agree with the learned counsel of the appellant that plaintiffs waived their right of forfeiture clause when instalments were fell due. In my opinion cause of action to claim the whole amount accrued to plaintiff on Agahan Sudi 6 St. 2015 when instalment was not paid in time. The learned Munsiff has dealt this point very elaborately and I am satisfied that he has come to a correct decision in not holding waiver proved."

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The learned lower appellate court, accordingly, dismissed the appeal. Dissatisfied with the said judgment and decree, the plaintiffs have preferred this second appeal.

4. The only point involved in this appeal is whether the suit is within time. It is common ground between the parties that the defendants were to repay the loan of Rs. 3,000/- in 30 monthly instalments of Rs. 100/- each instalment falling due on Sudi 6 of every month. The first instalment fell due on Kartik Sudi 6, 2015. It is further not in dispute that the defendants paid instalments on the following dates,—

Serial No.	Amount	Date
1.	Rs. 100/-	Kartik sudi 2 Samvat year 2015
2.	Rs. 100/-	Agahan Sudi 8 "
3.	Rs. 100/-	Posh sudi 7 "
4.	Rs. 200/-	Falgun sudi 13 "
5.	Rs. 100/-	Baisakh sudi 6 2016
6.	Rs. 100/-	Jeth sudi 6 "
7.	Rs. 100/-	Jeth sudi 14 "
8.	Rs. 100/-	Asadh sudi 12 "
9.	Rs. 100/-	Asoj sudi 1 "
10.	Rs. 100/-	Kartik sudi 13 "
11.	Rs. 100/-	Agahan sudi 6 "
12.	Rs. 100/-	Agahan sudi 7 "
13.	Rs. 100/-	Magh sudi 2 "
14.	Rs. 100/-	Chet sudi 4 "
15.	Rs. 200/-	Chet sudi 2 2017
16.	Rs. 100/-	Jeth sudi 6 2017
17.	Rs. 100/-	Bhadon sudi 5 2017

Total Rs. 1,900/-

It is also not in dispute that besides other defaults, the defendants committed defaults in payment of 2nd, 3rd, 4th and 5th instalments, which fell due on Agahan sudi 6, Samvat year 2015, Posh sudi 6, Samvat year 2015, Magh sudi 6, Samvat year 2015, and Falgun sudi 6, Samvat year 2015 respectively. Again, it is not in dispute that if it is proved that the plaintiffs exercised their right of waiver in respect of the aforesaid four defaults, the suit is within time.

5. In view of the above admitted facts, the question that arises for consideration is whether the plaintiffs waived the default clause in respect of the aforesaid four defaults committed by the defendants? It is contended that the payments made by the defendants of the 2nd, 3rd, 4th and 5th instalments speak for themselves that the plaintiffs waived the default clause. Elaborating his argument, the learned counsel for the plain-

tiff-appellants contended that the second instalment fell due on Agahan sudi 6, Samwat 2015, and the plaintiffs accepted its payment 2 days after on Agahan sudi 8, Samwat 2015. Again, the third instalment fell due on Posh sudi 6, Samwat 2015 and the plaintiffs accepted its payment on Posh sudi 7, Samwat 2015 i.e., one day after the due date. Similarly, 4th and 5th instalments fell due on Magh sudi 6, Samwat 2015 and Falgun sudi 6, Samwat 2015 respectively and the plaintiffs accepted their payments on Falgun sudi 13, Samwat 2015, i.e., after one month (Contd. on Col. 2)

"75. On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years
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This Article lays down that if the promissory note or bond payable by instalments provides that if default be made in payment of one or more instalments, the whole shall be due, then three years will be computed from the date when the default is made unless the payee or the obligee waives the benefit of the provision. Column 3 of Article 75 provides that the starting point of limitation, in the first instance, is the date of the default, but the starting point can be carried forward if the default is waived. In other words, if the payee waives the benefit accrued from the default clause, then in that case, the period would run from the date when fresh default, which has not been waived, is made. In the present case, the payments made by the defendants, which are incorporated in the "khata" Ex. 1, clearly reveal that each payment made by the defendants was towards a particular instalment, whose amount had become due. The default in payment of second instalment occurred on Agahan sudi 6, Samwat 2015, but its payment was accepted by the plaintiffs on Agahan Sudi 8, 2015. This payment cannot be in respect of any other instalment except the second instalment, inasmuch as the third instalment had not, by that time, become due. It, therefore, follows that the payment accepted by the plaintiffs on Agahan sudi 8, Samwat 2015, was in respect of the second instalment, which fell due on Falgun sudi 6, Samwat 2015. So is the case in respect of third, fourth and fifth instalments. Acceptance of the payment by the plaintiffs in respect of

and seven days in case of due date of the 4th instalment and after seven days in case of due date of the 5th instalment. The above facts, it is alleged, leave no room for any doubt that the plaintiffs waived their right in respect of all these four defaults committed by the defendants. In my opinion, the above contention is well founded.

6. The suit was instituted on March 28, 1962 and it was governed by the Limitation Act, 1908. It is also not in dispute that the Article which applied to the suit was Article 75, which reads as under,—

When the default is made, unless where the payee or obligee waives the benefit of the provision, and, then when fresh default is made in respect of which there is no such waiver."

the said instalments, goes to show that the plaintiffs waived the benefit arising from the aforesaid defaults. If the payment by the debtor is made, specifically towards the satisfaction of a particular defaulted instalment, then such payment and its acceptance by the creditor amounts to a waiver of that default. I am supported in my view by a Division Bench decision of this Court in Shivdayal v. Ramrikh, AIR 1955 Raj 188. To the same effect is the Full Bench decision in Gokhul Mahton v. Sheoprasad Lal, AIR 1939 Pat 433 (FB). The relevant portion of the headnote (d) runs as follows,—

"Where the promisee has accepted an overdue instalment it must be held that he has waived his rights which accrued to him on that default and that the starting point of limitation would be from the next default if not waived"

7. The lower appellate court has relied upon the following passage contained in Raghunathdas Madangopal Bhangade Shop v. Warlu Bapu Maral, AIR 1948 Nag 225:—

"On the aforesaid discussion and authorities the following points can be taken to be well-established.

(a) That the exigibility clause in an instalment is for the benefit of the creditor and he has a right to waive that benefit even in the absence of a fresh agreement, a fresh consideration or a fresh bilateral arrangement.

(b) That a mere inaction on the part of the creditor such as an abstinence to sue or a mere receipt of payment does not amount to a waiver. What is requir-

ed is some overt act on the part of the creditor, communicated to the debtor, by which a Court of fact can conclude that the creditor has waived the benefit.

(c) The payment by the debtor and the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default and of the benefit arising out of that default.

(d) A waiver is a mixed question of law and fact. It has to be properly pleaded and proved. A choice left to the creditor in the default clause itself is inconsequential.

(e) In the absence of proof of waiver, the creditor cannot fall back on the primary terms of the bond regarding repayment and claim to recover on that basis instalments which are still within limitation."

Now, keeping those principles in view, the case in hand squarely falls within the purview of clause (c).

8. The lower appellate court has observed that the plaintiffs did not waive the default clause as they claimed Rupees 1,000/- as interest at the rate of 24 per cent. per annum. The plaintiffs claimed the amount of Rs. 1,000/- as interest on the unpaid instalments. Now, simply because the plaintiffs claimed interest at the rate of 24 per cent. per annum, it cannot be said that they did not exercise their right of waiver in respect of the defaults committed by the defendants in payment of instalments. The learned counsel for the respondents laid considerable stress on the default in payment of fourth and fifth instalments which fell due on Magh sudi 6, Samwat 2015 and Falgun sudi 6, Samwat 2015. Both these instalments were admittedly paid by the defendants on Falgun sudi 13, Samwat 2015. It may be mentioned that on Falgun sudi 13, Samwat 2015, the sixth instalment had not become due and therefore it is reasonable to presume that the sum of Rs. 200/- was paid in satisfaction of the fourth and fifth instalments which fell due on Magh sudi 6 and Falgun sudi 6 of Samwat 2015. Apart from that, it appears that the defendants not only paid Rs. 200/- on Falgun sudi 13, Samwat 2015, but they also paid Re. 1/- more as interest, because there was delay of one month in payment of 4th instalment, which fell due on Magh sudi 6, Samwat 2015. The acceptance of interest by the plaintiffs clearly shows that they waived the default clause.

9. For the reasons stated above, I allow the appeal, set aside the decrees passed by the courts below dismissing the suit as time barred and pass a decree in favour of the plaintiffs and against the defendants for a sum of Rs. 1,584/-. The plaintiffs shall get interest from the date of the suit till the date of realisation at the rate of 6 per cent. per annum on the principal sum of Rs. 1,100/-. Having regard to the circumstances of the case, the parties are left to bear their own costs throughout.

Leave to appeal to a Division Bench prayed for by the learned counsel for the respondents is refused.

Appeal allowed.

AIR 1976 RAJASTHAN 211

M. L. JOSHI, J.

Satyanarain, Petitioner v. Bajranglal, Respondent.

Civil Revn. No. 29 of 1975, D/- 28-7-1975.*

(A) Civil P. C. (1908), Order 26, R. 4 and Order 16, Rule 19 — Witness residing beyond 200 miles — Commission cannot be claimed as of right even for examination of such witness.

The court has discretion to issue commission under Order 26, Rule 4, Civil Procedure Code, and the commission cannot be claimed as a matter of right. The discretion has, however, to be exercised according to well accepted judicial principles. (Para 8)

It is true that Order 16, Rule 19 (b), Civil Procedure Code precludes the court from compelling the attendance of the witnesses residing more than 200 miles from the court house but merely on that account it cannot be said that the party has a right to examine such witnesses on commission. All that Order 16, Rule 19, Civil Procedure Code says is that the personal attendance of such witnesses in the court shall not be enforced by a process, but that does not lead to an inference that such witnesses are necessarily to be examined on commission in any event. Order 26, Rule 4 is an independent provision and is in no way controlled by Order 16, Rule 19. (Para 7)

*(Against order of Prabhu Dayal, Jaiwal, Addl. Munsiff, Bhilwara, in C. O. S. No. 26 of 1974, D/- 16-1-1975.)

Where the application praying for commission simply mentioned the names of the witnesses and did not say how the witnesses sought to be examined on commission were material and no reason was stated as to why the application was being made with inordinate delay it was held that it could not be said that the trial court had exercised the discretion in improper manner in refusing to issue commission for the examination of the aforesaid three witnesses. Case law referred. (Para 9)

(B) Civil P. C. (1908), Section 115 — Material irregularity — Omission to issue process to witnesses and closure of evidence for non-appearance.

Once the process has been filed for summoning the witnesses even with delay leaving reasonable time to effect service, an omission to issue process and close the evidence for non-appearance of the witnesses amounts to material irregularity on the part of the trial court.

(Para 10)

Cases Referred: Chronological Paras
 AIR 1963 Andh Pra 429 = (1963) 1 Andh 5
 WR 232 5
 AIR 1963 Mad 103 = (1962) 2 Mad LJ 6
 490 6
 AIR 1963 Pat 213 = 1963 BLJR 490 5
 AIR 1962 Andh Pra 435 = (1962) 1 Andh 6
 WR 218 6
 AIR 1960 Andh Pra 459 = (1960) 1 Andh 6
 WR 367 6
 AIR 1958 All 19 = 1957 All LJ 646 6
 AIR 1958 Orissa 287 = ILR (1958) Cut 6
 357 6
 AIR 1956 All 232 6
 AIR 1956 Mad 179 6
 AIR 1956 Orissa 65 = 22 Cut LT 72 5
 AIR 1955 Raj 32 = ILR (1955) 5 Raj 68 8
 AIR 1950 Cal 326 5
 AIR 1949 Mad 468 = (1948) 2 Mad LJ 5
 641 5
 AIR 1927 Rang 175 = 5 Bur LJ 242 6
 AIR 1924 Cal 971 = 39 Cal LJ 598 5
 AIR 1923 Mad 321 = 44 Mad LJ 202 5, 7
 R. L. Maheshwari, for Petitioner; H. M. Pareek, for Respondent.

ORDER:— This revision petition is directed against the order of the Additional Munsif Bhilwara dated 16th of January, 1975, whereby he refused to issue commission for the examination of the three witnesses residing 200 miles away from the court house and further refused to issue process to the witnesses living within the limits of 200 miles from the court premises and thus closing the evidence of the defendant.

2. The plaintiff commenced an action for eviction of a shop and arrears of rent against the defendant-revision-petitioner alleging that the defendant was the tenant of one Smt. Sharda Devi who sold her right, interest in the said property in favour of the plaintiff by a registered sale-deed which fact was notified by her to the defendant by a written notice. The plaintiff claimed that he required the suit premises for carrying the business as he and his brother were carrying the business in a rented shop.

3. The defendant resisted the plaintiff's claim on various grounds and inter alia alleged that the premises were not required by the plaintiff bona fide and reasonably for carrying the business.

4. On the pleadings of the parties the court in all framed 8 issues. The plaintiff led his evidence in support of the issues the burden of which was placed on him and his evidence on 16-11-1974 reserving his right of rebuttal on the issues the burden of which was placed on the defendant and the case was fixed for the examination of the defendant's witnesses before Commissioner Mr. Nandlal who was directed by the Court to submit the record with his report on 28-11-1974. On 28-11-1974 the Commissioner submitted the record with the report that the defendant's witnesses had refused to depose before him. It may be mentioned here that the defendant had moved an application in the court on 27-11-1974 stating therein that he did not want to examine his witnesses on Commission and prayed that his witnesses be examined by the court. On the next day i. e. on 28-11-1974 the defendant filed a list of five witnesses, namely, (i) Shivprasad of Patna, (ii) Omprakash of Bombay, (iii) Jamna Dhar of Bagchale (Assam), (iv) Makhanlal of Jalore (Gujarat) and Sheodayal of Alwar. On 28-11-1974 the case was adjourned to 30th of November, 1974, for necessary orders. On 30th of November, 1974, the plaintiff's Advocate expressed that he had no objection to the defendant's witnesses being examined by the court. Accordingly the court acceded to the defendant's request and fixed 19th, 20th and 21st of December, 1974, for defendant's evidence and directed the defendant to present his witnesses for himself. However, the defendant thereafter submitted process-fee for summoning the witnesses and summons were issued to the witnesses for hearing of 19-12-1974. On 19-12-1974 the presiding

officer was having his camp at Mandalgarh but the defendant's witnesses Radheyshyam and Smt. Sharda Devi were absent in spite of service. Sanwermal was present who was directed to be present on 20th of December, 1974. On 20th of December, 1974, the defendant was partly examined but his statement could not be completed for want of time. The court, however, on that day deprecated the conduct of the Reader in issuing process to the witnesses in the absence of any order to that effect and directed the defendant to bring the witnesses for himself. On 21st of December, 1974, the defendant's statement was completed. The other witnesses of the defendant were not present for which the application for summoning them was submitted by the defendant and the case was fixed for consideration of the application on 23rd December, 1974. On 23rd December, 1974, the court partly allowed the defendant's application for want of objection by the plaintiff's counsel and directed that the process be issued on submission of the process fee on that very day to the witnesses residing within 200 miles from the court house. The trial court further directed the defendant to produce the witnesses residing beyond 200 miles for himself and fixed 15th and 16th of January, 1975, for the defendant's evidence. The defendant failed to file the process on 23rd of January, 1975, but filed the same on 4-1-1975. On 15-1-1975 the witnesses of the defendant were not present but the defendant moved an application for issuing commission for the examination of the witnesses residing beyond 200 miles from the court house and the case was adjourned to 16th of January, 1975. On 16th of January, 1975, the court dismissed the application praying for issue of commission and closed evidence as defendant's witnesses were not present. It is against this order that the defendant has come up in revision before this Court.

5. It has been firstly contended before me that the court erred in refusing commission for the examination of the witnesses who were residing at various places which were at a distance of more than 200 miles from the court house. It was argued that it was incumbent upon the court to have issued the commission for the examination of such witnesses. Reliance was placed on Order 16, Rule 19, Civil Procedure Code and Order 26, Rule 4, Civil Procedure Code. The learned counsel for the defendant

urged that Order 16, Rule 19, Civil Procedure Code precludes the court from compelling the attendance of such witnesses before the court and therefore the defendant was entitled as a matter of right to examine such witnesses on commission under Order 26, Rule 4, Civil Procedure Code. In this connection reliance was placed on *Jagannatha v. Sarathambal*, AIR 1923 Mad 321, *Moodavan-chu Borraya v. Kasavajjula Ramkoti Sashtri*, AIR 1949 Mad 468, *Subrahman-yam v. Venkayya*, AIR 1963 Andh Pra 429, *Mst. Anooru v. Sagarmal*, AIR 1963 Pat 213; *Union of India v. M/s. Natbar Lal*, AIR 1956 Orissa 65, *Panchkari Mitra v. Panchanansaha*, AIR 1924 Cal 971 and *Aswani Kumar v. Anukulchandra*, AIR 1950 Cal 326.

6. On the other hand Mr. Pareek on behalf of the non-petitioner contended that issue of commission under Order 26, Rule 4, Civil Procedure Code was in the discretion of the court and it could not be claimed as of right. He relied upon *Ramsewak v. Harihar*, AIR 1927 Rang 175; *P. R. Bizani v. Hanszucker*, AIR 1960 Andh Pra 459, *Sudhansu Mohan v. Union of India*, AIR 1958 Orissa 287; *Jaya Shan-ker Mills v. Hazi Zakaria*, AIR 1962 Andh Pra 435, *Ramkrishna v. F. E. Hardcastle and Co.*, AIR 1963 Mad 103, *In Re Thi-rupathiamma*, AIR 1956 Mad 179; *Kather Dutt v. Dist. Magistrate*, AIR 1956 All 232 and *Mohammed Khan v. Ibrahim*, AIR 1958 All 19.

7. I have perused the cases cited by the learned counsel for the petitioner. They are in line with the proposition laid down in *Jagannatha v. Sarathambal*, (AIR 1923 Mad 321) wherein it has been held that ordinarily in case of witnesses not under the control of party asking for the examination of the witnesses residing beyond the limit fixed under O. 16, R. 19 (b) C. P. C. the issue of a commission is a matter of right unless the court is satisfied that the party is merely abusing the authority for getting the commission issued. On the other hand the cases cited by the learned counsel for the non-petitioner proceed on the view that issue of commission is entirely within the discretion of the court which of course has to be exercised in a judicial manner and no party can ask for the issue of commission as a matter of right. It is true that Order 16, Rule 19 (b), Civil Procedure Code precludes the court from compelling the attendance of the witnesses residing more than 200 miles from the court house but merely on that account

it cannot be said that the party has a right to examine such witnesses on commission. All that Order 16, Rule 19, Civil Procedure Code says is that the personal attendance of such witnesses in the court shall not be enforced by a process, but that does not lead to an inference that such witnesses are necessarily to be examined on commission in any event. Order 26, Rule 4 is an independent provision and is in no way controlled by Order 16, Rule 19, Civil Procedure Code. From a bare reading of Order 26, Rule 4, Civil Procedure Code it will appear that the word 'may' has been used in that section which gives indication that the court has got discretion. It is true that the word 'may' some times has force of 'shall' but looking to the language of Order 26, Rule 4, Civil Procedure Code and the object which it seeks to achieve the word 'may' cannot be read as shall. The reason is obvious. There may be so many factors weighing with the court before issuing a commission. To illustrate the point, suppose the party asks for a commission for the examination of his witnesses at the fag-end of the trial with inordinate delay or with a view to protract the proceedings although the witnesses proposed to be examined on commission are not at all material in the case. Has the party even in such cases a right to examine the witnesses on commission although they be resident of place beyond the limits prescribed under Order 16, Rule 19, Civil Procedure Code? That could not have been the intention of the legislature. It appears to me that the legislature had used the word 'may' so as to vest discretion in the court to issue commission for the examination of the witnesses in appropriate cases. It was, however, argued that the word 'may' also appears in Order 26, Rule 1, Civil Procedure Code but there the word 'may' will have force of 'shall' otherwise the very object of Order 26, Rule 1, Civil Procedure Code shall be rendered meaningless. On this analogy it was argued that the word 'may' which occurred in Order 26, Rule 4, Civil Procedure Code should also be construed as having the force of 'shall'. I am not impressed with this argument. According to me even Order 26, Rule 1, Civil Procedure Code if the party is guilty of laches or abuse of the process of the court or if the witnesses are not material the court is not at all helpless and has a discretion in the matter of issuing commission. Even the authorities cited by the learned counsel for the petitioner

concede that if the application is mala fide or is made with inordinate delay the court has got discretion in the matter of issue of commission. It therefore cannot be said that the commission can be claimed as of right even for the examination of the witnesses residing beyond 200 miles. Each case has to be examined on its own facts and circumstances involving in it and court has to exercise judicial discretion in considering the application for commission. I need not therefore discuss the authorities cited at the Bar individually.

8. The learned counsel for the petitioner, however, laid stress on the observation of Wanchoo, C. J., as he then was made in *Jiwibai v. Laxmichand*, ILR (1955) 5 Raj 68 = (AIR 1955 Raj 32) wherein Wanchoo, C. J., while interpreting Order 26, Rule 15, Civil Procedure Code has observed that commission shall be issued as a matter of course to the witnesses residing beyond 200 miles from the court house but these observations do not necessarily imply that court has no discretion to refuse commission in appropriate cases. The correct interpretation of Order 26, Rule 4, Civil Procedure Code in my opinion is that the court has discretion to issue commission under Order 26, Rule 4, Civil Procedure Code and the commission cannot be claimed as a matter of right. The discretion has, however, to be exercised according to well accepted judicial principles.

9. In the light of legal position referred to above I have to examine whether the trial Court had erred in refusing to issue commission for the examination of the three witnesses of the defendant residing beyond 200 miles in this case. As stated above the petitioner's evidence was to be recorded on 27th of November, 1974. He filed the list of witnesses on 28th of November, 1974, and further filed the list of witnesses on 30th of November, 1974, but did not pray for issue of commission to any of the witnesses. On the other hand, the petitioner had moved an application on 27-11-1974 to the effect that he did not want to examine his witnesses on commission and prayed that they be examined in the court. Even on that date, the petitioner did not move for issue of commission. It was only on 15th of January, 1975 that he applied for commission. Even the application praying for commission simply mentioned the names of the witnesses and did not say how the witnesses sought to be examined

on commission were material. Further no reason was stated as to why the application was being made with inordinate delay. In this state of affairs it cannot be said that the trial court had exercised the discretion in improper manner in refusing to issue commission for the examination of the aforesaid three witnesses. No case has been made out for interference of the order refusing the issue of commission.

10. The next contention of the learned counsel for the petitioner is that the court committed material irregularity in refusing to issue process to the witnesses residing within the jurisdiction of the court. I have examined the contention and I am of the opinion that it is not without substance. The date 23rd of December, 1974, was fixed for defendant's evidence. On that day at the request of the defendant the court ordered for issue of process for the attendance of the witnesses for the hearing of 16th of January, 1975. To this, counsel for the plaintiff had no objection. The court, however, directed the filing of the process on that very day. The learned counsel has stated in his revision application that the impugned order was passed at 4.00 P. M. on that day and from 24th December, 1974, to 1st of January, 1975, were winter holidays and it was, therefore, not at all possible for him to carry out the court's order. Be that as it may, one thing is clear that the court did not give reasonable time to the defendant to file the process when it ordered the process to be filed on that very day. The defendant filed process on 2-1-1975 in a wrong court i.e., the court of District Judge and the same was filed on 4th of January 1975, before the trial Court. The case as stated earlier, was fixed on 15th and 16th of January, 1975, the process had been filed on 4-1-1975. The process should not have been refused on the ground that such an application was too late; though it is within the discretion of the court to refuse adjournment of the case on the ground of inaction of the party. The closure of evidence without issuing summons to the defendant's witnesses, although there was ample time available for the defendant to get the process served upon the witnesses who were residing within the jurisdiction of the court in my opinion, is a material irregularity. Once the process has been filed for summoning the witnesses even with delay leaving reasonable time to effect service, an omission to issue process and close the evi-

dence for non-appearance of the witnesses amounts to material irregularity on the part of the trial court. This part of the court's order, therefore, is improper and deserves to be interfered with in revision.

11. In the result, the revision petition is allowed in part. The order regarding refusing to issue commission for the examination of the witnesses residing beyond 200 miles from the court house is maintained. The order regarding refusing to summon the witnesses residing within the limits prescribed under Order 16, Rule 19, Civil Procedure Code and closing the evidence is set aside. The court shall now proceed to issue process to those witnesses for which prayer has been made by the defendant on 23rd of December, 1974. In the facts and circumstances of the case the parties are left to bear their own costs.

Revision partly allowed.

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RAJINDAR SACHAR, J.

Bhanwarlal, Petitioner v. The State of Rajasthan and others, Respondents.

Civil Writ Petn. No. 1271 of 1975, D/- 14-5-1976.

(A) Rajasthan Excise Rules (1956), Rules 67-I, 67-KK, 93 — Tender for sale of country liquor group shops — Withdrawal prior to acceptance — Forfeiture of earnest money — Permissibility — Sections 5 and 6 of Contract Act, if attracted. (Contract Act (1872), Sections 5, 6.)

Fact that the tender as submitted by a person for retail sale of country liquor for group shops in a city for one year has been withdrawn by him earlier to the acceptance of the same by the Excise Authority concerned does not by itself entitle the person submitting the tender immunity from forfeiture of earnest money. Sections 5 and 6 of the Contract Act will not be attracted when aforesaid person is bound by the statutory conditions in the tender form. The whole procedure of tender and acceptance is provided by these statutory rules and conditions and the person having given their tender subject to those conditions is bound by them. If in law the tender has not been rejected it is immaterial that the excise authorities attempted to auction the individual shops when the tender is

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for group shops. Civil Misc. Writ No. 647 of 1975, D/- 18-2-1976 (Raj) and AIR 1947 Mad 366 and AIR 1963 Andh Pra 110 and AIR 1968 Pat 433, Distinguished.

(Para 8)

(B) Rajasthan Excise Rules (1956), Rule 74 (5) — Action under — Person submitting tender debarred for three years from obtaining licence — Such person not given any hearing — Action held liable to be quashed. AIR 1975 SC 266, Relied on.

(Para 15)

Cases Referred: Chronological Paras

(1976) Civil Misc. Writ No. 647 of 1975, D/- 18-2-1976 (Raj) 9

AIR 1975 SC 266 = (1975) 1 All LR 22 15

AIR 1968 Pat 433 12

AIR 1963 Andh Pra 110 = (1962) 1 Andh WR 383 11

AIR 1962 SC 378 = (1962) 3 SCR 769 13

AIR 1947 Mad 366 = (1947) 1 Mad LJ 123 10

H. M. Parekh and N. M. Lodha, for Petitioners; H. N. Calla, Dy. Govt. Advocate, for the State.

ORDER:— This is a petition under Article 226 of the Constitution of India praying for quashing the impugned order (Ex. 7) of respondent No. 2 dated 13th March, 1975, by which it had been ordered that the earnest money which had been deposited by the petitioners be forfeited and also declaring the petitioners to be disqualified for a period of three years from obtaining any licence under the Rajasthan Excise Act and the Rules.

2. Licence for the retail sale of country liquor in the State is governed by the Rajasthan Excise Act, 1950, (hereinafter to be referred as 'the Act') and the Rajasthan Excise Rules, 1956 as amended (hereinafter to be called as 'the Rules').

3. By notification of 30th March, 1972, the State Government in exercise of its powers under Section 41 of the Act made certain amendments to the Rules. Rule 67-I provides that licence for exclusive privilege of selling by retail country liquor at a shop may be granted amongst others by inviting sealed tenders. Rule 67-KK lays down the procedure for invitation of sealed tenders. Sub-rule (3), amongst others, provides that the tender shall be submitted in the form to be obtained from the office of any District Excise Officers or Excise Commissioner. Sub-rule (5) which provided that tenders shall be for individual shops and not for group of shops was however later on amended on 4th March, 1974, so that

it now provides that subject to the written sanction of the Excise Commissioner, licence under this rule may be granted in respect of group of shops.

Sub-rule (9) of Rule 67-KK provides that acceptance of tender shall be communicated to the successful tenderer in the form laid down by the Excise Commissioner and the tenderer shall be required to furnish due security in cash within the time indicated in this communication. Sub-rule (13) lays down that if the required security is not furnished within the time indicated acceptance of the tender may be revoked by the Excise Commissioner and the earnest money deposited by the tenderer with the tender shall in the event of such revocation be forfeited to the State.

4. Section 41 of the Act empowers the State Government to make rules for the purpose of carrying out the provisions of the Act. Rule 93 gives power to the Excise Commissioner to prescribe form for any licence, permit, permission or pass to be issued under these rules or for any application or statement to be submitted under these rules. In pursuance of the said power tender form (copy is Ex. R/1) was prescribed for obtaining the purpose of a licence for vend of country liquor for 1975-76.

5. In terms of the Rules the Excise Commissioner Rajasthan issued a notice for inviting tenders by tender notice dated 16th January, 1975 and detailed instructions were issued for this tender notice and detailed conditions of the notice were published in Ex. 1.

6. In pursuance of the said notice the petitioner submitted his tender on form R/1 for the retail sale of country liquor for the group shops of Jodhpur City for Rs. 61,01,117/-. The petitioner had along with the tender deposited the earnest money of Rs. 1,02,000/- as required by the rules.

7. On 12th February, 1975, the petitioners sent a telegram to the Excise Commissioner pointing out that though their tender was the highest the same had not been accepted and pointing out that it was learnt that the Department was contemplating the auction of individual shops and stating that if the auction was not restrained their tender submitted already should be deemed to be cancelled, withdrawn and rejected. It appears that the Department put up for auction individual shops for Jodhpur on 23rd February, 1975, but as no tender in that respect was forthcoming nothing

came out of it. The petitioner, however, again sent a telegram on 28th February, 1975, to the Excise Commissioner stating that their tender stood withdrawn and asking for the refund of the money.

In the meanwhile, however, the respondent No. 2 by his letter dated 1st March, 1975 (Ex. 7) informed the petitioners that their tender had been accepted and requiring them to deposit a part of the security amount within five days and the balance of the security amount by 15th March, 1975. The petitioners not having deposited the security amount, the respondent No. 2 informed them by the impugned order dated 13th March, 1975, (Ex. 7) that as they had not deposited the security amount as required by rules, the earnest money deposited by them has been forfeited and that further they were under Rule 74 (5) being declared disqualified for a period of three years to obtain any licence under the Rajasthan Excise Rules. This led the petitioner to file the present writ petition.

8. The first contention of Mr. Parekh, the learned counsel for the petitioners is that as the tender which was submitted by the petitioners had been withdrawn earlier to the acceptance of the same by respondent No. 2 on 1st March, 1975, and thus there was no concluded contract the question of forfeiture of the earnest money cannot arise. He invokes to his aid Sections 5 and 6 of the Contract Act to support his argument that the tender which is equivalent to offer could be withdrawn by the petitioners before its acceptance by the respondent No. 2. This argument of Mr. Parekh proceeds on the fallacious assumption as if there was nothing in law binding the petitioners not to withdraw the offer submitted by them.

Now by clause 5 (क) of the Tender Form the petitioners had clearly bound themselves and stated clearly that they had no right to withdraw the tender and that in case they do so the earnest money deposited by them could be forfeited. Similarly, clause 5 (ख) also binds the tenderer that if the petitioners do not deposit the security amount after the tender had been accepted the Excise Authorities would have the right to cancel the acceptance of the tender and forfeit the earnest money. Similarly, clause 12 (ग) of Ex. 1 also makes the tenderer liable for forfeiture of the earnest money if

he does not remain bound by his tender. Thus the petitioners were bound by the statutory condition that if they default in terms of their undertaking given in the tender they would be liable to have their deposit of earnest amount forfeited. There is an obvious rationale behind this compulsion on the tenderer not to withdraw his offer. The revenue earned by the vend of the country liquor is quite a substantial part of the State Budget, and it is naturally interested in dealing with it in a definite known manner.

If the argument of Mr. Parekh was to be accepted that anybody can give a tender and before acceptance of it withdraw the same without attracting any penalty it may lead to an administrative confusion inasmuch as the State would not be certain of any tenders being genuine. The whole procedure of tender and acceptance is provided by these statutory rules and conditions and the petitioners having given their tender subject to those conditions is bound by them. It is true that there was an attempt by the Excise Authorities to auction the individual shops though nothing came out of it. There is some justification for the grievance made by Mr. Parekh on behalf of the petitioners that this action of the Excise Department in purporting to auction the individual shops when it had earlier invited tenders for group of shops was neither fair to the petitioners, nor was it based on any rational explanation.

I also personally find it a little odd that the Department should have attempted to auction individual shops without at least first deciding whether to accept or reject the tender submitted by the petitioners. Mr. Parekh says that this action of the respondent No. 2 shows utter disregard to the interest of the petitioners who had given the highest tender. That may be so, but unfortunately that will not help the petitioners because in law the tender had not been rejected. Though therefore the action of the Excise Department at the same time to auction the individual shops may be somewhat queer the petitioner cannot get out of their legal liability which they had undertaken when they submitted their tender.

9. Mr. Parekh referred me to a judgment of this Court in Civil Misc. Writ No. 647/75, Chandulal v. State of Rajasthan, decided on 18-2-1976 (Raj). In that case the writ petitioner who had given a tender on 18th March, 1974, had

withdrawn the same by 24th March, 1974, while provisional acceptance of tender was made on 30th March, 1974. The Excise Commissioner had directed the forfeiture of security amount on failure of writ petitioner to enter into agreement. The defence of the State that it was entitled to forfeit it by virtue of condition No. 5 (क) was repelled by the learned Judge because it was found at the time of arguments that there was no such condition No. 5 (क) in the tender form prevalent at the time the tender form in question was submitted by the petitioner. It was on this premise that Lodha, J., held that in the absence of any such condition the parties rights will be governed by the law of contract and as the writ petitioner had withdrawn his offer six days before the acceptance of tender there was no concluded contract and the earnest money could not be forfeited. That case is therefore clearly distinguishable.

10. In *Somasundaram Pillai v. Provincial Government*, (AIR 1947 Mad 366) the auction for giving licence in respect of four arrack shops was held under conditions of sale framed by the Board of Revenue. One of the conditions provided that if the bidder committed a breach of this condition he would be liable to make good any loss suffered by the Government. The plaintiff who had given bid for four shops but his bid for two shops was refused by the Collector, the competent authority though it had been provisionally accepted by the Sub-Collector but who had no power to accept a bid. Thereafter the plaintiff informed the Collector that he was withdrawing his bid. Thereafter fresh auction took place and auction being of a less amount the Government forfeited the earnest money, and plaintiff filed a suit for refund. The learned Judge proceeded on the basis that the rules drawn up by the Board had no statutory force and, therefore, they could not be binding in law. It was further held that in an enforceable contract there must be an offer and an unconditional acceptance and the provisional acceptance by the Sub-Collector was of no consequence and, therefore, could not bind the plaintiff and that as before the acceptance by the Collector the plaintiff had withdrawn his offer he was entitled to do so he could not be liable. It is, however, relevant to note that the learned Judges nevertheless while observing that the appellant was entitled to withdraw his offer as there was no consideration to support his implied acceptance of the condi-

tion that once a bid had been made it could not be withdrawn nevertheless observed: "If the conditions of sale had statutory force, the position would of course be different but they had not statutory force."

11. Similarly, in *Raghunandhan v. State of Hyderabad*, (AIR 1963 Andh Pra 110) after consideration of the relevant rules the Bench held that though the Deputy Excise Commissioner had power to accept the bid, but that bid is not final till after the expiry of one month during which period the Excise Commissioner had power of revocation and, therefore, it followed that the acceptance is not final till after the Excise Commissioner had approved it and as the plaintiff had withdrawn his offer before the approval by the Excise Commissioner, there was no concluded contract and, therefore, the State was not justified in refusing to refund the amount deposited by the bidder at the auction. Their Lordships also held that clause (10) which permitted the Excise Commissioner to suspend or revoke the auction within one month of the auction was not a statutory condition. It was for this reason that the learned Judges held that as the offer was withdrawn earlier to the acceptance by the Excise Commissioner that there would be no concluded contract and no amount could be forfeited.

12. Similarly, in *Abdul Rahim v. Union of India*, (AIR 1968 Pat 433) all that was held was that where a bid at an auction is subject to its being accepted it is open to the party who has given bid at the auction to withdraw the same before the acceptance is given and revoke the bid and in such a case he would not be bound by the contract. This part of the argument of Mr. Parekh therefore fails.

13. The next contention of Mr. Parekh is that there has in fact been no definite acceptance by the respondent No. 2 and on that ground also it cannot be said that the petitioner has failed to perform his part of the contract. He refers me to Annexure 8 dated 1st March, 1975, wherein the petitioners have been informed that their tender had been accepted along with certain conditions mentioned therein. Mr. Parekh stresses that in the said acceptance letter the word 'अस्थायी' has been used which, according to him, signifies that it is a provisional acceptance and, therefore, it cannot be

said to be a definite acceptance because as held in *Jawahar Lal v. Union of India*, (AIR 1962 SC 378) under Section 7 of the Contract Act acceptance of the offer must be absolute and unqualified and it cannot be conditional. Now in the reply filed by the State it is stated that though the word 'अस्थाई' has been used yet the petitioners' tender was accepted with no reservation or condition and that the petitioners cannot go back thereafter and ask for the return of the earnest money. Of course, the mention of the word 'अस्थाई' seems a little inapposite, but a reading of the said letter makes it quite clear that the acceptance of the tender is unconditional. Mr. Parekh makes much of the fact that conditions mentioned in the acceptance note of 1st March, 1975, are conditions precedent to the acceptance of tender and, therefore, until those conditions are fulfilled it could not be said that there was unqualified acceptance.

A reference however to those conditions would show that condition No. 1 which required the tenderer to deposit the security is the same Condition No. 5 (ब) of Ex. R/1 and which could only be complied with after the tender had been accepted. The other Condition No. 3 in Ex. 8 is the same as Condition No. 15 in Ex. P-1 which required that if the tenderer owed any arrears to the Excise Department his tender would not be eligible. All that this means is that if at any time it is so found it will amount to a breach of contract on the part of the tenderer. It is certainly not a condition precedent so as to have kept the acceptance in abeyance. The other Condition No. 4 in Ex. 8 that the tenderer is bound by the Act and the Rules is obviously no condition precedent because the very submission of the tender is subject to compliance with the Act and the Rules. Mr. Parekh is, therefore, not right in contending that the conditions mentioned in Ex. 8 are in the nature of condition precedent and the acceptance of the Excise Commissioner was only provisional and not absolute. All that those conditions in Ex. 8 meant were that if it were subsequently found that the tenderer had any arrears to the Department it will amount to a breach of the contract by the tenderer which might entitle the Department later on to rescind the contract, but this cannot mean that when the Excise Commissioner sent his acceptance on 1st March, 1975, it had not bound itself unconditionally to the tender.

14. In view of the above, grievance of the petitioners that the earnest money had been forfeited illegally has no merit and must be rejected.

15. The second part of the impugned order Ex. 7 by which the Excise Authorities purporting to act under Rule 74 (5) have debarred for a period of three years the petitioners from obtaining any licence from the Excise Authorities is not supported by the counsel for the State. In view of the authority of the Supreme Court reported as *E. E. & C. Ltd. v. State of West Bengal*, (AIR 1975 SC 266) the Deputy Government Advocate concedes that the petitioners could not be debarred from obtaining licence under the Excise Act for a period of three years without having been given a hearing. Admittedly no opportunity was given to the petitioners before passing this part of the impugned order. In this view of the matter I would quash only that part of the order in Ex. 7 in so far as it declares that the petitioners are disqualified to obtain any licence from the Excise Department for a period of three years. I may however make it clear that it is open to the respondent No. 2 if it is so advised to proceed according to law against the petitioners under Rule 74 (5), but only after giving them a proper opportunity of hearing.

16. In the result the petition is, therefore, disposed of as above. In the circumstances of there being a divided success there will be no order as to costs. Order accordingly.

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D. P. GUPTA, J.

Ram Khilari and others, Petitioners v. Union of India and others, Respondents.

Civil Writ Petns. Nos. 2577 etc., of 1974, D/- 10-5-1976.

(A) Constitution of India, Article 16 — "Matters relating to employment or appointment to any office" — Meaning of — Guarantee under Article 16 applies to all stages of employment including termination of services — Withdrawal of orders of dismissal of some of the employees — Whether amounted to discrimination.

"Matters relating to employment or appointment to any office" occurring in

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Article 16 refer not only to the matters relating to the commencement of employment or appointment but also to its continuity and the termination thereof. The guarantee enshrined in Article 16 ensures similar and equitable treatment to persons similarly situated at all stages of the employment, at the commencement, during the continuance and at the termination of such employment or engagement.

The matter of withdrawal of order of removal or dismissal of railway employees, who took part in an illegal strike, must depend upon the role played by such individual employee in connection with the strike and in the very nature of things there could be no general order of withdrawal of order of dismissal or termination merely on the ground that all such employees had taken part in the illegal strike or in organising the same and had earlier been dismissed or removed by similar orders passed by competent authorities. It is for the concerned Disciplinary Authority to consider the facts and circumstances in the case of each individual employee and to decide for itself as to whether it would be proper to afford any concession to the concerned employee or as to whether there were any mitigating or extenuating circumstances which could have justified a review of the case of that individual employee for his continued retention in service. Merely because the petitioners and other employees, whose orders of dismissal were withdrawn by competent authorities, were permanent employees of the railways and were alleged to have taken leading part in organising the strike, it could not be concluded that they were similarly situated in the matter of termination of their services inasmuch as such termination in essence depended upon the part played by each individual employee in connection with the illegal strike. Hence, it could not be held that the orders of dismissal or removal from service in the case of the petitioners suffered from the vice of discrimination. (Para 8)

(B) Railway Service (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Compliance with — Whether some sort of enquiry necessary. (1975) 1 Serv LR 277 (Guj), Dissented from.

If an elaborate enquiry as prescribed in Rules 9 to 13 could not be held in the case of any individual employee because it was not reasonably practicable to hold such an elaborate enquiry in the circumstances of his case and if the con-

cerned Disciplinary Authority had recorded its satisfaction in this respect with reasons therefor, as he was required to do under clause (ii) of Rule 14, then on account of the non obstante clause, with which Rule 14 begins, the provisions of Rules 9 to 13 could not at all be made applicable and in such circumstances there was no basis for holding that an enquiry as might have been found feasible in the circumstances of each case should have still been held by the concerned Disciplinary Authority. (1975) 1 Serv LR 277 (Guj), Dissented from.

(Paras 12, 15)

(C) Railway Service (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Recording of reasons — Communication to employee — Necessity.

Although recording of reasons which induced competent Disciplinary Authority to hold that it was not reasonably practicable to conduct an enquiry in the manner provided in the Rules in respect of the misconduct of a railway employee is mandatory for the initiation of the proceedings under Rule 14 and for dispensing with the enquiry contemplated under Rules 9 to 13, yet it is not incumbent upon the competent Disciplinary Authority to communicate such reasons to the delinquent railway employee. (Para 20)

(D) Railway Service (Discipline and Appeal) Rules (1968), R. 14 (ii) — "Make such orders thereon as it deems fit" — Meaning of — Whether authority bound to give employee opportunity of being heard in the matter of inflicting of punishment.

The utter impracticability of the enquiry is the very basis for dispensing with an enquiry in cases coming under cl. (ii) of R. 14 and therefore the rule does not postulate giving the delinquent employee an opportunity of being heard in the matter relating to the nature and quantum of punishment to be imposed upon him. Of course, the Disciplinary Authority would still be duty bound to objectively consider the circumstances of each case, with the sense of justice and fair-play, before imposing penalty upon the concerned employee. (Paras 25, 26)

(E) Railway Service (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Recording of reasons for holding misconduct proved and communication of reasons to employee whether necessary.

Even while the holding of a disciplinary enquiry was dispensed with under the provisions of clause (ii) of Rule 14, yet it was incumbent upon the concerned

Disciplinary Authorities to record reasons for holding the misconduct of the employees proved and for imposing punishment upon them and further the orders containing such reasons should have been duly communicated to the employees. It was incumbent upon the competent Disciplinary Authority to set out the reasons which led it to reach at the conclusion that the alleged misconduct on the part of the concerned delinquent employee was proved and the imposition of the penalty of dismissal from service was justified in the facts and circumstances of each case. The non-communication of reasons in respect of an order passed by an Administrative Authority, which is required to act in a quasi-judicial manner could not be supported merely on the ground that reasons could be extracted from the file, although not communicated to the concerned delinquent employee. In the absence of communication of such reasons the right of appeal provided by Rule 18 against an order imposing penalty of removal or dismissal upon the concerned railway employee became illusive. What was required to be communicated to the railway servant concerned was not merely a cryptic order just informing him that he was found guilty of serious misconduct and was removed or dismissed from service, but a copy of the order recorded by the competent Disciplinary Authority under clause (ii) of Rule 14. By following the procedure of communicating merely a cryptic order, the concerned Disciplinary Authority had deprived the railway employee concerned of his statutory right of presenting and prosecuting an effective appeal before the appellate authority. Case law discussed.

(Paras 28, 41, 45, 47)

Cases Referred: Chronological Paras

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M. Mridul, Calla and R. R. Vyas, for Petitioners; C. L. Agarwal and L. R. Bhansali, for Respondents.

ORDER:— These 29 writ petitions arise in somewhat similar circumstances and, therefore, it would be proper to dispose them of by a common order.

2. The petitioners in all these writ petitions were employed in different capacities at various places in Rajasthan in the Indian Railways and they were removed from service as a sequel to the All India Strike of Railwaymen, which took place in May, 1974. It is common ground that the Central Government, by virtue of the powers conferred upon it under Rule 118 of the Defence of India Rules, 1971 prohibited any strike in the Railway Service in India in connection with any industrial dispute for a period of six months with effect from November 26, 1973. Several Unions representing railway employees gave notices of an All India Strike of employees working on Indian Railways, which was to take effect from May 8, 1974, to ventilate the grievances of the railway employees, in respect of various matters relating to their service conditions. As the attempted negotiations failed, the strike took place as contemplated. The Disciplinary Authority concerned, in the case of each one of the petitioners, waived the holding of a disciplinary enquiry in accordance with the provisions of Rules 9 to 13 of the

Railway Service (Discipline and Appeal) Rules, 1968 (hereinafter referred to as 'the Rules') by passing an order under Clause (ii) of Rule 14 and orders of dismissal or removal were passed by the concerned Disciplinary Authority, separately in the case of each one of the petitioners. The petitioners have now challenged in these writ petitions the validity of the aforesaid orders of their removal or dismissal from service and have alleged that the termination of their service was illegal and arbitrary and was brought about in a mechanical manner, with the sole intention to victimise them.

It has further been alleged that although some of the railway employees, who were also dismissed by the Disciplinary Authorities concerned in the same manner as the petitioners, have since then been taken back in service and the orders of their dismissal were withdrawn, yet the petitioners were not given similar treatment and that the petitioners only were picked up and sacked amongst striking railway employees.

3. The Railway Administration has stated in its replies that an unprecedented and grave situation was brought into existence largely affecting the economy of the country, as the movement of goods traffic including food-stuffs was brought to a stand-still, on account of the illegal strike resorted to by the railway employees on an All India basis and that the petitioners played a leading role in organising the said strike and in preventing loyal staff from attending to their normal duties, by exercising coercive pressure upon them. It is alleged that the petitioners not only resorted to illegal strike by absenting themselves from their duties, but they exhorted the railway staff to participate in the illegal strike and indulged in aggressive propaganda for that purpose and threatened the loyal staff of dire consequences if they did not join the strike and thus committed serious misconduct.

It is also alleged that the railway employees and their leaders were at the relevant time in a turbulent mood and no loyal employee could dare to give evidence against the petitioners for fear of their lives or of severe bodily injury and as such it was not possible to hold disciplinary enquiries in accordance with the provisions of the Rules against the erring workmen and, therefore, proceedings under clause (ii) of Rule 14 were initiated against the petitioners. It is alleged that the Disciplinary Authorities concerned

considered the relevant material which was placed before them and satisfied themselves about the truth of the allegations made against the petitioners and after applying their mind proceeded to pass orders of removal or dismissal of the concerned employees and that speaking orders were passed in the case of each one of the petitioners. It is also submitted that no discrimination was practised and that individual cases were considered on merits while taking back the employees and the orders of re-instatement were passed on a consideration of the facts and circumstances of each case. The Railway Administration has also submitted that a remedy by way of appeal was open to the petitioners which was duly availed of by them and that appeals were dismissed in all cases as the orders of removal or dismissal of the petitioners were based on serious misconduct committed by them.

4. The cases of the petitioners can be broadly divided into two categories. In the cases of petitioners, which have been included in Schedule 'A' annexed to the order, a cryptic order was conveyed to the respective petitioner. The order conveyed to Shri Ram Khilari, the petitioner in S. B. Civil Writ Petition No. 2577 of 1974, was in the following terms:—

"WESTERN RAILWAY

Works Manager's Office,
Kota.

No. E. 1082/8/7/(74)(iii) D/- 9-5-1974
To,

Shri Ram Khilari, Fitter, T. No. 6373
Body Repair Shop, Wagon Repair
Shop, Kota.

You are hereby informed that in exercise of the powers vested in me by Rule 14 (ii) of the Railway Service (Discipline and Appeal) Rules 1968, you are dismissed from Railway service with effect from 9-5-1974.

You are required to acknowledge receipt of this letter on the form subjoined below.

Signature sd/-

Designation of Works Manager,
the competent Western Railway,
authority Kota.

Instructions:—

(a) You are relieved of your duties on 9-5-1974.

(b) Settlement of your dues will be paid at the office of A. A. O. (W & S) — Kota.

(c) Under Rule 18 of the Railway Service (Discipline and Appeal) Rules,

1968, an appeal against these orders lies to the Addl. CME (W)-CCG, provided:—

(i) the appeal is preferred within 45 days of the receipt of this notice.

(ii) the appeal contains no disrespectful or improper language.”

5. The other petitioners, whose cases have been included in Schedule 'A', were served with similar orders except that the difference in the date with effect from which the dismissal of the concerned petitioner became effective. In the cases of some of the petitioners, included in this category, the words “for serious misconduct” were also added after the date with effect from which the orders of dismissal became operative, although in all other respects the orders conveyed to such petitioners were identical to the one quoted above. In the cases of petitioners included in Schedule 'B' appended to this order, the orders conveyed to the respective petitioners contained particulars relating to the alleged misconduct, although the reasons for the satisfaction of the concerned Disciplinary Authority as to why it was not reasonably practicable to hold an enquiry in case of such petitioners were not communicated to some of them.

6. Mr. Agarwal, appearing for the Railway Administration in some of the cases, argued that the writ petitions, particularly the one filed by Shri Mahesh Chandra (S. B. Civil Writ Petition No. 2576 of 1974) should be dismissed on the ground that the petitioners were guilty of suppression of material and relevant facts relating to the occurrence of the All India Railway Employees' strike and the participation of the petitioners therein. Having considered the averments made in the writ petitions and the replies, I do not feel impressed with the submission that the writ petitions suffer from the vice of suppression of material facts. The preliminary objection raised by Shri Agarwal on this score is, therefore, repelled.

7. The first ground on which the orders of removal or dismissal of the petitioners have been challenged by the learned counsel for the petitioners is that the Railway Administration discriminated between its employees and although the orders of dismissal and removal were withdrawn in cases of some of such employees, a like treatment was not afforded to the petitioners. Learned counsel argued that the petitioners were similarly situated to other persons whose details have been furnished by the petitioners in

their writ petitions and it is submitted that although those persons were detained under the Maintenance of Internal Security Act for organising the aforesaid strike of railway employees and that they were dismissed in like manner as the petitioners by identical orders of dismissal, but the orders of their dismissal were later on revoked by the concerned Disciplinary Authorities. It is argued that similar treatment was not accorded to the petitioners in respect of the withdrawal of orders of dismissal or removal. Learned counsel submitted that the petitioners were deliberately picked up and chosen for discriminatory treatment and that the respondents have not justified even in their replies as to why a distinction was made in the cases of the petitioners and other persons, who were similarly situated to them and were dismissed or removed from employment in like manner. Mr. Mridul, learned counsel appearing for some of the petitioners relied upon the following observations of their Lordships of the Bombay High Court in Pandurang Kashinath More v. Union of India, AIR 1959 Bom 134 in support of the aforesaid contention:—

“These considerations apply not merely at the initial stage that is when any citizen is engaged in service or appointed to any office by the State. All along during the continuance of the engagement or office the citizen is assured of that equality of opportunity. Here also there can be no discrimination between one employee and another on any ground of prejudice or bias or one which is extraneous. The discretion is of course there and the court would be wary and extremely slow in saying that equal opportunity has not been afforded to any individual citizen. And the same fundamental principle of equality and equitable treatment must, in our judgment, apply and govern the case when the employment or appointment is sought to be terminated.

.....”
Learned counsel further submitted that the aforesaid decision of the Bombay High Court was approved by their Lordships of the Supreme Court in General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36 and was followed with approval by this court in Sudama Prashad v. Divisional Superintendent, Western Railway, Kota, AIR 1965 Raj 109, wherein it was observed that the basic guarantee of equal treatment assured by the Constitution is applicable to every citizen who is seeking employment or appoint-

ment to an office under the State and to all stages of such employment. The following observation in the decision of Pandurang More's case was quoted with approval in Sudama Prasad's case:—

"If the termination of service was on grounds extraneous, the order of termination would be without competence and jurisdiction and order must be treated as if it had not been made at all."

Learned counsel also placed reliance upon the decisions of the Allahabad High Court in Abdul Ahad v. The Inspector General of Police, U. P., Lucknow, AIR 1965 All 142 and of the Patna High Court in Sukhandan Thakur v. State of Bihar, AIR 1957 Pat 617, wherein similar observations were made.

8. There can be no doubt that "matters relating to employment or appointment to any office" occurring in Article 16 of the Constitution refer not only to the matters relating to the commencement of employment or appointment but also to its continuance and the termination thereof. The guarantee enshrined in Article 16 of the Constitution ensures similar and equitable treatment to persons similarly situated at all stages of such employment—at the commencement, during the continuance and at the termination of such employment or engagement. Its primary purpose is to prevent any person or class of persons from being subjected to invidious or purposeful discrimination or hostile treatment in the matter of employment under the State. As is well known, discrimination is a double edged weapon and the the guarantee of equality in matters of employment envisages equitable treatment in similar circumstances and forbids on the one hand the imposition of any impediment or unfair burden or disadvantage upon some while others similarly situated are not subjected to the same and on the other hand it also forbids the conferment of special privilege upon any individual or class of persons in an unreasonable or arbitrary manner or based upon extraneous considerations. The guarantee extends to employment or appointment whether it is temporary or permanent. In the cases before me, it is not contended by learned counsel for the petitioners that any discrimination was practised by the concerned Disciplinary Authorities in the matter of awarding punishments to the petitioners and other persons who were similarly situated.

It is a common ground that all persons who were similarly situated

were subjected to similar treatment in the matter of imposition of penalty of dismissal or removal from service. However, what is contended is that while the orders of dismissal of some of such employees were withdrawn, but the petitioners were not given similar treatment in the matter of withdrawal of the orders of their dismissal or removal from service. It may be true that all persons, who were dismissed or removed from service by the Railway Administration, might have taken part in the illegal strike and might have also taken part in organising the aforesaid strike or in instigating persons to go on strike, yet the part played by each individual employee in such matters might not be similar. The case of the Railway Administration is that in the matter of taking back some of the employees, who were dismissed or removed from service, concession was shown to them after considering the merits of each individual case. Some of the erring workmen requested the competent Authorities for sympathetic review of their cases and some of such employees were taken back in employment by the concerned Disciplinary Authorities.

The argument of the learned counsel for the petitioners is that the respondents have failed to supply the basis for the difference in treatment in this respect between the cases of the petitioners and the others, to whom concession is alleged to have been shown and who were taken back in employment, although it was alleged at the time of their dismissal or removal from service that they also took leading part in organising the strike. It may be that the Railway Administration did not furnish detailed reasons on account of which some other dismissed employees were taken back in employment and were shown some leniency or concession, inasmuch as the orders of their removal or dismissal from service were withdrawn, yet it can very well be considered that the part which might have been played by any two individual employees in organising the strike or in exhorting other railway employees to participate in that strike or in threatening them in case they failed to join the aforesaid strike could not be similar and each case had to be considered and reviewed by the concerned Disciplinary Authority on its own facts and circumstances. When a junior person is retained in service while the service of a person senior to him is terminated, a case of discrimination may arise in the matter of termina-

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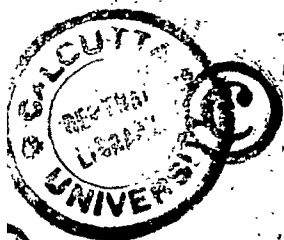
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